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SANTA BARBARA METROPOLITAN TRANSIT DISTRICT, Plaintiff and Respondent, v. DAVID GILBERT BERTRAND et al., Defendants and Appellants.

Civ. No. 60015.

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

127 Cal. App. 3d 911; 179 Cal. Rptr. 833; 1982 Cal. App. LEXIS 1181

January 15, 1982

NOTICE: NOT CITABLE – ORDERED NOT PUBLISHED

SUBSEQUENT HISTORY: [1]** May 6, 1982, Reporter of Decisions directed not to publish this opn. in the Official Reports, pursuant to *rule 978, Cal. Rules of Ct.*

PRIOR HISTORY:

Superior Court of Santa Barbara County, No. 111095, Arden T. Jensen, Judge.

LexisNexis(R) Headnotes

COUNSEL:

Crawford, Schwartz & Davidson, Leland Crawford, Jr., Thorpe, Sullivan, Workman, Thorpe & O'Sullivan and John J. Dee for Defendants and Appellants.

Francis Sarguis and Dankert & Kuetzing for Plaintiff and Respondent.

OPINIONBY:

COHEN

OPINION:

[*835] COHEN, J. n*—Condemnee David G. Bertrand and others, defendants and appellants (appellant), appeal from a judgment in eminent domain by the trial court. Appellant assigns as error the granting of the *in limine* motion of the Santa Barbara Metropolitan Transit District, a public corporation, condemner, plaintiff and respondent (district), to exclude all evidence regarding proposed development of the property to be condemned, or expenditure of money in connection with plans for such development from the condemnation proceeding. He also assigns as error the denial by the trial court of his offer to prove work, services, expertise and risk in development of the property for its highest and best use, in order to compensate him justly for the true condition of the property on the date of value. We affirm the judgment below for reasons that follow.

n* Assigned by the Chairperson of the Judicial Council.

[2]**

FACTS

On February 11, 1976, district commenced an action in eminent domain to condemn certain real property owned by appellant for the purpose of constructing a transit terminal and public transportation facility in the community of Goleta in Santa Barbara County.

In 1975 the Legislature enacted Code of Civil Procedure, title 7, known as the Eminent Domain Law, operative July 1, 1976, which provided that in the case of an eminent domain proceeding commenced prior to July 1, 1976, but on or after January 1, 1976, it applied to the proceeding to the fullest extent practicable, with exceptions not here applicable. (*Ibid.* , at § 1230.065.)

The agreed date of value (or condition) is August 27, 1976. The parties are agreed that the highest and best use of the property is for commercial development for which the property is zoned.

[*836] Jury trial in the case commenced on August 2, 1979, at which time the district moved the court *in limine* to exclude all evidence relative to proposed development of the property or the expenditure of money in connection with development and consequential damages. Argument was had out of the jury's presence, at which time appellant offered **[**3]** to prove the condition of the property on the date of value for the express and sole purpose of showing

enhancement of actual market value over raw acreage by its feasibility, adaptability and readiness for commercial development, through proof of the following facts.

Appellant offered to prove, through his expert Weber, that the expenditure of time, indirect costs, work and reduction of financial risk over a year's time toward commercial development, enhanced the market value of the property over raw acreage on the date of condition. He further offered to prove, by his foundational expert Beaver, that such factors, that is the expenses, plans and work undertaken toward development, are commonly taken into account by a willing informed buyer and a willing seller in the marketplace in determining and defining the value of the property as a whole on the date of value. Appellant further offered to prove by these experts that they had purchased comparable property in the marketplace, in a stage of development comparable to that of the subject property, and had considered the items sought to be proved herein as elements of the condition of the property in estimating market value in those **[**4]** transactions.

Except as indicated below, the trial court granted the district's *in limine* motion to exclude such evidence, denied appellant's several offers of proof and further excluded the proffered evidence pursuant to *Evidence Code section 352*, which accords to a court discretion to exclude evidence on the ground that the prejudicial effect of the evidence outweighs its probative value, or that its admission will necessitate undue consumption of time, confuse the issues or mislead the jury.

The parties stipulated that the subject property had a water supply and that it had been issued a water permit, that was received in evidence.

The district's objections were sustained specifically as to evidence of the bid and oral acceptance to build on the property, the commitments from a lending institution and approval of a building permit. Proffered evidence of the facts that the prior tenant was terminated one year before the suit, that the prior building had been removed, that previous installation of curbs, gutters and sidewalks had occurred, and evidence as to physical condition of the property was not objected to and was ruled admissible. Appellant testified that the value **[**5]** of the property on the date of value was $155,000, his expert appraiser testified that the property's value on that date was $138,500, and the district's expert appraiser valued the property on that date at $81,000. The jury returned a verdict of $111,000.

POSITIONS OF THE PARTIES

The foundational issue in this appeal is the admissibility of certain excluded evidence. Appellant contends that (1) insofar as such factors as work, services, expertise and lowered risk in development for the highest and best use of property in fact enhanced the actual market price on the date of value, they were admissible for the limited purpose of supporting appellant's expert's opinion that the subject property had a market value greater than that of raw acreage; (2) while exclusion of such evidence by the trial court as incompetent in that such items were not themselves compensable interests in or appurtenances to real property was correct, the exclusion of evidence was nevertheless reversible error because it was admissible on the basis just stated; and (3) exclusion of such evidence under *Evidence Code section 352*, constituted a prejudicial abuse of discretion and as such was reversible error. **[**6]**

District argues that the factors in (1) above, are inadmissible because they do not constitute real property or an interest therein or appurtenance thereto, and therefore **[*837]** are not compensable, and contends that: (1) such factors were correctly excluded as constituting evidence of value for a specific use, of frustration of profits and of a proposed plan of development of the condemnee, and as such were not compensable, and were incompetent and inadmissible even when offered in the guise of reasons for the expert's or owner's opinion of value; (2) exclusion of such factors was correct since admissibility, if at all, depended upon the existence of partial improvements, which did not exist here; (3) such factors are not admissible, if at all, where the parties have agreed, as here, as to the highest and best use of the property; (4) such factors are not admissible, if at all, where both sides agree, as here, as to the immediacy of feasibility for development; (5) even if relevant and otherwise admissible to show condition or enhanced value on the date of value, the prejudicial effect of such evidence outweighed its probative value, consumed undue time and was misleading and **[**7]** confusing. This afforded the trial court a sound basis for exercising its discretion to exclude the evidence. Even assuming an abuse of discretion by the trial court in excluding this evidence, no prejudice to the condemnee occurred and any error therefore is harmless since the record is replete with evidence included in the rejected offer of proof, and since appellant's appraiser had earlier made a valuation of the subject property inconsistent with this evidence.

DISCUSSION

1. *The proffered evidence was inadmissible as such because the factors set forth therein are not compensable as real property, an interest therein, or appurtenances thereto.*

Only real property, interests therein, improve-

ments and fixtures thereon or appurtenances thereto are compensable in condemnation proceedings. (*People v. Ricciardi (1943) 23 Cal.2d 390, 395–397 [144 P.2d 799].)* Absent legislative action, the rule is that personal property not affixed to the realty, taken through eminent domain, is not subject to just compensation under the Constitutions of California and the United States, although such personal property might be rendered valueless thereby. (*Community Redevelopment* **[**8]** *Agency v. Abrams (1975) 15 Cal.3d 813, 833–834 [126 Cal.Rptr. 473, 543 P.2d 905, 81 A.L.R.3d 174].)* In *Abrams* our Supreme Court stated that although certain nonreal property losses may be demonstrably attributable to condemnation, constitutional provisions prescribing just compensation do not contemplate their indemnification. In other words, the law does not equate "just compensation" with total indemnification. (*Id . at pp. 827, 838.)*

This view was codified, effective in 1965, in *Evidence Code section 822*, which, at all times pertinent hereto, read as follows: "Notwithstanding the provisions of Sections 814 to 821, the following matter is inadmissible as evidence and is not a proper basis for an opinion as to the value of property.. . . (e) The influence upon the value of the property or property interest being valued of any noncompensable items of value, damage, or injury." (See *People ex rel. Dept. Pub. Wks. v. Curtis (1967) 255 Cal.App.2d 378, 393 [63 Cal.Rptr. 138]* (conc. opn. by Cobey, J.)

For the reasons stated above, the proffered evidence consisting of investment of time, work, and money, and representing lost profits or frustration, does **[**9]** not consist of compensable items and may not therefore be used per se to enhance the market value of the property. On that basis, the trial court correctly excluded it as both parties concede.

2. *The proferred evidence was inadmissible as a reason for the expert's opinion evidence.*

(a) *The proferred evidence was incompetent and per se not admissible under the guise of a reason for the expert opinion of value .*

The test of the market value of real property is not its value for a special purpose, but the fair market value in view of all the purposes for which it is naturally adopted, and evidence of value for such **[*838]** purposes should be freely given and received. (*People v. La Macchia (1953) 41 Cal.2d 738, 751 [264 P.2d 15]* [overruled on a different point in *County of Los Angeles v. Faus (1957) 48 Cal.2d 672, 678–680 (312 P.2d 680)]; Sacramento etc. R. R. Co. v. Heilbron (1909) 156 Cal. 408, 412 [104 P. 979].) Evidence Code section 814*, at all times pertinent hereto, provided as follows: "The opinion of a witness as to the value of property is limited to such an opinion as is based on matter perceived by or personally known to the witness **[**10]** or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion as to the value of property, including but not limited to the matters listed in Sections 815 to 821, inclusive, unless a witness is precluded by law from using such matter as a basis for his opinion."

Furthermore, *Evidence Code section 813*, subdivision (a), at all times pertinent hereto, provided that "[t]he value of property may be shown only by the opinions" of qualified persons. This statute codified the long established rule that value is a matter to be established by opinion evidence. (3 Cal. Law Revision Com. Rep. (1961) p. A–6; Witkin, Cal. Evidence (2d ed. 1966) § 441.)

Clearly, one who has given his opinion as to the value of certain property may state the reasons therefor on direct examination. (*Evid. Code, § 802*.) But the facts stated as reasons do not become evidence in that they have independent probative value on the issue of market value. Instead they go only to the weight to be accorded the opinion. And, there is no right to put in evidence matters which are incompetent as substantive evidence to fortify **[**11]** the opinion of an expert witness, even though they are offered under the guise of reasons for his opinion, and even though they might properly have been admitted on cross–examination to test and diminish the weight to be given the opinion. (*People v. La Macchia, supra , 41 Cal.2d at p. 745.)* "The general rule which permits a witness to state the reasons upon which his opinion is premised may not be used as a vehicle to bring before the jury incompetent evidence." (*Ibid ., Evid. Code, §§ 802, 803*; see also *People v. Odom (1980) 108 Cal.App.3d 100, 115 [166 Cal.Rptr. 283]; Golden Gate Bridge etc. Dist. v. Muzzi (1978) 83 Cal.App.3d 707, 716 [148 Cal.Rptr. 197]; People v. Nahabedian (1959) 171 Cal.App.2d 302, 311 [340 P.2d 1053].)*

In ascertaining the market value of real property, any evidence which tends to show the physical condition of the property, the purpose for which it is employed or any reasonable use for which it may be adapted, is competent. (*People v. La Macchia, supra , 41 Cal.2d at p. 745.)* Thus ". . . probable prospective use of property is a factor to be considered in determining market value, i.e., a factor the hypothetical **[**12]** buyer and seller would consider, but the money value of the property for that use is not an independent element of market value." (Fn. and citations omitted.) (*South Bay Irr. Dist. v. California–American Water Co. (1976) 61 Cal.App.3d 944 at p. 986 [133 Cal.Rptr. 166].)*

And while loss of profits from a business is not com-

pensable as an element of damage, evidence of economic feasibility of a claimed highest and best use of the property bears upon market value, and is therefore admissible. (*Orange County Flood Control Dist. v. Sunny Crest Dairy, Inc. (1978) 77 Cal.App.3d 742, 758 [143 Cal.Rptr. 803],* and cases cited therein.) Likewise, under certain circumstances, evidence that a proposed use is a profitable one is admissible, not for the purpose of enhancing the damages (viz. market value), by showing loss to the owner of a particular plan of operation, but to show that such proposed plan is a feasible one and should be considered in fixing market value. (*People v. La Macchia, supra , 41 Cal.2d at p. 751,* citing *City of Daly City v. Smith (1952) 110 Cal.App.2d 524, 532 [243 P.2d 46],* and *United States v. 25.406 Acres of Land (4th Cir.* **[**13]** *1949) 172 F.2d 990, 994.)* The relevancy thereof is that the uses to which property may be adapted, in order to be considered in **[*839]** the determination of market value, must be so reasonably probable as to have an effect upon the present market value of the land. A purely imaginary remote or speculative value may not be considered. (4 Nichols, Law of Eminent Domain (3d ed.) § 12.314, p. 12–237.) Otherwise, the owner's actual plans or hopes for the future are completely irrelevant. (*Id* ., at p. 12–259, citing *People v. Johnson (1962) 203 Cal.App.2d 712 [22 Cal.Rptr. 149]; Buena Park School Dist. v. Metrim Corp. (1959) 176 Cal.App.2d 255, 260 [1 Cal.Rptr. 250].)* The reason is that they are too speculative to merit consideration in enhancement of market value. (4 Nichols, *supra* , at p. 12–261.) It follows that evidence of the owner's intentions regarding the land cannot be considered in ascertaining market value in that damages may not be enhanced by reason of the owner's being prevented from carrying out a particular scheme of improvement, which is only contemplated at the time of trial. (*People v. La Macchia, supra , 41 Cal.2d at p. 751; Evid.* **[**14]** *Code, § 822,* subd. (e), *supra* .)

Concededly, no physical construction or alteration except demolition of the prior building and construction of curbs, gutters and sidewalks, evidence of which was received, occurred on the subject property. Appellant concedes the correctness of excluding evidence of the bid and oral acceptance to build on the property (i.e., the construction contract), the commitment from a lending institution and the approved building permit on the ground that the losses occasioned thereby were noncompensable personal property interests and thus irrelevant. Appellant urges however that such facts were admissible to show the feasibility of immediate development of the subject property by a willing buyer which would cause such a buyer to pay, in effect, a premium for the expenses, plans and work undertaken by appellant over a year's period, toward development. In this connection, appellant argues that this evidence, even if not directly admissible to show enhancement of the property's market value through the payment of a premium on account thereof, was nevertheless admissible as a reason substantiating his expert's opinion regarding the market value of the property **[**15]** on the date of condition.

For the foregoing reasons, including *Evidence Code sections 814* and *822* subdivision (e), the proffered evidence was incompetent and therefore inadmissible either as direct evidence to show enhancement of market value by the probable payment of a premium for the preparation work or under the guise of a reason for the defense expert's opinion. Accordingly, the trial court correctly rejected appellant's offer of proof with respect to such evidence.

(b) *The proffered evidence, even if otherwise relevant and admissible, was inadmissible once the parties agreed as to highest and best use.*

In a case where the parties were in agreement as to the highest and best use of the condemned land, and defendant condemnees sought admission in evidence of an architect's sketch to show such suitability and value of the land for that use, our Supreme Court held that the trial court correctly excluded the proffered evidence since, where all the experts agree on the suitability and value for a specific use before but not after the taking, the sketch of the specific plan or development could have no purpose other than to attempt to enhance damages, and its rejection was proper. **[**16]** (*People v. Chevalier (1959) 52 Cal.2d 299, 309 [340 P.2d 598],* citing *People v. La Macchia, supra , 41 Cal.2d p. 751, Laguna Salada etc. Dist. v. Pacific Dev. Co. (1953) 119 Cal.App.2d 470, 476 [259 P.2d 498],* and *City of Los Angeles v. Kerckhoff–Cuzner Mill & Lbr. Co. (1911) 15 Cal.App. 676, 677–678 [115 P. 654]; City of Pleasant Hill v. First Baptist Church (1969) 1 Cal.App.3d 384, 400 [82 Cal.Rptr. 1].)*

In another case, the defendants appealed the exclusion from evidence of a tentative tract map filed with the Los Angeles County Planning Commission, where only two out of five proposed units were in a developed condition prior to the date of value, and defendant spent over $2 million in improving portions of the remaining parcel after severance, including grading and **[*840]** installing storm drains, streets, water line and sewer system, where one residential development was 90 percent complete and some work had been done on unit 2. Division 1 of this district excluded evidence pertaining to severance damages consisting of an economic feasibility study, prepared by defendant's expert engineer, and the tentative tract map. This court **[**17]** held that the offer of the feasibility study constituted an attempt by the defendants to obtain a measure of damages based on frustration of a specific plan of development as illustrated by specific costs referred to

in the offer of proof, and since it could have no purpose other than to attempt to enhance damages, its rejection was proper. (*People* ex rel. *Dept. Pub. Wks. v. Princess Park Estates, Inc. (1969) 270 Cal.App.2d 876, 878, 883, 884–885 [76 Cal. Rptr. 120].)*

Furthermore, the parties were in agreement that the highest and best use of the property was for ultimate subdivision development and agreed that a certain portion would be more expensive to develop as a result of the severance. The court held that the "defendant's offer of proof was an attempt to emphasize its case in chief by eliciting specific studies and costs, and such testimony was properly excluded since it would have been merely cumulative in effect." (*Id . at p. 885.)* The court rejected the cases relied on by the defendant as dealing with property adaptable for subdivision rather than with severance damages, and upheld the lower court's sound discretion in excluding, under *Evidence Code* **[**18]** *section 352*, the theoretical tract map submitted by defendant in view of its complete, specific and detailed nature, on the ground that the probative value of such evidence was substantially outweighed by the probability that its admission would necessitate undue consumption of time, create substantial danger of undue prejudice, confuse the issues or mislead the jury. The court also held that, under the foregoing circumstances, a cautionary limiting instruction would have been of no avail. (*Ibid* .)

We believe the *Princess Park Estates* case controls the instant appeal and therefore will affirm the trial court's exclusion of the proffered evidence for the reasons already set forth. (See also *State of Cal.* ex rel. *State Pub. Wks. Bd. v. Wherity (1969) 275 Cal.App.2d 241 [79 Cal.Rptr. 591],* and *City of Los Angeles v. Retlaw Enterprises, Inc. (1976) 16 Cal.3d 473, 490 [128 Cal.Rptr. 436, 546 P.2d 1380],* and *Evid. Code, § 822*, subd. (e), *supra* .)

Appellant cites cases which he argues compel our agreement with his position. Examination of these cases, however, (aside from two, both of which are hereafter discussed) discloses that, in each of them the **[**19]** existence of improvements or partial improvements permitted the condemnee to prove reproduction or replacement costs thereof, pursuant to *Evidence Code section 820*, n1 or the parties failed to agree as to the highest or best use of the condemned property on the date of value. (See, e.g. *People* ex rel. *Dept. Pub. Wks. v. Leadership Housing Systems, Inc. (1972) 24 Cal.App.3d 164, 168 [100 Cal.Rptr. 747],* and *Buena Park School Dist. v. Metrim Corp., supra , 176 Cal.App.2d 255, 257.)* Accordingly, these cases are distinguishable on their operative facts from the case at bar.

n1 At all times pertinent hereto, *Evidence Code section 820* provided: "When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the value of the property or property interest being valued as indicated by the value of the land together with the cost of replacing or reproducing the existing improvements thereon, if the improvements enhance the value of the property or property interest for its highest and best use, less whatever depreciation or obsolescence the improvements have suffered."

In *Santa Clara County Flood Control* **[**20]** *& Water Conservation Dist. v. Freitas (1960) 177 Cal.App.2d 264 [2 Cal.Rptr. 129],* alone of the cases relied upon by appellant, n2 it appears **[*841]** that on the date of value the tentative subdivision map had not been recorded, no work had been commenced to actually improve the property as a subdivision, and the parties were in agreement that the highest and best available use of the property was its division into building lots. (*Id. at p. 266.)* The trial court permitted the defendant's expert to testify, presumably over objection, that he arrived at the market value of the parcel taken by dividing the parcel taken into three lots and valuing each lot at $7,250. The appellant–plaintiff argued that valuation or damage was thus improperly based on a loss of improved subdivision lots which were not even in existence on the date of valuation. The trial court had refused appellant's requested jury instruction in support of his theory. The appellate court upheld the ruling of the trial court, and stated that a reading of the witness' testimony evinced clearly that it pertained to actual market value on the date of value and not to a mere prospective future value, consonant **[**21]** with the prevailing rule that the actual market value of the lots insofar as that value is presently enhanced by the property's availability for subdivision may be shown, but not a possible future value when subdivided. (*Ibid.* , at pp. 266–267.)

n2 Appellant also cites *State v. Chang (1967) 50 Hawaii 195 [436 P.2d 3],* for the proposition that evidence of a condemnee's preliminary development costs are admissible to show enhancement of fair market value above that of raw acreage, absent actual improvement to the property and absent disagreement as to the highest and best use. We decline to follow the *Chang* case in view of the California authority to the contrary.

The *Freitas* case makes no reference to the *La Macchia* or *Chevalier* Supreme Court cases, and their progeny referred to above, regarding the exclusion of such testimony when the parties have agreed upon the highest and best use. Absent improvements or partial improvements, on account of which reproduction or replace-

ment costs are compensable under the general rule, and in view of the parties' agreement as to highest and best use, no basis appeared to exist in the *Freitas* case for the **[**22]** admission on direct examination of the witness' testimony. We therefore decline to follow the *Freitas* case as we do not consider it persuasive precedent. We are further precluded from doing so, in our opinion, by *Evidence Code section 822*, subdivision (e), referred to above, which excludes evidence of the influence upon the value of the property or property interest being valued of any noncompensable items of value, damage or injury.

The parties here were in complete agreement as to the highest and best use on the date of value of the property to be taken, including, as conceded by the district's expert witness, Neilson, the immediacy of feasibility for development of the property. Resolution of the issue of the highest and best use of the property on the date of value foreclosed the only arguably relevant basis for receipt of the proffered evidence, that is, as a means or method in determining the market value of the property on the date of value. Possessed of the evidence of agreement of both sides' experts as to the highest and best use of the property and its immediate readiness for development, the jury had all the uncontradicted information needed with regard to use and **[**23]** feasibility in order to enhance the property's value on the date of value to that of land immediately ready for commercial development. The proffered evidence, therefore, could have no purpose other than to attempt to enhance damages, and its rejection was proper.

3. *Assuming arguendo the proffered evidence to have been wrongfully excluded, no prejudice inured to appellant in that such evidence was placed before the jury without objection through the testimony of appellant and his expert Weber, and was emphasized in closing argument of counsel.*

On appeal only prejudicial error is reversible, and the burden of showing such prejudice is on the appellant. (*Dorsic v. Kurtin (1971) 19 Cal.App.3d 226 [96 Cal.Rptr. 528]; Evid. Code, § 354*.)

The record below discloses that the clear import of the testimony of appellant and of his expert witness was to the effect that all necessary permits had been obtained and preconditions to development had been satisfied, and appellant's counsel so argued to the jury in closing.

[*842] Appellant therefore, proved substantially that which comprised his otherwise rejected offer of proof. Consequently he suffered no prejudice by **[**24]** reason of such rejection.

Finally, defendant's expert testified on cross–examination that he had previously valued the subject property at $112,000 in his 1976 preliminary report to defendant, and that at that time he considered the adaptability of the property for immediate development. This prior inconsistent expert opinion would be admissible in any subsequent trial subject to such reasons and explanation that the expert might give. (*People* ex rel. *Dept. Pub. Wks. v. Murata (1958) 161 Cal.App.2d 369, 379, 380 [326 P.2d 947].)* Since the verdict herein was amply supported by appellant's evidence, including his expert's prior inconsistent expert opinion, the likelihood of a substantially different outcome upon retrial is slim. In any event, no reversible error was committed. (See *People v. Watson (1956) 46 Cal.2d 818, 836 [299 P.2d 243].)*

The judgment below is affirmed in all respects. Costs on appeal to appellant as provided in *Code of Civil Procedure section 1268.720*.

Potter, Acting P. J., and Lui, J., concurred.