



UNITED STATES OF AMERICA v. 275.81 ACRES OF LAND, MORE OR LESS, SITUATED IN STONYCREEK TOWNSHIP, SOMERSET COUNTY, PENNSYLVANIA

2014 | Cited 0 times | W.D. Pennsylvania | March 26, 2014

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA United States of America, Plaintiff, vs. 275.81 Acres of Land, More or Less, Situated in Stonycreek Township, Somerset County, Commonwealth of Pennsylvania, and Svonavec, Inc. Defendant. AMBROSE, Senior District Judge

Civil Action No. 09-233

OPINION

AND ORDER OF COURT I. BACKGROUND The factual and procedural details of this condemnation action are well known to the parties and I need not repeat them in detail here. In short, the United States of America filed a Complaint for Condemnation on September 1, 2009, for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest. (Docket No. 1). The subject property consists of 275.81 acres of land owned at the time of taking by Defendant, Svonavec, Inc., and located in Stonycreek Township, Somerset County, Pennsylvania. This site includes approximately six acres of land on which United Airlines Flight 93 crashed on September 11, 2001. The United States acquired a fee simple estate in the 275.81 acres, including oil and gas rights and eight acres of coal, subject to existing easements and certain rights of third parties. See Docket No. 1. The public use for which the property was taken was for the administration, preservation, and development of a Flight 93 National Memorial. *Id.*

The parties in this case agreed that the issue of just compensation for the taking of the land involved should be determined by a commission, and I found that the appointment of such a commission was appropriate under Federal Rule of Civil Procedure 71.1(h)(2)(A) for just reasons, including the complex appraisal methodologies and valuation issues involved. See Docket Nos. 137, 144. Accordingly, On July 9, 2013, I appointed an impartial three-person commission pursuant to Rule 71.1(h) to determine just compensation to be paid to Defendant by the United States. See Docket No. 144. The Commission was comprised of two real estate appraisers and one real estate attorney. See *id.*

A trial on just compensation was held before the Commission on October 7-11, 2013. On December 9, 2013, the Commission issued a 72-page report acres of coal, acquired by the United States under its power of eminent domain on September



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2, 2009, is \$1,535,000. (Docket No. 189).

Pending are Findings of the Report of the Commission and Objections to the Report of the Commission

Commission. (Docket No. 200). (Docket Nos. 205, 206, 211, 214). The matter is now ripe for my review.

II. ANALYSIS A. Standard of Review Federal Rule of Civil Procedure 71.1(h) permits the Court to appoint a three-person commission to determine compensation because of the character, location, or quantity of the property to be condemned, or for other just reasons. Fed. R. Civ. P. 71.1(h)(A). Pursuant to this Rule, the Commission has the powers of a master under Rule 53(c). Fed. R. Civ. P. 71.1(h)(D). Rule 53(d), (e), and (f) applies *Id.*

Rule 53(f)(3) requires that the Court decide *de novo* reviewed for clear error. Fed. R. Civ. P. 53(f)(3). The parties in this case did not stipulate to a

clear error review. Thus, I must apply the *de novo* standard to all objections to the *de novo* all objections to an abuse of discretion standard. Fed. R. Civ. P. 53(f)(4), (5).

In *United States v. Merz*, 376 U.S. 192 (1964), the United States Supreme Court held that altho commissioners need not make detailed findings such as judges do who try a

case without a jury, *Id.* at 198-99. Conclusory findings alone are

not enough. *Id.* The path followed by the commissioners in reaching the amount of the

Id. at 198-99 give more careful consideration to the problem if they are required to state not only the end

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As set forth above, the Commission in this case filed a comprehensive 72-page report setting forth the path it took in reaching its valuation conclusion, the reasoning it employed, and the record evidence on which it based its decision. (Docket No. 189). This report more than satisfies the requirements set forth in *Merz* and has allowed me to undertake an informed and meaningful review. record, and applicable law, and for the reasons set forth below, I adopt the Commi Report and the findings contained therein.

B. Eminent Domain Just Compensation As I instructed the Commission prior to trial, the United States has the authority to take private property for use by eminent domain, provided that it satisfies its Fifth Amendment *United States v. 6.45 Acres of Land*, 409 F.3d 139, 145 (3d Cir. 2005) (quoting



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Kirby v. Forest Indus., Inc., 467 U.S. 1, 9 Id. owner of

the condemned property must be made Id. at 145 n.11 (quoting United States v. 564.54 Acres of Land, 441 U.S. 506, 516 (1979) (emphasis in original)). Id.

Fair market value is determined by the highest and best use for which the property is adaptable in the reasonably near future from

the value United States v. 68.94 Acres of Land, 918 F.2d 389, 393 (3d Cir. 1990) (citing Olson v. United States, 292 U.S. 246, 255 (1934)). Although the existence of a potential use should not be excluded merely because it depends upon the existence of extrinsic Id.

C. and Motion to Modify the Report of the Commission Pending are (Docket No. 200). Primarily, Defendant complains that the Commission erred in finding that

the highest and best use of the property was a private memorial only, and not a private memorial and Randall Bell. This objection is without merit.

center as a potential use but rejected that use because, unlike a private memorial only, it could not conclude on the basis of the evidence presented that such a use was financially feasible. Report at 46-47. In explaining this conclusion, the Commission stated that Mr. Bell failed to support his analysis with a marketability study from a qualified provider or other credible evidence showing and evaluating the costs, expenses, and risks of constructing and operating a Id. at 46. This lack of evidence left the Commission uncertain as to the design of the museum, its suitability for the site and market, and the contents of the museum. Id. projected numbers as plausible. Id. The expert Gregory Jones, provided testimony on this topic at trial, but found that these experts

lacked the expertise or experience to assess the feasibility of a planned museum and that none of the witnesses supported their reasons sufficiently for the Commission to accept their conclusions. Id. at 46-47.

in the realm of real such conclusions are not for Defendant to make. Rather, as the instructions in this case made

clear, the Commission was the sole judge of the credibility and reliability of the witnesses at trial. (including admission rates, concession figures, net operating income, capitalization rates, etc.)

for numerous appropriate reasons, including, inter alia, improperly conflated business and land value, and/or failed to reflect the risks involved with an

operation on the property. Report at 49-52. I have and, based on the record evidence and my own



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observations at trial, find them to be accurate

and well-supported.

United States v. 6.45 Acres of Land, 409 F.3d 139 (3d Cir. 2005) , as support for its position that the highest and best use of the Property is necessarily a private memorial and is likewise without merit. As the United States correctly explains in its Response, the Gettysburg Tower case is inapposite for numerous reasons. (Docket No. 205, at 5-7). Not least of these reasons is the fact that, at the time of the taking in the Gettysburg Tower case, the condemned land contained improvements, including a decades-old operating business, a 307-foot observation tower completed in 1974; and a gift shop, restaurant, and parking lot, operating in conjunction with the tower. 409 F.3d at 142. Because the business and structures predated the taking, the Gettysburg Tower appraiser had the benefit of actual operating figures and business data with which to work. Nothing in the Gettysburg Tower case Commission was required to value the subject land vague and speculative

testimony regard 1

testimony as explained above, several additional points

merit brief discussion here. First, Defendant unpersuasively argues that the Commission erroneously applied jected annual visitation number of 230,000 set forth in a report authored for the National Park Service by Bruce E. Lord of Pennsylvania State University. As I instructed the Commission at trial and in response to the - prohibits awarding compensation based on any enhancement or reduction in value attributable to the project for which the Government condemned the property; here, public Flight 93 National Memorial. Thus, the Commission was not permitted to rely on

information related property to determine highest and best use and/or fair market value, because to do so would violate the scope of the project rule. The Commission was permitted, however, to consider relevant

1 The appraiser at issue in the Gettysburg Tower case, David Lenhoff for the same reasons set forth above. information, if any, contained in the evidence that is general to the market, such as generic information about the market area, existing infrastructure on the property, physical aspects of the subject property, the availability of artifacts, and other considerations that any private developer would consider in assessing the demand for and/or viability of a private memorial on the subject property.

Here, the Commission appropriately found that the 230,000 visitation number contained in the Lord Report fell within scope of the project rule because it was not generic to the market, but was projected solely for a fully- the National Park Service. Report at 50. Even if I agreed that the Commission erred in this regard which I do not it alternatively rejected the 230,000 visitation



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number because there was no evidence that 230,000 or more people visited the site prior to the date of taking and the projection was based on an assumption that people would come to the site in higher numbers as the result of improvements being added to the property after the date of taking. Such post- taking improvements included content that would be part of a business operation and not fairly attributable to the land. Id. at 50-51.

Second, Defendant argues that the Commission had no basis to assess environmental cleanup costs to the property because those costs would be paid for by a responsible third-party or that the separate cost of a parking lot would remedy the environmental contamination. Docket No. 200, at 22. Although the Commission recognized that the ultimate responsibility for these remediation costs might rest with a third party, it appropriately concluded that given the uncertainties of recovery from other parties and the prospect of delay in pursuing those parties, that a reasonably knowledgeable buyer would include remediation costs in determining price. Report at 67.

Third, Defendant argues that the Commission failed to account for the contributory value of the condemned oil and gas interests after the parties stipulated that the value of those interests was \$105,000. Docket No. 200, at 21. This argument likewise is without merit. After trial, the Commission was properly instructed that if the condemned land contains a mineral deposit, it is proper to consider this fact in determining the market value of the land as a whole, but it is not permissible to determine the market value of the land as a whole simply by adding the individual value of the mineral deposit to the value of the land as a unit. Docket No. 188, at In accordance with these instructions, the Commission did not simply add the \$105,000 to a calculated land value. The Commission, however, appropriately accounted for the contributory value of the oil and gas interests when it applied less of a discount adjustment than that applicable to land development properties where such oil and gas value is not present. Report at 69-70. Although Defendant separately challenges the discount- rate analysis is reasonable and well-supported by the record evidence. Report at 68-71.

Finally, Defendant ends by presenting an alternate calculation of just compensation in the amount of \$5,745,600. Docket No. 200, at 24-25. This never-before-presented number is a far cry from the \$23,300,000 valuation figure that Dr. Bell advocated at trial and that Defendant has urged throughout this case. Defendant contends the purpose of this calculation is to pting the most conservative, yet adequately supported figures in this 200, at 24-25. As Plaintiff aptly explains in its Response, Defendant appears to have reached

this new figure by picking and choosing numbers from sources unrelated to the subject matter and presenting misleading comparisons to other data. Docket No. 205, at 1-2. Defendant has failed to demonstrate that these new numbers are appropriate, timely, reasonable, or relevant to the subject property. Accordingly, I do not consider them here.

ound them to be without merit. For the reasons set forth above, the objections are overruled and



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Modify is denied. D. the Report of the Commission

Plaintiff also objects to and seeks modification of portions of . (Docket No. 201). Like Defendant, but for different reasons, Plaintiff focuses its attack on the Unsurprisingly, Plaintiff

also agrees with the acceptance of the testimony of its own appraisal expert, Gregory Jones, who concluded that open space/recreational use was physically possible, s value based on this use on the date of taking was \$610,000. Id. at 1-2. finding that the highest and best use of the property was as a private memorial. Id. at 1-4.

Plaintiff portrays the private memorial as a third use proposed by neither party and unsupported by the record evidence. Plaintiff contends that once the Commission rejected a private open \$610,000 valuation as the only valuation supported by the record evidence. Id. I disagree.

As an initial matter, I disagree with Plaintiff that the Commissi

evidentiary support. Although the instructions prohibited the Commissioners from basing any opinions on their own expertise in lieu of the record evidence, the instructions expressly permitted them to draw reasonable inferences from the evidence that they felt were justified by common sense and, similarly, to draw, from the facts found to have been proved, such inferences as seem justified in the light of their own experience. Docket No. 192 (10/7/13 Tr.), at 5, 8. Moreover, nothing in the instructions required the Commission to accept or reject any in toto. Rather, the instructions correctly explained that the and reliability and of the weight to be given to the testimony of each witness. Id. at 8-9. 2

Report and the record evidence in this case, I find that, while the Commission may at times have drawn reasonable inferences from the evidence justified in light of their own experience and common sense, at no time did the Commission go beyond the record and reach a conclusion unsupported by the evidence. Rather, the Commission carefully supported each element of its highest and best use and valuation analyses with citation to the evidence it considered. This evidence includes, inter alia, testimony and documentation that the use of the property as of the date of the taking was a memorial; evidence regarding annual visitation to the site prior to the taking; evidence regarding the topography and desirability of the land as a viewing site; testimony regarding admission

expenses; and testimony and industry publications regarding capitalization and discount rates.

Moreover, the distinction between

(private memorial) is not as sharp as Plaintiff attempts to portray. Throughout this case, 2 As I instructed the Commission, the Supreme Court in Merz cautioned that:



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[T]here is danger that commissioners, unlike juries, may use their own expertise and not act as a deliberative body applying constitutional standards. A jury, until it retires, sits under the direct supervision of the judge, who rules on the admissibility of evidence, who sees that witnesses are properly qualified as experts, and who polices the entire hearing, keeping it within bounds. Then in due course the judge instructs the jury on the law, answering any inquiries its members may have on the law. The jury is under surveillance from start to finish and subject to judicial control. Hence its general verdict that the land is worth so many dollars is not overturned for lack of particularized findings. The judge who uses commissioners, however, establishes a tribunal that may become free-wheeling, taking the law from itself, unless subject to close supervision. 376 U.S. at 197. Here, however, the Commission was under my direct supervision until it began deliberations. Not only was I present in the courtroom throughout the proceedings, but also, at the oversaw the qualification of expert witnesses. Thus, the concerns voiced by the Supreme Court were not present in this case. My particularized findings, convince me that the Commissioners did not act as a free-wheeling body of experts, but, rather, carefully applied the law and based their findings on the record evidence as instructed. Defendant has argued that the use of the property at the time of the taking was a private memorial. Although Dr. Bell valued a museum his proposed highest and best use, was always a component of a larger private memorial. In its Report, the Commission, as instructed, carefully rejected any evidence based on speculation and conjecture or that attempted to value a business as opposed to the land. In so doing, the Commission properly rejected a private memorial with a museum/visitor s center as the highest and best use. The record evidence that remained, however, fully supports the Commission s further conclusion that a private memorial alone met the highest and best use criteria.

Plaintiff additionally argues that the Commission erred in applying the income approach to value the property as a private memorial because it unreasonably assumed that no comparable sales of private memorials exist. (Docket No. 201, at 17-18). This argument is without merit. As I instructed the Commission, although evidence of comparable sales normally offers the best evidence of fair market value, the law is not wedded to any particular formula or any particular method for determining fair market value as the measure of just compensation. When evidence of comparable sales is unavailable, other methods of valuation such as the income capitalization approach may be appropriate to determine market value. Here, the Commission rightfully found that the events of September 11, 2001, rendered the subject property unique, and, thus, that comparable sales are not available. This finding holds true whether the property is valued as a private museum/visitor s center or a private memorial alone.

For all of these reas are overruled and its Motion to Modify is denied.

III. CONCLUSION In sum, I agree with the Commission in this case that the crash of Flight 93 on September 11, 2001, undeniably imbued the subject property with a national significance and intrinsic value that is neither transferable nor comparable to otherwise similar parcels. Faced with this unique valuation scenario, the Commission fairly and admirably analyzed and weighed the



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record evidence and correctly applied the relevant law to determine just compensation in this case. After careful consideration of the Commissioner's Report, the record evidence, the parties' objections, and applicable law, I agree that \$1,535,000 represents the fair market value of the property i.e., the amount for which in all probability the property would have sold on the date of the taking, after a reasonable exposure time on the open competitive market, from a willing and reasonably knowledgeable seller to a willing and reasonably knowledgeable buyer, with neither acting under any compulsion to buy or sell, giving due consideration to all available economic uses of the property at the time of the taking. For these and all of the reasons set forth herein, the parties' objections to the Report are overruled, and I hereby adopt the Report in its entirety.

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PENNSYLVANIA United States of America, Plaintiff, vs. 275.81 Acres of Land, More or Less,
Situating in Stonycreek Township, Somerset County, Commonwealth of Pennsylvania, and Svonavec,
Inc. Defendant. AMBROSE, Senior District Judge

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ORDER AND NOW, this 26th

day of March, 2014, it is hereby ORDERED that the Report of the Commission dated December 9, 2013 in the above-captioned case (Docket No. 189) is hereby adopted in its entirety. Just compensation the fee simple estate in the 275.81 acres of land owned by Defendant, Svonavec, Inc., and located in Stonycreek Township, Somerset County, Pennsylvania, including oil and gas rights and eight acres of coal, is set at \$1,535,000.

s Objections (Docket No. 200 Part Certain Findings of the Report of the Commission

Report of the Commission (Docket No. 200) is denied.

BY THE COURT: /s/Donetta W. Ambrose Donetta W. Ambrose Senior Judge, U.S. District Court

