

LAFAYETTE CITY-PARISH
CONSOLIDATED GOVERNMENT

15TH JUDICIAL DISTRICT COURT

Vs.

DOCKET NO: 2006-2522

ROBERT K. FELL, and
HOLLY JEAN FELL

LAFAYETTE PARISH, LOUISIANA

REASONS FOR JUDGMENT

This action in eminent domain came for trial by jury on August 14, 2007 for a determination of the amount of compensation to be paid to landowners for a servitude on their property in favor of the Lafayette Consolidated Government utilities department (LUS) to erect and maintain electric transmission lines. The parties had already entered into a consent judgment on July 31, 2007 granting to the city-parish government the servitude sought with a reservation of the right to try the issues of just compensation and damages. After a jury had been seated but before the presentation of any evidence, the parties reached a further compromise agreeing on an amount representing the value of the servitude. They could not, however, resolve their disputes over severance damages, and decided to release the jury and try that sole remaining issue before the bench.

BACKGROUND:

When the landowners bought the property, it was already subject to a servitude in favor of SLEMCO and already contained some large "H" shaped poles that supported several electrical transmission lines. The current expropriation by the city-parish government is for its own (LUS) electrical distribution lines with three (3) additional poles to support five (5) lines. The new poles and lines will run below the SLEMCO lines within the same boundaries as the already existing servitude. The landowners have planted a rose garden on the property subject to the servitude below the SLEMCO transmission lines.

The property is one of only a few remaining undeveloped tracts of land between Ambassador Caffery Parkway on the north, East Broussard Road on the south, the Vermilion River on the west and Kaliste Saloom Road on the east. Its current use is as the landowners' residence and extended grounds. They have no plans to sell or develop it at the present time. They contend that the additional electrical poles and lines to be

placed on the property by LUS will lessen the market value of the remaining property as it will diminish the aesthetics that factor into a determination of market value.

ANALYSIS OF "HIGHEST AND BEST USE"

A determination of whether severance damages are due in an expropriation case begins with an analysis of the "highest and best use" for the affected property or, "the most favorable employment to which the property is adaptable and may reasonably be put in the not too distant future." *State of Louisiana through Department of Highways v. Edward D. Rapier*, 164 S.2d 280 (La. 1964). "The issue of the highest and best use of property sought to be expropriated and its value is a question of fact. The issue as to whether or not the property remaining to a condemnee has suffered severance damage is also essentially a question of fact." *Valley Electric Membership Corporation, Inc. v. Mrs. Rivers R. Wallace*, 465 So. 2d 986 (La. App. 3d Cir., 1985)

"Our jurisprudence is established that severance damages to the remaining property cannot be presumed and will not be awarded unless the owner shows by competent evidence that the value of the remaining land has been diminished by the taking." *Texas Gas Transmission Corporation v. Young*, 198 So. 2d 453 (La. App.3rd Cir. 1967); *Michigan Wisconsin Pipeline Company v. Fruge*, 227 So. 2d 606 (La. App. 3rd Cir. 1969), writ refused, 255 La. 149, 229 So. 2d 732 (La. 1970)

The "highest and best use" doctrine encompasses the definition of "fair market value." *State, Dept. of Transportation & Development v. Schwegmann Westside Expressway Inc.*, 95-1261 (La. 3/1/96) 669 So.2d 1172. In expropriation cases, fair market value is the price a buyer is willing to pay after considering all of the uses that the property may be put to where such uses are not speculative, remote, or contrary to law. *Id.*, citing *West Jefferson Levee Dist. v. Coast Quality*, 640 So.2d 1258 (La.1994).

The current use of the property is presumed to be the highest and best use under the law, and the burden of overcoming that presumption by proving the existence of a different highest and best use based on a potential future use is on the landowner. To prevail the landowner must show that it is "reasonably probable" that the property could, absent the expropriation, be put to the highest and best use in the not too distant future. *West Jefferson*, 640 So. 2d 1258. "Such use must have an effect on the price a buyer is willing to pay." *Id.* at 1273. *Board of Commissioners of the Tensas Basin Levee District v. Larry W. Crawford and Marjorie Crawford*, 731 So.2d, 508 (La. App. 3d Cir. 1999)

The highest and best use can only be determined after a consideration of the surrounding factual circumstances. The determination of the highest and best use, the amount that will compensate the owner of a property right, to the full extent of his right, must be made on the basis of the facts of each case and in accordance with the uniqueness of the thing taken. *State, Dept. of Transportation & Development v. Hammons*, 550 So.2d 767 (La. App. 2 Cir. 1989).

In seeking to determine a highest and best use of property which would have an effect on the market value of the property at the time of the expropriation several factors may be considered, including market demand, proximity to areas already developed in a manner compatible with the intended use, economic development in the area, specific plans of businesses and individuals, including action already taken to develop the land for that use, scarcity of land available for that use, negotiations with buyers interested in the property taken for a particular use, absence of offers to buy the property made by buyers who would put it to the use urged, and the use to which the property was being put at the time of the taking; *West Jefferson Levee Dist. v. Coast Quality*, 640 So.2d 1258 (La.1994); *Board of Commissioners of the Tensas Basin Levee District v. Larry W. Crawford and Marjorie Crawford*, 731 So.2d, 508 (La. App. 3d Cir. 1999).

The "uniqueness of the thing taken" in the present case is two-fold. First, the property is in an area of the Lafayette community that is rapidly developing as an upscale residential area. Second, the property is already subject to an existing servitude in favor of SLEMCO, and the new servitude in favor of LUS will not involve the use or severance of any additional property. It would, however, involve a whole second set of poles and electrical lines in addition to those already there. The determination of severance damages must take into account these two unique factors.

THE EXPERT TESTIMONY ON HIGHEST AND BEST USE:

The two real estate appraisers in this case had entirely different opinions regarding "highest and best use." Michael Cope, who testified on behalf of Lafayette Consolidated Government, took the position that the "highest and best use" for the property is its current use as "some form of limited or restricted use associated with single family residential development and such associated uses as gardening, green space (additional yard area), storage, etc."

Conversely, the landowners' expert, Richard Duchamp, concluded that the "highest and best use" for the property is "residential development of upper priced homes (ideally one to five lots). The court finds that this opinion of Richard Duchamp is more compelling and more firmly supported by field data, interviews, comparables and statistics than that of Michael Cope for the following reasons.

Cope's opinion is based for the most part on what he calls "the state rule" that identifies four factors for determining "highest and best use", namely (1) physical possibility; (2) legal permissibility; (3) financial feasibility and (4) maximal productivity. Specifically, he is of the opinion that the current "legal status" of the property as "unzoned" and "unplatted" presents a nearly insurmountable impairment to the development of the property for residential or subdivision purposes. This is because they so adversely affect the financial feasibility and legal permissibility of developing the property as a subdivision that he sees no reasonable potential for achieving that goal anytime in the near future. The improvements and legal requirements that the landowners would have to meet in order to get approval for a subdivision development could not be accomplished without a great deal of expense and effort. He concluded therefore that any attempt to so develop the property would be "highly risky" and less desirable than letting the property remain in its current use as a single residence with recreational space.

However, Richard Duchamp rejected Cope's notion that the property has little or no potential as a residential development because of legal and financial hurdles. He pointed out how other developments in the area had overcome similar barriers and how the benefits to be reaped from developing in this particular area greatly exceed the cost and effort to get it done. He maintained that, in addition to the four factors that Cope used, other factors have been recognized as equally important such as market demand, proximity to areas already similarly developed, economic activity in the area, existing factors that facilitate the further development of the property, and perhaps most significantly the scarcity of land in the area available for residential development.

Duchamp supported his opinion and conclusions with evidence, statistics and photographs showing that this area is well-known as a "hot" area for development. The market demand is very high as evidenced by the success of other subdivisions nearby and the continuing constant development of more residential communities and

subdivisions. The landowners have already improved their property so as to facilitate development by incorporating a curb and gutter road and underground drainage comparable to other developments which Duchamp visited and photographed in the immediate vicinity. And finally, it is undisputed that property is becoming very scarce in the area as evidenced by the uncontradicted assertion that it is one of "only five remaining undeveloped tracts" in that economically active area.

In the final analysis, Duchamp paints a rosy picture for the "potential" of the landowners' property as a residential development if they should chose to make it one pointing to specific subdivision developments in the immediate vicinity to make his case. His research, field work and testimony clearly meet the test established by the jurisprudence that "the landowner must show that it is "reasonably probable" that the property could, absent the expropriation, be put to the highest and best use in the not too distant future."

SEVERANCE DAMAGES:

The experts also disagree on the issue of whether or not the creation of the second servitude further "severed" the property beyond the severance that occurred by reason of the original SLEMCO servitude such that the value of the remainder of the property is diminished thereby when put to its "highest and best use." Michael Cope and Lafayette Consolidated Government maintain that any reduction in market value that may have occurred was due to the granting of the SLEMCO servitude, and the new servitude being expropriated now does not further affect the remaining property. There is no taking of any additional property rights or further restriction of the use of the property because the new servitude is totally within the boundaries of the old.

However, the landowners argue that there is new or additional severance damage in this case, because the additional electrical poles and lines will affect the aesthetics or view associated with the property. Cope rejects this argument based on his analysis of a large data base of sales in certain subdivisions showing that additional electrical lines have not affected market values. He did not, however, have personal contact with any of the buyers or sellers of these properties nor did he personally inspect the locations. Cope's voiced opinion at trial was that severance damage never occurs from the construction of an electrical transmission distribution system on

property line, and this is true whether the system is the first or the second to be built on the property line.

The court finds that the jurisprudence clearly establishes that aesthetics or unsightliness can be used as one factor in determining whether severance damages are due in either an original servitude for an electrical distribution system or for a second servitude for the same purpose where additional poles and lines are constructed.

This court has found where the loss of aesthetic considerations serves to reduce the market value of the remainder of the property, they certainly may be considered in determining the amount of severance damages awarded; *Board of Commissioners of Tensas Basin and Levee District v. Crawford*, 731 So.2d 508 (La. App. 3rd Cir. 1999) and cases cited therein.

It only seems logical that, if aesthetics are to have any value at all for a landowner or for a prospective purchaser of property, then the loss of the same aesthetics causes damage to the market value of the property. No one (except perhaps a vendor of electrical power) could seriously argue that above ground transmission lines are a thing of beauty. They are, in fact, unsightly and not a desirable landscape feature. And surely, if one set of poles and electric transmission lines is ugly, then two are twice as ugly.

Richard Duchamp interviewed real estate developers as well as buyers and sellers to support his opinion that additional electrical lines do diminish the market value of property. He personally visited the sites of his comparables and testified that he saw no physical characteristics on those properties to account for a diminution in market value other than the presence of above ground electrical poles and wires. He then performed his own analysis between lots that had no power lines and those that had one or more of them. The results showed an average impact on the market value of lots that went from no power lines to one diminished the value by 45%. He then compiled data that compared the average impact of "more impaired" versus "less impaired" lot sales. Plaintiff's Exhibits A-B. These adjusted averages compared the single SLEMCO line system as opposed to multiple easements and resulted in a 25% sales price differential. He later reduced this average to provide an even more conservative figure and settled on 15% for the landowners' property as a result of the taking for the LUS line.

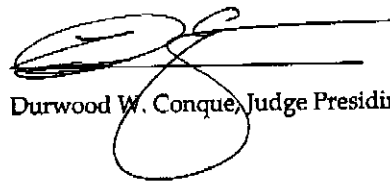
The court accepts this methodology as the only one presented in this case. Cope stands firm in his opinion that no severance damage at all is due, and therefore performed no analysis to suggest an appropriate amount of damages should the court find that damages should be awarded. In addition, the court finds that Duchamp's methodology is reasonable and logical and that his results are conservative.

The court finds that severance damages are due as a result of the additional loss of aesthetic value of the landowners' property and a corresponding diminution in its market value. The court also finds that the award for aesthetics alone should be very conservative since it is normally only one of the factors to be considered in awarding an amount of severance damages. Here it is the only factor.

The court finds therefore that an award based on a 15% impact upon the market value of the property as calculated by Duchamp should be applied to the most conservative valuation of the remainder of the landowners' property which is that suggested by Lafayette Consolidated Government - \$3.50 per square foot. This results in an award of \$53,161.29 the lowest award the court feels can be made in the face of the evidence and testimony.

A judgment incorporating the compromise between the parties made before trial and these reasons for judgment will be prepared by the attorneys and presented to the court for signature within 10 days of this decision.

Abbeville, Louisiana this 11th day of September 2007.


Durwood W. Conque, Judge Presiding