Appeal No. 2004AP3384 **Cir. Ct. No. 2003CV1214**

WISCONSIN COURT OF APPEALS
DISTRICT II

BERNICE SPIEGELBERG,

PLAINTIFF-RESPONDENT,

v.

STATE OF WISCONSIN AND DEPARTMENT OF TRANSPORTATION,

DEFENDANTS-APPELLANTS.

FILED

NOV 9, 2005

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Brown, Nettesheim and Anderson, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

Where the subject property in a partial taking consists of multiple contiguous tax parcels, is the property to be valued based on: (1) the fair market value of the property as a whole or (2) the sum of the fair market values of each individual tax parcel.

FACTS

The following facts are largely based upon the parties' stipulation. Bernice Spiegelberg's property is comprised of 150.36 (gross) acres of agricultural

land held as five separately described tax parcels. The five tax parcels are contiguous except for two roads that cut through the parcels. The State of Wisconsin Department of Transportation's (DOT) taking consisted of a total fee acquisition of 11.08 acres (9.21 acres of new right-of-way and 1.87 acres of an existing right-of-way) from three of the five parcels. According to Spiegelberg, "All five parcels are zoned A-2 which allows for residential of five acres (or less) individual parcels. However parcels 4 and 5 which are in the wetland district, would lend themselves to larger residential lots of 10 or more acres. Each parcel can be sold individually."

The DOT completed an analysis of the subject property by determining its value both before and after the taking based upon the five tax parcels being considered as one large parcel (of 150.36 acres) for valuation purposes. The subject property had not been transferred for five years prior to the taking. The property had been used in a consolidated form as a farm. At the time of the taking, Spiegelberg had leased the entire property, with the exception of the residence, for use as a farm. The DOT appraiser reported Spiegelberg's loss and damages from the taking as $18,900.

Spiegelberg, on the other hand, completed an analysis of the subject property by determining its value both before and after the taking for each of the five tax parcels separately. Before the taking, the five tax parcels either had direct access to existing roads or could have been provided access by Spiegelberg through her own property. The physical taking caused direct and indirect damages to three of the tax parcels which all had direct road access. Spiegelberg's appraiser reported her loss and damages from the taking as $84,200.

The DOT submitted jury instructions and special verdict forms consistent with its analysis that all five tax parcels should be considered as one land parcel for valuation purposes. Spiegelberg submitted jury instructions and special verdict forms consistent with her valuation analysis that each tax parcel should have its before and after valuation determined separately.

The DOT brought a motion in limine seeking to exclude Spiegelberg's before and after analysis. The trial court denied the DOT's motion. The court ruled that it would adopt Spiegelberg's proposed jury instructions and special verdicts for determining the damages under the before and after analysis she offered. The court then determined that the DOT's expert had not evaluated the subject property on that basis. Therefore, the DOT had no evidence to present to the jury relevant to the determination of the issues as formulated by the trial court. The trial court rendered judgment for Spiegelberg in the amount of $84,200. The DOT appeals.

DISCUSSION

The question of how to value Spiegelberg's property—as a whole or as the aggregate of each individual tax parcel—is one of first impression in Wisconsin and perhaps the country. In general, resolution of the question requires the interpretation and application of WIS. STAT. § 32.09 (2003-04).[1] Section 32.09(6) provides in pertinent part:

> In the case of a partial taking of property … the compensation to be paid by the condemnor shall be the greater of either the fair market value of the property taken

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

> as of the date of evaluation or the sum determined by deducting from *the fair market value of the whole property* immediately before the date of evaluation, the fair market value of the reminder immediately after the date of evaluation ….

Id. (emphasis added). Because § 32.09 is a condemnation statute concerning the remedies available and compensation owed to a condemnee, the statute is to be liberally construed. *See* ***Pulvermacher Enters., Inc. v. DOT***, 166 Wis. 2d 234, 238, 479 N.W.2d 217 (Ct. App. 1991).

The DOT contends that the just compensation statute's reference to the condemnee's "*whole* property" means that when a tract of land is taken by eminent domain, the compensation awarded is for the land itself and not for the sum of the different interests therein. *See* WIS. STAT. § 32.09 (emphasis added); ***Van Asten v. DOT***, 214 Wis. 2d 135, 139-40, 571 N.W.2d 420 (Ct. App. 1997); ***Zealy v. City of Waukesha***, 201 Wis. 2d 365, 375-76, 548 N.W.2d 528 (1996) (concluding that the United States Supreme Court has never endorsed a test that "segments" a contiguous property to determine the relevant parcel; rather, the Court has held that a landowner's property in such a case should be considered as a whole). The DOT applies what is commonly called the "unit rule." In general, a party claiming that the land is a unit and should be treated as such for valuation purposes, whether it be a property owner or condemnor, must show contiguity, unity of use and unity of ownership. *See* ***Jonas v. State***, 19 Wis. 2d 638, 642-44, 121 N.W.2d 235 (1963) ("Where two or more distinct parcels (at least when owned by the same person) are used as a unit, the parcels may be treated as one and the taking of part or all of one of them treated as a partial taking of the combined whole."); James Timothy Payne, Annotation, *Eminent Domain: Unity or Contiguity of Separate Properties Sufficient to Allow Damages for Diminished*

Value of Parcel Remaining After Taking of Other Parcel, 59 A.L.R.4th 308 § 2 (1988).

Based on the application of this rule, the DOT maintains that land containing contiguous separate tax parcels used as a single economic unit must be valued as one larger parcel. The DOT directs us to 4 NICHOLS ON EMINENT DOMAIN § 12.02[1] (rev. 3d ed. 2005), where it is stated:

> *Property Valued*
>
> All parcels of real property, whether contiguous or non-contiguous, that are in substantially identical ownership and are being used, or are reasonably suitable and available for use in the reasonably foreseeable future, *for their highest and best use as an integrated economic unit, must be treated as if the entire property constituted a single parcel*.

Id. at 12-72.1 to 12-73 (emphasis added; footnote omitted); *see also* ***Leathem Smith Lodge, Inc. v. State***, 94 Wis. 2d 406, 414-15, 288 N.W.2d 808 (1980). As the DOT observes, Spiegelberg's entire property with the exception of the residence had been leased for use as a farm. Therefore, according to the DOT, Spiegelberg's property must be valued in its present condition as a whole.

Spiegelberg contends that where the condemnee's property consists of multiple contiguous tax parcels, the statute requires the "whole" property to be valued based upon the sum of the individual parcels. *See* WIS. STAT. § 32.09. Spiegelberg likens the separate tax parcels to individual lots in a subdivided property. She observes that both have separate legal descriptions, can be freely bought and sold without further subdivision or attachment to other land and are recognized as distinct entities by taxing authorities.

Spiegelberg quotes NICHOLS ON EMINENT DOMAIN for the following proposition, "Determining the market value presents little problem where the land

has actually been subdivided. In that case there being little speculation as to use, the lots may be valued individually." 4 NICHOLS ON EMINENT DOMAIN § 12B.14[1] at 12B-159. She then articulates the following standard, "Separate tax parcels, which can legally be independently sold without subdivision or connection to other parcels, may be valued separately just like separate lots, which have identical freedom of transferability, if it is advantageous for determining compensation to the condemnee." She argues that her standard, unlike the standard the DOT advocates, is in keeping with the mandated liberal construction of WIS. STAT. § 32.09 in favor of the condemnee.

On the one hand, the statute's reference to the condemnee's "*whole* property" suggests that the fair market value of the condemnee's entire property is to form the basis for the compensation award. *See* WIS. STAT. § 32.09 (emphasis added). Further, as the DOT's brief evidences, case law and legal treatises are rife with *language* supporting its view that for valuation purposes contiguous undeveloped tax parcels used as a single economic unit must be treated as a single parcel. Finally, the application of the general legal principles governing a partial taking of subdivided parcels does not necessarily assist Spiegelberg. The DOT maintains that Spiegelberg's land was "raw land," or land "with little or no improvements or preparation for subdivision." *See* 4 NICHOLS ON EMINENT DOMAIN § 12B.14[1] at 12B-154. Raw land as such, with little or no improvements or preparation for subdivision, may not be valued as if the land were in fact a subdivision; valuation generally will be on a whole subdivision basis. *See* ***id.*** at 12B-159, 12B-162. The DOT cautions that this limitation on the valuation of the subject property is necessary to avoid speculation or conjecture and uncertainty.

On the other hand, the cases and legal treatise the DOT cites do not squarely address the question presented in this case. *See* ***Jonas***, 19 Wis. 2d at 642-644 (considering whether a condemnee properly treated noncontiguous parcels as a single parcel for purposes of establishing the value of the whole parcel before the taking); ***Van Asten***, 214 Wis. 2d at 139-141 (concerning the application of the unit rule to the litigation expense provision in the condemnation statute); 4 NICHOLS ON EMINENT DOMAIN § 12B (exploring property valuation generally in the United States). *See also* ***Northern Ind. Pub. Serv. Co. v. McCoy***, 157 N.E.2d 181, 184-86 (Ind. 1959) (applying both Indiana case law and the legal treatise to hold that because the condemnee had not recorded the plat of a subdivision, the land was to be considered unplatted for valuation purposes), *but see* ***Southern Ind. Gas & Elec. Co. v. Riley***, 299 N.E.2d 173, 174 (Ind. 1973) (noting that ***McCoy*** had "overly broad and misleading explanations"). Additionally, Spiegelberg makes a strong argument that permitting valuation on a parcel basis does not lead to speculation or conjecture and uncertainty because the parcels are already legally separate entities. Finally, as we noted, we are to liberally construe WIS. STAT. § 32.09 in favor of the property owner. *See* ***Standard Theatres, Inc. v. DOT***, 118 Wis. 2d 730, 742-43, 349 N.W.2d 661 (1984). Spiegelberg points out that larger parcels typically sell for less per acre than smaller parcels. It therefore seems more consistent with the policy of liberal construction to hold that, just as with subdivided lots, a condemnee is entitled to be compensated for the difference between the sum of the fair market values of each individual tax parcel before and after the taking.

CONCLUSION

The question of what constitutes proper compensation for a condemnee where the property consists of contiguous individual tax parcels is a

question of statutory interpretation that raises important public policy concerns. The supreme court is the law declaring and law defining court and, as such, is the proper judicial authority to resolve the legal and policy considerations that are of first impression in this state. We respectfully ask the supreme court to provide definitive guidance in order to ensure proper compensation for property owners in Wisconsin.