

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-0586

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

TERRY AND CATHY LAUBE,

PLAINTIFFS-RESPONDENTS,

v.

CITY OF OWEN,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Clark County:
JAMES M. MASON, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Vergeront, JJ.

PER CURIAM. The City of Owen appeals from a judgment against it for damages from a condemnation proceeding and from the decision of the circuit court denying its motions for a new trial. This appeal focuses on whether the jury properly determined the before-taking value of the property at issue, and whether the City is entitled to a new trial because the damages are excessive.

Because we conclude there was sufficient evidence to support the jury's determination, and the City is not entitled to a new trial, we affirm.

This case stems from a condemnation proceeding by the City of Owen taking approximately sixty-six acres of the Laubes' farm. The Laubes brought the action claiming that the amount of compensation was inadequate. After a jury trial at which expert appraisers testified for both sides, the jury returned a special verdict finding that the before-taking value of the Laubes' property was \$400,000 and the after-taking value was \$208,000. After trial, the City asked the court to set aside the verdict and grant a new trial. The court declined to do this because it found that there was sufficient evidence to support the verdict, and that the City was therefore not entitled to a new trial. The court did not explain in sufficient detail the evidence that supported the jury's determination. Therefore, we have independently reviewed the record. *See Ballard v. Lumbermens Mut. Cas. Co.*, 33 Wis.2d 601, 607, 148 N.W.2d 65, 69 (1967). We must, however, resolve all conflicts in the testimony in a light most favorable to support the jury's verdict. *Id.*

The first issue concerns the determination that the before-taking value of the property was \$400,000. The City contends that the evidence presented did not support the \$400,000 amount because it improperly included the value of fill dirt, gravel, and borrow material (fill dirt). In condemnation cases, the compensation to be paid by the condemnor is the difference between the fair market value of the whole property immediately before the taking and the fair market value of the remainder immediately after the taking. *Besnah v. City of Fond du Lac*, 35 Wis.2d 755, 758, 151 N.W.2d 725, 727 (1967). Moreover, the finding of a jury as to valuation in a condemnation case "will not be disturbed on review where it is clear that the value arrived at is well within the range of values

placed in evidence, and where there is credible evidence to sustain the jury's finding." *Id.* at 759, 151 N.W.2d at 727. In reviewing the jury's determination, we need only consider that evidence that supports the verdict; the verdict should not be disturbed if there is any credible evidence which supports it. *Id.* at 760, 151 N.W.2d at 728.

Both the City and the Laubes rely on *Volbrecht v. State Hwy. Comm'n*, 31 Wis.2d 640, 143 N.W.2d 429 (1966), to support their positions. In that case, the supreme court ruled that in order to introduce evidence of the value of fill dirt when determining the value of property before and after taking, a foundation must be laid to establish that the presence of the fill dirt affects the fair market value of the property. "[T]he necessary foundation consists of showing the existence of a market or the reasonable likelihood of a future market That market must be one apart from that created by the taking itself or the contemplated improvement." *Id.* at 643, 143 N.W.2d at 430 (citations omitted).

In *Volbrecht*, the court held that because there was sufficient evidence that a market for fill dirt existed in past years, it would allow the introduction of evidence regarding the value of fill dirt to enhance the before-taking value of the property at issue. *Id.* at 646, 143 N.W.2d at 432. In other words, the fact that there had been a market for the materials in the recent past was

sufficient to establish that the market existed.¹ The court did not require the landowner to show that they had a buyer for the fill dirt as of the date of taking.²

Evidence presented by the Laubes at trial established that there had been a market for the fill dirt during the past year, and that there was a market for sand and gravel in the area. Under the ruling of *Volbrecht*, this is sufficient. *Id.* at 645, 143 N.W.2d at 431. We conclude that there was credible evidence to sustain the jury's answers to the verdict questions.

The City also argues that it should be awarded a new trial and the verdict should be set aside because the damages awarded are excessive and the verdict is contrary to the weight of the evidence. As we have already discussed, however, we conclude that there was credible evidence to support the jury's determination. We agree with the circuit court that the City is not entitled to a new trial. Therefore, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

¹ The court stated: “In addition to this testimony of the general market for fill dirt in the area and of the sales by the Volbrechts, albeit minor, there was testimony that the fill dirt on the Volbrecht farms was of exceptionally good quality.” *Volbrecht v. State Hwy. Comm'n*, 31 Wis.2d 640, 645, 143 N.W.2d 429, 431 (1966). The Laubes presented even stronger evidence concerning their own sales and similar evidence as to the quality of their materials.

² The City is confusing “market” with “purchaser.” In essence, the City argues that because there were no purchasers for the fill dirt on the date of the taking, then there was no market for it. There may not have been a purchaser for the Laubes' land on that day either, but that does not mean that a market did not exist or that the land should have a value of zero. By establishing that they had sold the dirt in the recent past, the Laubes have sufficiently established that there was a market for it. See *Volbrecht*, 31 Wis.2d at 646, 143 N.W.2d at 432.

