

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-008646

03/09/2015

HON. DAWN M. BERGIN

CLERK OF THE COURT
C. Watling
Deputy

STATE OF ARIZONA, et al.

RON ASCHENBACH

v.

B D 218 L L C, et al.

DALE S ZEITLIN

DAVINA DANA BRESSLER

UNDER ADVISEMENT RULING

The Court has considered: (1) Defendant's Motion for Sanctions Against State and Its Attorneys for Withholding Relevant Documents, filed on September 18, 2014; (2) the State's Response; (3) Defendant's Reply; (4) the State's Motion to Exclude Sales of Property to the State Under Threat of Condemnation, filed on October 21, 2014; (5) Defendant's Response; (6) the State's Reply; and (7) the arguments of counsel presented at the January 9, 2015 hearing. It now makes the following findings and orders.

Factual Background

In 2005, the Maricopa Association of Governments provided recommendations for improvements to the Williams Gateway Freeway Corridor in order to control anticipated increased traffic near the Williams Gateway Airport due to the growth of businesses in the area.

In December 2007, the Director of the Arizona Department of Transportation (ADOT) issued a Resolution authorizing an advance acquisition of a 90-acre lot owned by GKK Williams Gateway Crismon, LLC (the "GKK Parcel"). The Resolution also provided that: "[u]pon failure to acquire said lands by other lawful means, the Director is authorized to initiate condemnation proceedings."

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On or about December 1, 2009, an Acquisition Agent from ADOT personally presented an offer to purchase the GKK Parcel for \$11,925,000 to Ryan Eller, the owner's agent. The ADOT Agent also provided a brochure explaining the State's rights to exercise its power of eminent domain if the parties were unable to reach an agreement. Later that month, a meeting of interested parties occurred, where the agents or representatives of the owner asked about eminent domain proceedings and were told that under the circumstances of the particular project, the State would exercise its power of eminent domain if they were unable to reach an agreement on the purchase price. In an email dated December 18, 2009, Mr. Eller confirmed with the Acquisition Agent that he could: (1) accept the offer; (2) counter the offer; or (3) reject the offer, which would result in eminent domain proceedings.

On February 18, 2010, GKK Williams Gateway Crismon Land Owner, LLC signed a Purchase Agreement for \$11,925,000. The Agreement was approved by ADOT on March 11, 2010. It contained the following provision:

State is acquiring Grantor's property through its right of eminent domain under threat of condemnation; therefore, it is not a voluntary sale in the ordinary course of real estate negotiation. Further the settlement herein is in lieu of condemnation and not admissible as evidence of value, nor for any other evidentiary purpose, in conjunction with any judicial or administrative proceeding.

On September 16, 2010, ADOT's Board authorized acquisition of part of a vacant lot owned by Defendant Bid 218 in connection with the highway realignment project. Defendant seeks to admit the GKK Sale to support its expert's valuation of its property.

State's Motion to Exclude Sales of Property to the State Under Threat of Condemnation

Relying on *State v. McDonald*, 88 Ariz. 1, 352 P.2d 343 (1960), the State seeks to exclude evidence of any purchases of property through condemnation or under threat of condemnation.¹ In *McDonald*, the State filed a condemnation action to acquire a portion of defendants' property in order to relocate part of an existing highway. The trial court allowed two witnesses to testify to the price paid by the state and federal governments for purchases of nearby property. The State argued that the trial court erred in admitting the testimony, citing the majority view that the price paid by the same or another condemner for similar land, even if proceedings have not begun, is not admissible. *Id.* at 8, 352 P.2d at 347. The Court declined to adopt a *per se* rule of exclusion, explaining:

¹ The State notes at page two of its Motion that Defendant listed three acquisitions by the State that it intended to use as comparable sales: SMT Investors Limited Partnership, 202 Holdings and the GKK Sale. The Court's understanding is that Defendant has narrowed the list to use of the GKK Sale only.

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We fail to see why evidence of such a sale should be kept from the jury simply because the purchaser has the power to condemn, subject of course to the trial court's sound discretion as to its probative value, and subject to a proper foundation having been laid for its admission...

Id.

The *McDonald* Court found that the trial court erred in admitting the testimony of the two witnesses because the condemnee failed to make any showing that the sale was voluntary, that the owner was willing to sell but not compelled to do so, or that the buyer was willing to buy but under no necessity to do so. Further, he presented no evidence from which a lack of compulsion, coercion or compromise could be inferred. *Id.* at 8, 352 P.2d at 348.

The State argues that Defendant cannot meet its initial burden because under no circumstances can it prove that the State "was willing to buy but under no necessity to [do so]." *Id.* The Court tends to agree with this interpretation under the circumstances presented here, *i.e.*, ADOT was required to buy a specific parcel of property, rather than having a choice among different properties, and a resolution was adopted for the State to exercise its powers of eminent domain if no agreement could be reached on the purchase price. The Court also notes that in these circumstances, the State's bargaining power is limited by A.R.S. §28-7098(D), which provides that: "[t]he department's initial offer of just compensation to the aggregate of those persons with an interest in the property shall not be less than the lowest of the appraisals prepared by or for the department."

As explained below, however, even if the Court expanded its inquiry to consider the negotiations leading up to the GKK Sale, it would reach the same conclusion—the evidence is not admissible.

The State points to the following evidence to refute Defendant's assertion that the GKK sale was voluntary: (1) the provision of its brochure explaining its eminent domain powers to the owner; (2) the meeting with owner representatives where ADOT advised them that it would exercise its power of eminent domain if they were unable to reach an agreement on the purchase price; (3) the email exchange with Mr. Eller where he confirmed that he had three options for responding to the offer; and (4) the boilerplate language in the Purchase Agreement.

The Court places little weight on ADOT's brochure explaining its eminent domain powers and the boilerplate language in the Purchase Agreement because, as *McDonald* suggests, each sale must be considered individually, and preprinted forms do nothing to assist the Court in evaluating the circumstances of a particular sale. The discussion with the owner representatives

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and the email exchange with Mr. Eller in December 2013 are significant, however. They demonstrate that the possibility of condemnation was clearly considered by the owner in determining how to approach negotiations.²

To support its argument that the GKK Sale was voluntary, Defendant points to several documents. First, in an October 28, 2014 email exchange between Mr. Bagnaschi, the agent of the seller, and Defendant's counsel, Mr. Bagnaschi, stated: "[f]rom my recollection, [the owner] was pleased with the ADOT appraisal and we did not dispute the value they came up with for the taking." Defendant also offers testimony from his expert that he believed the GKK Sale could be properly considered in this case because ADOT obtained an appraisal, offered to purchase the parcel for the appraisal price and the seller accepted without a counter-offer.

Finally, Defendant points to the "Parcel Transmittal" approved by ADOT on March 11, 2010, which contains a certification by ADOT's "Right of Way Agent" that the "... above agreement was reached without coercion, promises other than those shown in the Right of Way Contract, or threats of any kind whatsoever by or to either party." The "Right of Way Contract" is the Purchase Agreement. Again, just as the language in the Right of Way Contract/Purchase Agreement is boilerplate and on a preprinted form, so is the certification on the Parcel Transmittal. Neither assists the Court in assessing the circumstances of this particular sale.

In *Transwestern Pipeline Co. v. O'Brien*, 418 F.2d 15, 19 (5th Cir. 1969), the Fifth Circuit, which has adopted the same minority view as Arizona, described the condemnee's burden of establishing the voluntariness of a purchase by a party with eminent domain power to be a "heavy" one. Defendant's one-sentence email from the seller's agent, general testimony from his expert and reference to boilerplate language simply does not meet that burden.³

IT IS THEREFORE ORDERED granting the State's Motion to Exclude Sales of Property to the State Under Threat of Condemnation (as to the GKK Sale).

² It appeared to the Court that in early February 2010, ownership of the GKK Parcel changed, as ADOT sent a letter to Mr. Eller on February 11, 2010 formally withdrawing its offer due to the "change in ownership," which apparently resulted from a foreclosure on the property. The same day, ADOT sent the offer letter to Mr. Bagnaschi from Gramercy Capital, which he accepted a week later. Neither party addressed the change in ownership in its briefing, but the Court can reasonably assume that Mr. Bagnaschi knew the property was under threat of condemnation and had communicated with Mr. Eller or others involved in the prior negotiations.

³ Defendant also argues that the GKK Sale should be admitted because it would not be used as independent evidence of value, but as a comparable sale for valuation purposes. Since the Court has determined that Defendant has failed to show that the GKK Sale was voluntary, it is inappropriate for it to be used in the valuation of Defendant's property. See Robert V. Kerrick et al., *Eminent Domain in Arizona* § 9.5B (2d ed. 2004).

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Defendant's Motion for Sanctions

Defendant seeks sanctions for the State's: (1) failure to voluntarily disclose the GKK Sale under Rule 26.1; (2) documents related to elimination of Knox Road and 88th Street; and (3) late production of a traffic engineering report prepared by Lee Engineering.

The GKK Sale

Defendant learned of the GKK Sale through documents it obtained from Arizona 202 Holdings ("202 Holdings"), whose appraiser used the GKK Sale as a comparable sale in valuing 202 Holdings' property. Defendant acknowledges that the State ultimately produced information on the GKK Sale in response to a discovery request, but argues that the Court should impose sanctions for its failure to provide the information voluntarily under Rule 26.1.

In response, the State argues that the GKK Sale information was not reasonably calculated to lead to the discovery of admissible evidence and therefore not subject to Rule 26.1 for the reasons set forth above. While it is true that this Court ultimately found the GKK Sale inadmissible, it disagrees with the State's blanket view that such information can never be calculated to lead to the discovery of admissible evidence. For example, a condemnee should have the opportunity to challenge whether the State was in fact "under the necessity" to purchase the property and to investigate the circumstances of the sale. The Court therefore finds that the GKK Sale was subject to disclosure under Rule 26.1.

This finding, however, does not compel the imposition of sanctions. Here, Defendant was not forced to file a motion to compel production of evidence related to the GKK Sale because the State complied with a discovery request for the information. In addition, while the Court disagrees with the State regarding whether the GKK Sale was subject to disclosure under Rule 26.1, the State's position was not unreasonable given the paucity of Arizona case law on the admissibility of such evidence. Finally, Defendant is not prejudiced by the late disclosure since the Court has ruled that the GKK Sale is inadmissible.

Lee Engineering Report and Knox Road and 88th Street Documents

For the reasons set forth by the State in its briefing and at oral argument, the Court finds that no sanctions against the State are warranted in connection with production of the Lee Engineering report and the documents related to the elimination of Knox Road and 88th Street.

IT IS THEREFORE ORDERED denying Defendant's Motion for Sanctions.

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The State's Request for Sanctions

In its Response to Defendant's Motion for Sanctions, the State requested sanctions against Defendant under A.R.S. §12-349(F) for unreasonably expanding or delaying proceedings.

IT IS ORDERED DENYING the State's Request for Sanctions.