

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Case No. 1:00CV00185
)	
v.)	OPINION AND ORDER
)	
100.01 ACRES IN BUCHANAN)	By: James P. Jones
COUNTY, VIRGINIA, ET AL.,)	United States District Judge
)	
Defendants.)	

Julie C. Dudley, Assistant United States Attorney, Roanoke, Virginia, for Plaintiff; S.T. Mullins, Street Law Firm, Grundy, Virginia, for Defendants Jim R. Rice, Joyce Rice, James R. Stiltner, Jr., and Carol Stiltner.

This is a civil action brought by the United States at the request of the Secretary of the Army for the taking of real property under the power of eminent domain and for the ascertainment and award of just compensation to the owners of the property.¹ The property consists of 100.01 acres of land located in Buchanan County, Virginia, taken by the United States in connection with the Grundy, Virginia Nonstructural Flood Control Project (“Project”) being conducted by the Army Corps of Engineers. The

¹ Jurisdiction of the court exists pursuant to 28 U.S.C.A. § 1358 (West 1993). Venue is proper under 28 U.S.C.A. § 1403 (West 1993).

government intends to use this land as a site for the placement of fill material generated by the construction of the Project.

Pursuant to the Takings Clause, private property may not be taken for public purpose without just compensation. *See* U.S. Const. amend. V. At the time of the filing of the action, on December 19, 2000, the government estimated the just compensation for the property at \$69,400, based on a written appraisal report dated April 6, 2000, by James W. Whaley, a staff appraiser for the Army Corps of Engineers, and deposited that amount with the court. Thereafter, on November 28, 2001, the government obtained another written valuation of the property from Warren Klutz, a certified general real estate appraiser, in the amount of \$54,500.

The defendant owners of the property challenge the government's estimate of just compensation based upon their own valuation performed by Jay Rife, also a certified general real estate appraiser. Rife concluded that the highest and best use of the property was as a site for the placement of excess dirt and spoil. He found the value of the property to be \$870,000.

The parties waived a jury trial as to the issue of just compensation and agreed that the issue may be decided by the court without the appointment of a commission. *See* Fed. R. Civ. P. 71A(h). The government has now filed a pretrial "Motion to Strike/Motion in Limine" in which it objects to the admissibility of Rife's opinion of

the value of the property. The government contends that Rife's opinion should be stricken either in its entirety or in the alternative that any portion of Rife's opinion that considers the highest and best use of the property to be as "hollow fill" should be stricken. The government's motions have been briefed and argued and are ripe for decision.

The government asserts that Rife's opinion is inadmissible because it is "unorthodox" and therefore unreliable under the principles of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In addition, the government contends that Rife's designation of a hollow fill as the highest and best use of the property is invalid because this rationale includes the increase in value caused by the government's use of the property after the taking. Lastly, the government argues that in any event, Rife has not disclosed adequate evidence of a demand for a hollow fill in the area.

The Federal Rules of Evidence allow expert evidence under certain circumstances.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

In *Daubert*, the Supreme Court interpreted this rule as placing the court in a “gatekeeping role” between expert evidence and the trier of fact. *See Daubert*, 509 U.S. at 589, 597. Accordingly, the court should determine pursuant to Federal Rule of Evidence 104(a) whether the proponent has established by a preponderance of the evidence that the expert’s opinion is admissible. *See id.* at 593 n.10 (citing *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987)); Fed. R. Evid. 104(a).

To make this determination, *Daubert* suggests that the court examine the evidence’s reliability and relevancy using a number of nonexclusive factors. *See Daubert*, 509 U.S. at 593-95. In a subsequent case, the Court held that *Daubert* applied to all forms of expert evidence and that courts have “considerable leeway” in their determination of relevancy of such evidence. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

The gatekeeping function of the court is relaxed where a bench trial is to be conducted, as in this case, because the court is better equipped than a jury to weigh the probative value of expert evidence. *See Volk v. United States*, 57 F. Supp. 2d 888, 896 n.5 (N.D. Cal. 1999).

Just compensation is determined at the time of the taking, and is generally determined to equal “what a willing buyer would pay in cash to a willing seller.” *United States v. Miller*, 317 U.S. 369, 374 (1943). However, the methods of

calculation in this area are not precise and the resulting value is “largely a matter of opinion.” *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1077 (5th Cir. 1996) (quoting *United States v. 68.94 Acres of Land*, 918 F.2d 389, 393 (3d Cir. 1990)). Consequently, the trier of fact must rely heavily upon the opinions of competing experts, and as a result, if one side’s expert evidence is excluded, the amount of just compensation can be influenced. *See id.* at 1077-78. Because of the competing interests involved in establishing just compensation and the reliance that the trier of fact must place upon experts in such cases, courts “should proceed cautiously” before excluding an expert’s opinion. *Id.* at 1078.

In this case the defendants have proffered the opinion of Rife as evidence of the market value of their land. Rife utilized the “market data approach” to valuing the land, which according to Rife, consists of “estimating the market value of a given property by direct comparison with similar properties that have recently sold in the open market under competitive conditions.” (Rife Appraisal at 4.)

Pursuant to this approach, Rife obtained a study by an engineering firm that calculated the potential capacity of the property as 2.9 million cubic yards of fill. He then considered two tracts of land located within four miles of the subject property that had been used as hollow fill for debris caused by expansion of a highway. Rife reported that the owners of the first site had negotiated a rate of \$0.20 per cubic yard

of fill with the highway contractor in 1996, and that the other owners had negotiated a rate of \$0.30 per cubic yard in 1998. In both cases, the original owners were paid fees according to these calculations, but maintained title to the property.

Based on the engineering study and the hollow fill rates, Rife determined that the fair market value of the defendants' property was 2.9 million cubic yards of fill at \$0.30 per cubic yard, or \$870,000.

In response to the government's motions and in particular the government's argument that the hollow fill valuation was speculative, the defendants filed affidavits from Rife, M.K. Brittle, a district construction engineer of the Virginia Department of Transportation ("VDOT"), and Chuck Crabtree, the town manager of Grundy.

Rife asserts in his affidavit that he "conducted extensive investigation" of the defendants' property and that this investigation revealed demand for hollow fill sites in the area, irrespective of the Project. (Rife Aff. at ¶ 4.) The other affidavits provide that VDOT has plans to expand U.S. Route 460 through Grundy and that this project will cause a need for a hollow fill.

On the basis of this evidence, I deny the government's motions. According to Rife, it is common practice for users of hollow fill land to pay a rate based upon the amount of fill dumped on the property rather than purchasing the land outright. Under that rationale, it appears that the market value approach could include these figures as

reliable estimates of the value of land despite the fact that no transfer of title has previously taken place on similar tracts.

The government may be correct that Rife's approach is unorthodox because it considers payments for cubic yards of fill rather than sales of property. However, both sides agree that Rife has substantial qualifications in the valuation of local real estate. In addition, the government's expert did not consider the use of the land as hollow fill and offers no other calculation for the value of land for this use. Therefore, I cannot say, based on the present record, that Rife's method and his conclusions are sufficiently irrelevant or unreliable to be excluded under Rule 702.

Similarly, on the record before me, I cannot say that the demand for hollow fill on the defendants' land is speculative or based merely upon the Project.² The defendants have submitted affidavits that road expansion in the area has created demand for hollow fill. In addition, these affidavits contend that this demand is completely separate from the Project's use of the land. As a result, I cannot conclude that the opinion that a hollow fill is the highest and best use of the land is so speculative as to be rendered inadmissible.

² A condemnee may not benefit from the amount his tract of land is increased in value by the taking itself. *See Miller*, 317 U.S. at 377. Thus, if the demand for the defendants' land as a hollow fill occurs because of the Project, the just compensation for the land cannot reflect this increase in value.

The parties must understand the limited nature of my ruling at this stage of the proceedings. I do not intimate at all that I will ultimately accept Rife's method of evaluation or his opinion as to fair market value. Moreover, the issue of whether any increased value of the property arises from the Project and thus is not subject to compensation is still open, based on the evidence that may be presented at trial. All I have ruled here is that the parties are entitled to present their evidence at trial and that I cannot make a definitive ruling that the landowners' evidence is inadmissible, based on the sparse record now before me.

For the foregoing reasons, it is **ORDERED** that the government's motions [Doc. No. 16] are denied.

ENTER: May 7, 2002

United States District Judge