Federal Court of Canada
Trial Division

Section de première instance de
la Cour fédérale du Canada

T-2653-89

BETWEEN:

AUDREY WOODHOUSE, AND AUDREY WOODHOUSE, EXECUTRIX OF THE ESTATE OF JESSIE MACKENZIE, MARTIN DUNNE

Plaintiffs

- and -

HER MAJESTY THE QUEEN

Defendant

REASONS FOR JUDGMENT

ROULEAU, J.

This is an action by the plaintiffs for compensation for land expropriated by the defendant on June 29, 1989. The plaintiff, Audrey Woodhouse, brings this action in her personal capacity and in her capacity as Executrix of the estate of her deceased mother, Jessie MacKenzie Martin Dunne.

In 1984, Ms. Woodhouse became the beneficial owner of lands in the Gatineau Park, in the Municipality of West Hull, in the province of Quebec, after having acquired the property by legacy from the estate of her mother. The site is located on Part of Lot 18B, Range VIII, Municipality of West Hull, within Gatineau, Quebec. The 28.5 hectare parcel of land is

bordered by Kingsmere Road to the north, Swamp Road to the west and Barnes Road to the south.

In 1988, Ms. Woodhouse retained a firm of planning and engineering consultants, Joseph B. Mangione & Associates, to prepare a plan of subdivision for the development of the subject lands. After reviewing the development potential of the land, a full study was conducted by the planning and engineering consultants resulting in a drainage report, a hydrogeological and terrain analysis, a road study and a planning report. Based on these reports, a plan of subdivision for forty-three single family lots of minimum size 0.4 hectares was prepared and submitted to the Municipality of West Hull for approval.

On March 6, 1989, approval for the plan of subdivision was given by the Council for the Municipality of West Hull. That approval was however, subject to a number of conditions, including the submission of a final plan of subdivision for approval; receipt of an engineering report pertaining to septic installations; review and verification by the C.R.O. and the Department of the Environment of the hydrogeological study; approval of the roads by the Roads Committee; and, payment of the subdivision tax.

The Minister of Public Works registered a Notice of Intention to Expropriate the subject property for the purpose of development, conservation and improvement of the National Capital Region on February 15, 1989. A Notice of Confirmation of Intention to Expropriate was registered on June 29, 1989, whereupon all interests in the subject property became absolutely vested in the defendant.

On September 25, 1989, the Crown, in accordance with the provisions of the *Expropriation Act*, delivered to Audrey Woodhouse and the Estate of Jessie MacKenzie Martin Dunne, written offers of compensation in the amounts of $44,000.00 and $1,306,000.00 respectively, for their expropriated interests. The plaintiffs accepted the total offer of $1,350,000.00 on October 5, 1989, without prejudice to their right to claim additional compensation.

The sole issue in this litigation is the market value of the subject property as of the date of registration of the Notice of Confirmation. The plaintiffs maintain that the market value was $2,400,000.00 and claim compensation in that amount together with compensation for legal, appraisal and other costs reasonably incurred by them in accordance with the *Expropriation Act*, interest and costs. The defendant submits that the market value of the property in June of 1989 was $1,125,000.00 and the plaintiffs have therefore already been paid $225,000.00 over and above the value of the property.

The parties are agreed that the proper approach to fixing the market value of the subject property is the subdivision approach. In *Eddy v. Ontario (Minister of Transportation & Communications)* (1974), 7 L.C.R. 120, the land development approach was described at p. 137 as:

> . . . one in which a future potential subdivision is devised, and the selling price of the serviced lots is then estimated; this is then multiplied by the estimated potential number of lots in the subdivision; from the gross potential receipts of the sales, the servicing and development costs are estimated and deducted. The net result must then be discounted by deducting a percentage for future profits. The result is intended to be the present value as of the date of expropriation.

The parties also agree that the average value of each developable lot is $84,000.00. The primary contention between them, and the first issue which must be dealt with by this Court, is the number of potential subdividable lots within the subject property.

DEVELOPABILITY OF LOTS 30 TO 42

The defendant argues that only thirty of the lots are developable since the other thirteen do not comply with the septic installation requirements of article 8(j)(iv) of Outaouais Regional Community By-law #124 and would not therefore have received approval for development.

The plaintiffs maintain that all forty-three lots shown on their plan of subdivision are capable of being developed. Even if they were unable to meet the requirements of article 8(j)(iv) with respect to the thirteen lots in question, they argue that article 2(j) of By-law 124 permitted them to submit an alternative proposal for a safe septic system. Article 2(j) reads as follows:

> Tout projet d'installation septique qui ne répond pas à l'une ou l'autre des dispositions de ce règlement, tant dans la partie urbaine que dans la partie rurale, ne peut être approuvé que par la Communauté, suite à une recommandation du service du génie et une résolution de la municipalité concernée, à la condition qu'il respecte le sens de ce règlement.

According to the plaintiffs, this provision permits the installation of a septic system which does not comply with one of the provisions of By-law 124 provided an alternative proposal for a safe septic system is put before the Communaute. They argue that the plan prepared by Mr. Mangione in 1989 would have met the test. The essence of the plaintiffs' case is that, provided

an engineer's plan for overcoming any shortfall was submitted, approval for development of the lots in question would have been obtained.

However, even if I accept the plaintiffs' argument that article 2(j) of By-law 124 permitted them to submit an alternative proposal for a septic system installation, I must be satisfied that the proposal so submitted, that is Mr. Mangione's plan, would have received the necessary approval of the Communaute required for development.

I cannot reach that conclusion for the following reasons.

Mr. Mangione's alternative solution for a septic system on the lots in question, found at p. 14 of his February, 1989 report, was the following:

> This area of the site will require drainage and the importation of a minimum 2' (0.7 m) of granular material for the construction of elevated absorption fields as outlined in Regulation 124 of the Regional Community of Outaouais. This 2' (0.7 m) of fill is required to bring the lot surface above the groundwater level, additional fill material will be needed on some lots to meet the 1.22 m of soil required beneath the pipe trenches and over the water table level.
>
> An engineer's report for each lot will have to be prepared prior to obtaining a building permit. The thickness of overburden and depth to the water table will be investigated on each lot in this report, at which time the design of each leaching bed will be established in accordance with Regulation 124 of the Regional Community of Outaouais. In accordance with this regulation, the absorption fields will be constructed where bedrock or the existing water are 1.22 metres (4') below the bottom of the absorption trenches.

This plan is based on section 8(k) of the unofficial English version of By-law 124. That section reads as follows:

> 8(k) Elevated absorption field: when it is impossible to have four feet (4') of acceptable soil under the trenches to contain the pipes, the absorption field shall be made of imported materials, in such a way as to form a mound in which the absorption trenches will be placed, providing there

> is the four feet (4') required under the trenches. It shall be ensured that the effluent will not flow through the fill and run over the surface of the ground. The effluent shall be absorbed by the soil under and around the absorption field and there shall be natural permeable soil of sufficient thickness to prevent the effluent from appearing of [sic] the surface. If necessary, sufficiently permeable soil shall be added over a distance of fifty feet (50') downhill of the absorption field to prevent the danger of effluent breaking out to the surface.

However, Mr. Mangione was apparently unaware that in 1989, when he prepared his plan, article 8(k) was no longer in existence. It had in fact been repealed on November 30, 1978, and replaced with article 8(j)(iv). The official French version of that provision reads as follows:

> j) Types d'éléments épurateurs:
>
> iv) Type surélevé:
>
> Lorsque la profondeur de sol naturel perméable ne permet pas d'avoir les quatre (4) pieds requis sous les tranchées, l'élément épurateur de type surélevé peut être utilisé à la condition que le roc, la nappe phréatique ou la couche imperméable se trouve à un minimum de deux (2) pieds sous la surface du sol naturel. L'élément épurateur surélevé est constitué de matériaux rapportés formant un monticule à l'intérieur duquel sont creusées les tranchées d'absoption de manière à assurer les quatre (4) pieds requis de matériel perméable sous le fond des tranchées. Il faut s'assurer que l'effluent ne s'écoulera pas en travers du remblai et à la surface du sol. L'effluent doit être absorbé par le sol sous et autour de l'élément épurateur et il doit y avoir une épaisseur suffisante de sol perméable naturel pour éviter leur apparition à la surface. Au besoin, on devra ajouter de la terre suffisamment perméable sur une distance de cinquante (50) pieds en contrebas de l'élément épurateur, afin de prévenir le risque de remontée des eaux à la surface.
>
> (emphasis added)

Mr. Mangione's plan therefore is based on section 8(k) which permitted the installation of an elevated absorption field when it was "impossible to have four feet of acceptable soil under the trenches to contain the pipes". However, by 1989, when his plan would actually have been submitted for approval, the by-law had been amended and was now far more restrictive. I accept that these changes were, to a great extent, the result of

environmental concerns over the protection of wetland and marshes in the Gatineau Park and the prevention of water pollution. In any event, in 1989 the installation of an elevated absorption field was only permitted when the ground water was at least two feet under the natural soil: " . . . a un minimum de deux (2) pieds sous la surface du sol naturel."

The only logical conclusion is that in 1989, after the by-law had been amended to reflect environmental concerns, an alternative proposal for the installation of a septic system on land where the ground water was not two feet under the natural soil, would not have obtained the approval of the Communaute. It is inconceivable that a plan, based on a provision which had been repealed and replaced with a more stringent one, would have received the necessary approval for development. In 1989, a plan based on article 8(k), would have been viewed as a step backwards. It is not reasonable to assume that it would have obtained approval.

The plaintiffs further argue that the only requirement imposed by article 8(j)(iv) is that two feet of natural soil be transported to the area. In other words, natural soil from any area would suffice. Accordingly, if two feet of natural soil doesn't exist, the land could be re-engineered; any water above ground level could be drained off and two feet of fill brought in.

With due respect, I find that to be a perverse interpretation of the clear words of article 8(j)(iv). When the by-law is read in its entirety, the only conclusion can be that "sol naturel" means exactly what it says; the natural soil that is already in place. The drainage of water and the placement of two feet of fill does not meet the requirement of two feet of natural soil above ground level.

In my view, there was no alternative engineering plan with respect to the installation of a septic system on the thirteen lots in question which would have obtained the necessary approval for development. The most reliable and credible evidence before this Court, the expert reports prepared in 1989, establishes quite clearly that the water level on the thirteen lots in question was either at or above ground level.

The defendant relies on two reports. The first report, dated September 1, 1989, was prepared by Mr. Richard Cyr of Higgs, Cameron, Cyr & Wilson Ltd.. Mr. Cyr was initially hired to determine the engineering costs of developing the forty-three lots and, in preparing his report, he relied on Mr. Mangione's study. His first report concluded that all forty-three lots were developable.

However, as this first report failed to take into account By-law 124, Mr. Cyr prepared a revised report, dated October 10, 1996, for the purpose of reviewing his original conclusion in light of the by-law and taking into consideration a report prepared by Mr. Michel Charron of the consulting firm of Charron & Associés Inc. This 1996 report states as follows as p. 4:

> On Pages 3 and 4 [of the 1989 report] it states that, save and except for Lot 43, Parcel A could <u>not</u> be subdivided in accordance with the 1989 By-Law #124 of the Communaute Regionale de L'Outaouais. The report further stipulates that Article 8 of the then by-law prohibits any septic fields being installed in marshland. Since **Lots 34 to 42** (inclusive) are entirely considered marshland, these nine (9) lots could not have been developed as part of the overall subdivision process.
>
> **Lots 30 to 33** are partially located within the demarcation line of the marsh area. Under the requirements of Article 8 for septic system installation, the consultant concludes that Lot 30 is also undevelopable. Furthermore, the report goes on to say that, given the setback requirements, the residual

> land areas allowing for the septic field installations on Lots 31 and 32 are insufficient to satisfy the regional by-law stipulations.
>
> In regard to Lot 33, the engineer identified that this site cannot accommodate a septic system in accordance with Article 7(B) i) of By-Law 124.
>
> In summary, Mr. Charron concludes that, out of the possible subdividing of 14 lots on Parcel A, only one site (Lot 43) satisfied By-Law regulation #124.

Mr. Charon first visited the site in September of 1994 and returned approximately ten times during the year. In 1996, he went back to the site four times. He testified that on each visit, he saw water on the thirteen lots, little basins of water distributed on other lots and ground water on the surface throughout the whole area. He stated that the vegetation was characteristic of a swamp.

The plaintiffs' expert witnesses were Mr. Mangione and Mr. Gaetan Roy. In 1988 and 1989, these two individuals each prepared a report with respect to the viability of subdividing the property into lots and the market value of those lots. In 1996, in anticipation of these proceedings, they prepared an amended report. However, these amended reports are so replete with contradictions from the earlier ones of 1989 that I do not find them credible.

For example, in his 1989 report, Mr. Mangione stated quite clearly that, with respect to the thirteen lots in question, "the natural water table is above existing ground." However, the wording in his 1996 report is more cautious and vague, claiming that "the natural water table is nearly at or above existing ground". On page 14 of his Hydrogeology and Terrain Analysis Report of 1989 he states, with respect to lots 33 to 43, that "no samples were taken in the organic deposits, as this area was submerged with

standing water." But at page 4 of the introduction to his 1996 report he writes that "in 1988 when the first site visit took place, the area embraced by [lots 30 to 42] was observed to be low lying. The soil consisted of organics and, as such, was spongy. However, the entire area could be walked on with regular construction boots . . ." In 1989 he wrote that "The topography slopes down to the west from Lot 29 where there is a relatively low-lying area with some ponded water on Lots 30 to 43". He goes on to describe the lots as swampy. His 1996 report though, makes no mention of ponded water or swampy lots.

In 1989 therefore, Mr. Mangione described the lots in question as wetland and marshy, some completely submerged in standing water with others containing ponded water. In 1996, he changed the term "wetland" to "low-lying area", eliminated all mention of ponded water, and denied that in 1989 the area was covered in water.

This witness' testimony also contained discrepancies. Although exhibit D-1 indicated there was some type of flowing water on the lots in question, it was difficult to get an admission from Mr. Mangione to this effect. He stated in direct examination that there was no inflow of water and that the area in question was self-contained. He also testified that there was no culvert. But in cross-examination he admitted that there was a definite pattern of water coming from the north and that there was a culvert but no creek. He also admitted there were 2.9 hectares which were drained from that area, and that an aerial photograph filed as an exhibit established that the water could come down, cross Kingsmere Road and flow into a swamp.

There are similar discrepancies in Mr. Roy's report. Indeed, the incongruities between his two reports, referred to quite aptly by counsel for

the plaintiffs as "flip-flops" are more serious than those of Mr. Mangione. It is sufficient to note that in his amended report of 1996, the lots which Mr. Roy valued the least in 1989 became the most valued lots. In other words, the thirteen lots in question, to which he gave a higher value in 1989, suddenly in 1996 became the lots with the lowest value. His explanation for this change in valuation, that the higher valued lots had more trees, quite frankly has no credibility whatsoever.

Mr. Roy also testified that when he visited the site in April of 1989, he noted water along Swamp Road and Moores Road. He also noticed a stream along Kingsmere Road which traversed lots 1 to 4. When he discussed the matter with Mr. Mangione, he was advised that there was a drainage problem but it would be taken care of.

Based on this evidence, I am satisfied that the water level on the thirteen lots in question was at or above ground level. Since there was not two feet of natural soil above the water level as required by By-law 124, it is my conclusion that the plaintiffs would not have obtained the necessary approval for the development of those lots on the basis of Mr. Mangione's alternative proposal for the installation of a septic system.

ABSORPTION RATE

The next issue is the absorption rate. This is the period of time it would take to sell the thirty lots which were developable. Mr. Roy's absorption analysis is presented at p. 66 of his 1996 Report. According to him, the best comparable is the McInnis subdivision, where there were thirty-

four sales in the four months between September and December of 1988, with the price increasing seven times during that period. The last average price was $74,000.00. In his opinion, this demonstrated the trend of the market. He also felt that the Woodhouse lots would be ready for sale after the McInnis lots had been sold so there would be no direct competition in the Park. Mr. Roy presumed sales of four lots per month, with the whole being sold one year after the expropriation date, and with no adjustments and no discounting.

Mr. Cyr concluded that the absorption period would be eighteen months. His testimony was that in order to determine the absorption rate, a developer takes into account the price he must achieve, the time to achieve that price, and the fact that the shorter the period, the greater the pressure to sell and the greater the risk. He also considered the fact that here, the plaintiffs were not selling a finished subdivision insofar as lots had to be engineered, roads put in place and surveys conducted.

He then explained the method by which he arrived at his absorption rate of eighteen months. In 1985, the Kingsmere subdivision was bought within a six month period. Three lots were sold in the $42,000.00 to $45,000.00 range. In the case of the Heinz and Pelletier subdivision, $120,000.00 was asked, then revised to $95,000.00 and sold for $85,000.00. The Woodhouses's two lots, which were put on the market in March of 1989, sold on September 25, 1989, for $75,000.00 each, more than six months later and at a time when there was no other competition. He reiterated that it is essential to relate absorption rate to the price; the higher the price, the more difficult it is to have the market acquire the lots.

Mr. Cyr also pointed out that in McInnis, the first price list averaged $40,000.00 and the last one averaged $76,000.00. There were twenty-three registered sales; three between $30,000.00 and $40,000.00, seventeen between $40,000.00 and $50,000.00, seven between $50,000.00 and $60,000.00, five between $60,000.00 and $70,000.00, and only two over $70,000.00. He was of the opinion that the lots were underpriced at the beginning and it was this fact which accounted for their rapid sale.

Furthermore, he did not agree that one could assume all of the McInnis lots would have been sold by the time the Woodhouse lots came on the market. In his view, there would still have been competition. In exhibit P-7, he identified the location of the market in West Hull. He testified that in the summer of 1989, twelve subdivisions remained in the name of developers and all still had unsold lots. He felt that given a price of $84,000.00, an eighteen month absorption period was very aggressive.

I accept the defendant's eighteen month absorption period as being the more reasonable. Mr. Roy admitted that during the five years prior to 1989, there had been no sales of lots which were not built in the Kingsmere area. This is a key point. He used the McInnis subdivision for his absorption rate because it was the only large subdivision in the Park at the same time. However, it must be noted that when the price of the McInnis lots was raised to the high end of $70,000.00, only two were sold. Clearly therefore, the competitiveness of the price is very relevant as there is a direct correlation between the price of the lots and the absorption period. Given an average price of $84,000.00 for the Woodhouse lots, it is implausible that all of the lots would have sold within a twelve month period. Even an eighteen month absorption period is quite generous.

DEVELOPER'S PROFIT

The third issue is developer's profit. This is the amount by which a developer would have discounted its offer to purchase the thirty lots, in order to take into account the profit anticipated to be earned above costs for the completion of the lots to a buildable or saleable status, along with the marketing risks for the full absorption period of developed lots.

Mr. Roy's position was that a developer's profit of 5% is appropriate. Mr. Cyr, on behalf of the defendant, submits that developer's profit was underestimated by Mr. Roy and should be set at 20%.

Mr. Roy's assessment of developer's profit varies in his 1989 and 1996 reports. In his 1989 report he used the figure of 3%. In 1996, he increased it to 7.5%. He testified that the normal rate of developer's profit is approximately 20% to 25% but that this is only applied where there is no control over the time frame of development. He stated that developer's profit can be anywhere in the range from 5% to 25%, the latter only being used when zoning is not in place and the developer is required to go through all those necessary steps as well.

In this case, Mr. Roy arrived at a 7.5% rate by considering the development costs; the borrowing of $575,000.00 at a 13.5% interest rate. He also added $22,000.00 for contingencies. He stressed that the only risk for the developer would be if it required more than twelve months to sell the lots. In his opinion, a developer would put only $575,000.00 at risk, since the cash flow would be sufficient. The interest owed to the bank would go down by

reason of reimbursement of capital. The net cash flow after a year would be $254,000.00, assuming a return of 10% on the deposit.

During his testimony, Mr. Roy asked for a correction to his Report. He agreed that the subdivision charges should be $24,000.00. When it was suggested that this amount seemed very low, Mr. Roy stated that the right term is not "profit" but rather "return on investment". In his view, the most important thing is the cash flow situation, not the profit.

Mr. Cyr used a 20% developer's profit in both of his reports. In order to establish that rate, he consulted texts, asked developers about the market place, weighed how reasonable the market value was, considered the absorption period and assessed the time, effort and money required to bring the lots to a saleable condition. In his opinion, there was a risk here with respect to the time required to put the subdivision "on line" given that lots had to be created; an endeavour which would involve the expenditure of considerable time, effort and money. There also had to be compliance with by-law 124, as well as the five conditions required for approval of the plan. It was Mr. Cyr's view that all of these unknowns had to be taken into account in determining the developer's profit.

Based on the evidence, I am satisfied that 20% is a far more realistic figure than the plaintiff's 7.5%. First, as already stated, the absorption period would be eighteen months rather than one year. Second, there was general consensus among the developers Mr. Cyr interviewed. None of them stated less than 10% for thirty lots averaging $84,000.00, to be sold in 18 months. Mr. Greenberg stated 30%, Burnside Construction said

20%. at the Kimberly development near Rivermead Golf Course the rate given was 25%.

Furthermore, the minimum risk which Mr. Roy alleges the developer of the Woodhouse subdivision would face, assumes that the road is in place, when it is not. In addition, there are potential environmental, registration and approval problems.

Finally, the McInnis subdivision, where a marketing program was already in force, where the market had been tested and where many lots had been sold, used a developer's profit of 15%. There is no question that the Woodhouse subdivision was not nearly as advanced. It is unreasonable therefore to set the developer's profit at a lower rate 7.5%.

DISCOUNTING

The plaintiffs did not consider any discounting while the defendant used a 9.75% discount rate. Mr. Roy testified that he did not discount because of the one year absorption period which he used. He added that where discounts are used, income from the cash flow reinvestment must be considered.

Mr. Cyr testified that in 1989 there was a 13.5% mortgage rate (for investment at risk). In his second report he changed the rate to 9.75%. He calculated the discount month by month based on cash flow and pointed out that Mr. Roy's firm had used the same method with respect to other subdivisions in 1989 with a 10% rate. He testified that his discounting rate

of 9.75% represents the net risk; it is the rate on a "safe" investment (Canada Savings Bonds) in June of 1989. He did agree that if the absorption period was one year, he would not calculate a discount.

As I am satisfied that an eighteen month absorption period should be applied, it follows that there must also be discounting. I accept that the discount rate of 9.5% as calculated by Mr. Cyr is appropriate.

SELLING FEES

Mr. Roy assumed selling fees of $1,500.00 per lot, plus advertising fees. He testified that he discussed this with active and large developers, who use many and various formulas. However, he admitted that of the developers he contacted, none of them had worked in West Hull nor in the province of Quebec.

I cannot accept Mr. Roy's opinion in this regard. There is simply nothing before me to substantiate a deviation from the normal selling fee of 5% of the gross sell-out value, as used by Mr. Cyr in his 1996 report.

CONCLUSION

In summary, and for the reasons expressed above, I find that lots 30 to 42 were not developable; that the absorption period of the remaining thirty lots is eighteen months; that developer's profit should be estimated at

20% of the gross lot value; that a discount rate of 9.75% should apply; and, a selling fee of 5% of gross sell-out value is appropriate.

No order as to costs will be made at this time. The parties shall however, after reviewing this decision, prepare a formal judgment for execution by the Court. With respect to costs I will entertain written submissions and an application may be submitted under rule 324 of the *Federal Court Rules*, not requiring attendance by counsel.

"P. ROULEAU"

JUDGE

OTTAWA, Ontario
May 14, 1997

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.: T-2653-89

STYLE OF CAUSE: AUDREY WOODHOUSE ET AL. v. THE QUEEN

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: NOVEMBER 18, 1996

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE ROULEAU

DATED: MAY 14, 1997

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