

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

CASE NO. 2019-0121

TORROMEIO INDUSTRIES

v.

**THE STATE OF NEW HAMPSHIRE DEPARTMENT OF
TRANSPORTATION**

**RULE 7 MANDATORY APPEAL FROM
ORDERS OF THE ROCKINGHAM COUNTY SUPERIOR COURT**

**REPLY BRIEF OF APPELLANT
THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION**

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION

GORDON J. MACDONALD
ATTORNEY GENERAL

Emily C. Goering, Bar No. 268497
Assistant Attorney General
Transportation & Construction Bureau
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3675
To be argued by Emily C. Goering

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ARGUMENT

Appellee freely agrees with Appellant that the trial court's "novel approach to this case is unsupported by case law." AB at 17¹. Appellee argues, however, that even if the trial court was mistaken in its reasoning that a subdivision waiver would have been granted before the taking, resulting in no change to the before and after value, there were sufficient alternative grounds to reach the same conclusion as to value. Appellee offers two distinct grounds upon which it claims the trial court could have alternatively found that the value of the residential portion of the property was unchanged before and after the taking. First, Appellee asserts that evidence related to the income approach of valuation establishes that the residential value did not change. Second, Appellee asserts that the property could have been condominiumized before the taking, and subdivided after the taking, which would result in the same value. Both of Appellee's arguments fail because there is not sufficient evidence in the record to support either rationale.

The Supreme Court has held that "where a trial court reaches the correct result on mistaken grounds, [they] will affirm if valid alternative grounds support the decision." *State v. Nightingale*, 160 N.H. 569, 575076 (2010). However, the Supreme Court does not mechanically follow the alternative grounds rule. *Doyle v. Comm'r, N.H. Dept. of Resources and Economic Dev.*, 163 N.H. 215, 222 (2012). While a trial court ruling may be upheld because it reached the correct conclusion based on incorrect reasoning, that judgment must still be supported by the evidence. Here, the

¹ AB is used herein to signify Appellee's Brief.

evidence does not support a finding, on any alternative ground, that the value of the residence remained the same before and after the taking.

I. THE RECORD LACKS ANY EVIDENCE THAT COULD SUPPORT A FACTUAL FINDING THAT THE INCOME APPROACH ESTABLISHED THE SAME BEFORE AND AFTER VALUE OF THE RESIDENCE.

Appellee incorrectly argues that, because the rent charged for the residence did not change from before the taking to after, the value of the residence did not change. AB at 19-20. This argument makes an assumption that *rent charged* to occupy the residence equates to the *actual value* of the residence. This assumption is not supported by the evidentiary record, and therefore there is not a sufficient basis for the trial court to have found that the income approach established the same value before and after the taking.

The Leidinger Appraisal, compiled for Appellant, finds that the income approach of valuation is given less weight in this particular situation, as the property is not considered to be a typical investment property. SA at 293². It further explains that the income approach is considered to be a test of reasonableness to ensure that the results of the sales comparison approach are proper. *Id.* Most importantly, the Leidinger Appraisal determined that the income approach was inapplicable to the residence after the taking, so no income approach value was developed for the after scenario. SA at 307. As such, the Leidinger Appraisal plainly fails to provide evidence that the

² SA is used herein to signify State's Appendix.

income approach established the same residential value before and after the taking, because there simply was no after income approach value.

The Gardner Restricted Appraisal, compiled for Appellee, contains no discussion of the income approach, in either the before or the after scenario. The Gardner Appraisal Report, also compiled for the Appellee, finds that the income approach is not particularly useful within this appraisal assignment, and that this type of building does not lend itself well to this valuation approach. SA at 462. Acknowledging its limitations, Gardner still performed an analysis using the income approach, and found that the property was \$25,500 less valuable after the taking³. SA at 468. Gardner further elaborated that, although he performed an income approach analysis, it should given no weight at all. SA at 468.

The trial transcript, much like all three appraisals, contained no evidence that the income approach should be relied upon, nor that the income approach established the residential value was unchanged. Leidinger testified that he relied upon both the sales comparison and income approaches. SA at 76-77. Yet he testified that the income approach was defective for this particular property because the added surplus land on the parcel would not have an income, meaning that a portion of the land could not be properly valued. SA at 77-78. To overcome this defect, the sales comparison and income approaches would have to be reconciled together to render an adequate valuation. *Id.* Leidinger explained that the sales comparison approach is typically used, and the income approach is

³ Gardner included all components of the property in the income approach, and did not single out the before and after value of the residence. His analysis of the income approach, as it applies to all components, is illustrative that the before and after values were different, *and* proves that there was no evidence presented that was particular to the residential value.

more of a test of reasonableness of the final valuation. SA at 88. Leidinger testified that he could achieve a more reliable value of the residence using the sales comparison method. SA at 105-06. Perhaps most importantly, Leidinger testified that he used no income approach to value the residence after the taking, meaning that he produced no evidence that the income approach rendered the same value before and after the taking. SA at 108. At trial, Gardner was largely silent on the income approach, but to say that the sales comparison approach was given more weight than the cost approach or income approach. SA at 209.

The trial court order discusses the income approach only in regard to *rental income* remaining the same before and after the taking. AD at 20, 21⁴. The trial court discusses rent for the sole purpose of refuting Appellee's position that the residential property is worthless after the taking, by highlighting that the property continues to draw an income, giving it some associated revenue. *Id.* At no point does the trial court opine that the income approach should be given greater weight, that the income approach is more reliable, or that it had any other reason to apply the values rendered by the income approach opposed to any of the other approaches presented. Notably, at no point does the trial court discuss that rental income and property value are on in the same.

The record is devoid of evidence that could support a finding that the income approach reliably rendered the same residential value before and after the taking. The evidentiary record makes it clear that the income approach is unreliable, should be given little to no weight, and produces

⁴ AD is used herein to signify Appendix for Defendant.

different values before and after the taking. The trial court could not have relied upon the evidence regarding the income approach as an alternative ground to reach the conclusion that the residential value was the same before and after the taking.

II. THE RECORD LACKS ANY EVIDENCE THAT COULD SUPPORT A FACTUAL FINDING THAT CONDOMINIUMIZATION BEFORE THE TAKING, AND SUBDIVISION AFTER THE TAKING, RESULT IN THE SAME PROPERTY VALUE.

Appellee incorrectly argues that the residence and light industrial building on the property could have been separated by condominium ownership before the taking, and could be separated by subdivision after the taking, which would result in the same property value. AB at 20. This argument assumes that condominium ownership, in which an individual would be subjected to joint ownership of all common property, is as valuable as subdividing the property, in which an individual could take ownership free and clear of any other interests. While condominiumization and subdivision may achieve the same practical effect of isolating the residence, there is nothing in the evidentiary record to support the conclusion that these two different ownership interests are valued the same.

The Leidinger Appraisal found that, before the taking, the property could not be subdivided, but it could be converted to condominium ownership, which would establish separation between the residence and the industrial building. SA at 258-59. However, the Leidinger Appraisal explained that current market conditions would not support condominiumization at this time, and the highest and best use of the

property was to hold the land as it presently existed, until the market supported future development. SA at 259. For this reason, Leidinger never developed a before value based on condominiumization, instead basing his before valuation on the land as it presently sat. SA at 293. Therefore, the Leidinger Appraisal produced no evidence that the value of condominium ownership equates the value of subdivision ownership, because he never developed condominium ownership values.

The Gardner Restricted Appraisal relied on the before valuation that Leidinger produced. SA at 331. In relying upon Leidinger's findings, the Gardner Restricted Appraisal adopted the "as-is" values, and did not develop values or produce other evidence regarding condominium ownership.

The Gardner Appraisal Report found that, before the taking, the residence could have been separated from the industrial building through condominium ownership. SA at 372, 390-91. Even with a before analysis that considered condominiumization, Gardner found that each of the three valuation methods he used rendered different before and after values. The income approach, which he gave no weight to, rendered a \$25,500 difference of value for the whole property before and after the taking. SA at 468. The cost approach, which he gave secondary weight, rendered a \$159,000 difference of value for the whole property before and after the taking. SA at 468. The sales comparison approach, which he gave the greatest weight, rendered a \$132,500 difference of value for the whole property before and after the taking. SA at 468. Analyzing just the residence, using the sales comparison approach, Gardner valued the residence at \$177,500 before the taking, and \$85,000 after the taking. SA at

460-61. Further analyzing just the residence, using the cost approach, Gardner valued the residence at \$151,792 before the taking, and \$81,683 after the taking. SA at 427, 431.⁵ Using each valuation approach, Gardner found that the value of the property, as condominiumized before taking, differed from the value after the taking. Therefore, the Gardner Appraisal Report produced no evidence that condominiumizing the property before the taking would render the same value as subdividing the property after the taking.

At trial, both Leidinger and Gardner testified that the property could be converted to condominium ownership before the taking to achieve separate identities for the residence and industrial building. SA at 82-83, 186. Notably, neither appraiser provided testimony that the before and after values of the residence remained the same, nor that condominium ownership and subdivision ownership produced the same property value.

The record does not contain sufficient evidence to support a conclusion that condominiumizing the property before the taking, and subdividing after the taking, would render the same property value. Quite the contrary, the record establishes that separation of the residence may be achieved in both scenarios, but the property values differ before and after the taking.

CONCLUSION

The Appellee and Appellant are in agreement that the trial court's conclusion of value, based on an assumption that the property could be subdivided before the taking, was improper and unsupported by case law.

⁵ Gardner performed an income approach analysis in which he combined the residence and the industrial building. This analysis is not discussed here because he did not separately identify the before and after value of the residence. SA at 461-67.

Reversal is proper if it can be shown that the trial court's conclusion could not have been reached on alternative grounds. Here, the record contains no evidence that the income approach can be relied upon, or that it rendered the same before and after value. Further, the record contains no evidence that the value of condominiumizing the property before the taking is equal to the value of subdividing the property after the taking. For these reasons, there is insufficient evidence to support either of Appellee's arguments, underscoring the point that the trial court could not have reached the same conclusion on any alternative ground.

RULE 16(11) CERTIFICATION

I certify that the foregoing reply brief complies with the word limitation of 3,000 words and that it contains 2,335 words.

Respectfully submitted,
THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION

By its attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL

October 10, 2019

By: /s/ Emily C. Goering
Emily C. Goering, NH Bar No. 268497
Transportation & Construction
33 Capitol Street
Concord, NH 0301
(603) 271-3675
Emily.Goering@doj.nh.gov

CERTIFICATE OF SERVICE

I, Emily C. Goering, hereby certify that on this 10th day of October 2019, copies of the foregoing Reply Brief of the Appellant, New Hampshire Department of Transportation, have been served electronically through the Supreme Court e-file system.

/s/ Emily C. Goering
Emily C. Goering