255 So.3d 57
Court of Appeal of Louisiana, Fourth Circuit.

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT
v.
VIOLET DOCK PORT, INC., LLC
St. Bernard Port, Harbor & Terminal District
v.
Violet Dock Port, Inc., LLC
St. Bernard Port, Harbor & Terminal District
v.
Violet Dock Port Inc., LLC

NO. 2016-CA-0096, NO. 2016-CA-0262, NO. 2016-CA-0331
|
September 12, 2018

Synopsis

Background: Parish port, harbor, and terminal district filed quick-take expropriation action against owner of property that contained port facilities. The 34th Judicial District Court, St. Bernard Parish, No. 116–860, Division "E", Jacques A. Sanborn, J., found, following evidentiary hearing, that taking served public purpose and, following bench trial, rendered judgment finding that value of property was $16,000,000, that port was not entitled to damages for debris removal, and that property owner was entitled to interest on funds that had remained in court registry pending determination on offset claim. Property owner appealed, and district cross-appealed. The Court of Appeal, Ronald L. Belsome, J., 229 So.3d 626, affirmed as amended, and property owner applied for writ of certiorari. The Supreme Court, Crichton, J., 239 So.3d 243, affirmed in part, reversed in part, and remanded for determination of just compensation for property owner.

Holdings: The Court of Appeal, Roland L. Belsome, J., held that:

[1] the port property was unique and indispensable to owner's business, and thus just compensation for expropriation of the property was its replacement cost, and

[2] property owner was entitled to over $28,000,000 for replacement cost of the property.

Affirmed as amended and remanded.

Lobrano, J., concurred in part and dissented in part with reasons.

Jenkins, J., dissented.

West Headnotes (6)

[1] Eminent Domain
Value for special use

If a landowner establishes that the location of the expropriated property or some physical feature of it is unique and indispensably related to the success of the landowner's business, just compensation requires the court to award replacement value. La. Const. art. I, § 4.

Cases that cite this headnote

[2] Eminent Domain
Value for special use

Port property along the Mississippi River was unique and indispensable to owner's business, and thus just compensation for expropriation of the property was its replacement cost; the property had access over land, road, rail, and water, the property was located at a very desirable straight bank line that was self-dredging, and the property featured three sturdy docks designed to berth large cargo ships and certified by the Navy for lay berthing ocean-going ships. La. Const. art. 1, § 4.

Cases that cite this headnote

[3] Eminent Domain
Value for special use

Factors which may be considered when determining the highest and best use of land

in an expropriation include: market demand; proximity to areas already developed in a compatible manner with the intended use; economic development in the area; specific plans of business and individuals, including action already taken to develop the land for that use; scarcity of the land available for that use; negotiations with buyers interested in the property taken for a particular use; absence of offers to buy the property made by the buyers who put it to the use urged; and the use to which the property was being put at the time of the taking.

Cases that cite this headnote

[4] **Eminent Domain**
Presumptions and burden of proof

Generally, the current use of the property in an expropriation is presumed to be the highest and best use.

Cases that cite this headnote

[5] **Eminent Domain**
Weight and sufficiency

Evidence
Real property in general

The characteristics examined by the experts in determining just compensation for expropriated property cannot be speculative and must consider the property in its use at the time of expropriation.

Cases that cite this headnote

[6] **Eminent Domain**
Commercial or industrial property

Former owner of a port property along the Mississippi River was entitled to over $28,000,000 for replacement cost of the property, in parish port, harbor, and terminal district's quick-take expropriation action; highest and best use of the property was layberthing operations with limited cargo operation, the port property was specialized in its ability to serve river traffic, and the property contained improvements including three sturdy docks certified for lay berthing Navy ships. La. Const. art. 1, § 4.

Cases that cite this headnote

***58** APPEAL FROM ST. BERNARD 34TH JUDICIAL DISTRICT COURT, NO. 116-860, DIVISION "E", Honorable Jacques A. Sanborn, Judge

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(Court composed of Chief Judge James F. McKay, III, Judge Terri F. Love, Judge Roland L. Belsome, Judge Joy Cossich Lobrano, Judge Sandra Cabrina Jenkins)

Opinion

Judge Roland L. Belsome

***59** ****1** This matter was remanded from the Louisiana Supreme Court for the determination of just compensation for the Violet Dock Port's expropriated property. [1] Over several years, St. Bernard Port ("the Port") negotiated with Violet Dock Port ("VDP") for the

purchase of its property along the Mississippi River ("the Property"). After negotiations failed, the Port instituted expropriation proceedings pursuant to La. Const. art. I, § 4.[2] The courts have determined that the taking of the Property was for a public purpose.[3] Thus, in accordance with La. Const. art. I, § 4(B)(1), VDP was due just compensation.

After a trial on the issue of just compensation, the trial court found that $16,000,000 was just compensation for the expropriated property. In so finding, **2 the trial court indicated it did not have the authority to "split the baby" and thus had to choose which party's expert he was going to rely on. The trial court chose to adopt the valuation presented by the Port, which was the amount that had been deposited in the registry of the court. Reviewing that ruling under a manifest error/clearly wrong standard, this Court affirmed.[4] The Supreme Court found that the trial court had made its ruling under an erroneous interpretation of the law. More specifically, the Supreme Court opined that the trial court was not *60 bound by any one expert's opinion in its entirety. Accordingly, this Court's affirmation of just compensation was reversed. On remand, we have been directed to conduct a *de novo* review of the evidence in the record to arrive at a valuation of just compensation.

VDP has maintained throughout its appeals that the principles set forth by the Supreme Court in *State, Dept. of Highways v. Constant*, should guide the Court in determining just compensation.[5] *Constant* recognized that the full extent of loss is not always satisfied by the market value analysis based upon comparable sales or other alternate methods that are used in place of fair market value. In *Constant*, the landowner was operating a marina business at the time that the highway department expropriated a portion of his land. The expropriated portion of land represented the entire loading and parking area of the business. It was established that the loading and parking area was indispensible to the landowner's marina business. The Court noted that the property was unique because the barge slip and adjacent area was the only site available for the commercial loading of heavy **3 equipment servicing the oil industry. The Court reasoned that the property was unique in nature; and the loading and parking area was indispensible to the business's operations. Therefore, the loading and parking area had to be reproduced at another location to maintain the marina business. Accordingly, the Court found that awarding replacement value was the only way to fully compensate the landowner even though that amount exceeded the market value of the land.[6]

[1] In accordance with *Constant,* if a landowner establishes that the location of the expropriated property or some physical feature of it is unique and indispensably related to the success of the landowner's business, just compensation requires the court to award replacement value. Since *Constant,* several courts considering those factors have determined that some landowners can only be fully compensated by replacement cost.[7]

[2] Likewise here, the evidence elicited at trial established that: 1) the Property is unique due to its location and its improvements; and 2) the Property was indispensable to VDP's business. The Property is located in Violet, Louisiana and has one mile of frontage along the Mississippi River and similar frontage on St. Bernard Highway and Norfolk Southern railroad, which gives the site access over land, road, rail, and water. It is zoned industrial and is located on a straight, self-dredging bank line making it an ideal location for river navigation. The Port's Executive Director, Dr. Robert Scafidel testified that the other potential locations along the river in St. Bernard Parish were not as desirable for the Port because they **4 were positioned where the river bends, which would impede river traffic. He represented to the State that VDP's property presented a unique opportunity to greatly expand the Port's ability to handle bulk cargo.

*61 Through the years, VDP had constructed a fully operational, private port facility with five steel and concrete docks. Three of the berths were certified by the Navy for lay berthing ocean-going ships. VDP had held contracts for providing services to the Navy for decades. To fulfill the needs of the Navy, VDP had renovated the Property by installing transformers, a potable water supply, six telephone lines per ship, and a boiler for steam necessary for the ships to be poised for immediate deployment. In addition to the mechanical support for the ships, VDP had also constructed landside improvements to comply with Navy specifications.

The Port highlighted the uniqueness of the Property in its application to the Louisiana Port Construction and Development Program.[8] The Port wrote:

> [t]he best attribute of this site is that it features three sturdy docks designed to berth some of the largest cargo ships in the world. These docks can be easily modified to support cargo handling operations similar to those currently taking place at the Chalmette Slip, such as ship or barge to truck or rail or to storage. The reverse movement is also available.

The application went on to state that:

> [t]he opportunity to acquire three active docks on the Mississippi River with available uplands and access to highway and rail, for only $14 million, is an opportunity that does not happen very often, if ever. [9]

Similarly, the Port's Strategic Business Plan stated that the Property "should be considered a national asset for transportation and manufacturing." The Port conceded that the site was one of the last major properties on the Mississippi River ****5** that is suitable for cargo with highway, rail, and deep water access on a straight section of the river. Riverfront property is limited in St. Bernard Parish and property with these attributes is nonexistent. The Port relied on the uniqueness of the Property to secure a $15,000,000 grant from the State and to support its public purpose argument.

Here, as in *Constant*, the Property was also indispensable for the operation of VDP's business. The appraisals in the record repeatedly recognized that the facility and business operations were highly specialized. That is further evident by the fact that the Port is now servicing the Navy contracts once held by VDP. The Port expropriated the Property because it is unique in nature and location. As a result of the expropriation VDP's business has ceased to exist. Thus, we find that the record supports a finding that the Property was unique in nature and location while also being indispensible to the landowners' business operations requiring just compensation to be calculated by assessing the replacement cost of the land and improvements.

At trial, VDP's experts presented reports and testimony suggesting that full replacement cost for the land and improvements would be $73,148,000 without taking into account depreciation. Alternatively, if the land and improvements were to be depreciated, the replacement value would be $50,930,000. Using numbers derived by the Port's experts, full replacement cost without depreciation amounts to $41,084,000, and with depreciation the amount was determined to be ***62** $28,764,685. [10]

****6** **[3]** **[4]** The most significant reason for the vast discrepancy in the values is due to the experts' differing opinions on the highest and best use of the Property. VDP's experts' calculations were based on the Property being used as a multimodal bulk cargo facility, while the lower calculations were based on layberthing with a limited cargo operation. Multiple factors are considered when determining the highest and best use of land in an expropriation. [11] However, generally, "the current use of the property is presumed to be the highest and best use." [12]

[5] **[6]** The Port's expert appraiser, Bennett Oubre testified extensively as to his review of the appraisal reports offered by VDP's and the Port's experts. In reviewing the testimony regarding the rationale for the differing appraisals, we find Mr. Oubre's testimony realistically evaluated the character of the Property. Mr. Oubre acknowledged how specialized the Property was while also taking into account the attributes that were problematic. During his testimony, he explained various flaws within VDP's experts' appraisals. The most significant criticism Mr. Oubre had was the use of "extraordinary assumptions." Those "extraordinary assumptions" included zoning and permitting issues as well as the water depth of the docks and its proximity to non-industrial areas. Thus, his testimony supports the highest and best use of the Property to be the layberthing operations that VDP was using the Property for at the time of expropriation. We find his assessment of the condition of the property to be representative of and consistent with the ****7** evidence presented as a whole. [13] During his testimony, he relied on estimates from the Port's expert engineer, Patrick Flowers and

his own appraisal of the land value to formulate a depreciated value of improvements of $23,515,404 and land value of $3,962,000. Although Mr. Oubre stated that in his opinion this valuation was high, we find it is a reasonable estimation for the purpose of determining just compensation. However, when valuing the improvements one of the docks had been omitted. Based on Dr. Ragas' valuation, the depreciated value of the omitted dock was $667,406.

Using the estimates discussed above, we find the record supports an estimated replacement cost after depreciation, of $28,764,685. [14] Based on the record, we find ***63** this to be a credible and accurate valuation of the Property. Accordingly, the trial court's award of just compensation is increased to $28,764,685, together with interest and attorneys' fees as provided for by law. The matter is remanded for further proceedings.

AFFIRMED AS AMENDED AND REMANDED

LOBRANO, J., DISSENTS WITH REASONS TO FOLLOW

JENKINS, J., DISSENTS

LOBRANO, J., DISSENTS WITH REASONS TO FOLLOW.

**1 I respectfully concur in part and dissent in part from the majority opinion.

I agree with the majority's ruling against St. Bernard Port, Harbor & Terminal District ("St. Bernard Port") [1] and in favor of Violet Dock Port Inc., LLC **2 ("Violet Port"), [2] finding that the $16 million deposited into the registry of the court on December 22, 2010, the date of the expropriation under Louisiana's "quick-taking" statutes, La. R.S. 19:141, *et seq.* [3] was a deficient amount to compensate Violet Port to the "full extent of loss" as required by La. Const. Art. I, § 4(B)(5). [4] However, I disagree with the majority's finding that an additional award of $12,764,685 fully compensates Violet Port for the quick-taking of its private property. Instead, I find Violet Port is entitled to an additional amount of $22,017,803. [5]

***64** Accordingly, based on a *de novo* review of the record, I find that Violet Port met its burden of proof that St. Bernard Port's estimated initial compensation of $16 million was deficient. I would award Violet Port the following: (1) the **3 deficient amount of $22,017,803, pursuant to La. Const. Art. I, § 4(B)(5) and La. R.S. 19:156; [6] (2) interest on this deficient amount from the date of the quick-taking, December 22, 2010, to the date of final payment, pursuant to La. R.S. 19:155; [7] and (3) reasonable attorney's fees, as authorized by La. R.S. 19:8(A)(3). [8] I would amend the December 1, 2015 judgment accordingly and affirm. I would remand the case to the district court for a determination of interest and attorney's fees as was ordered in the majority opinion.

My award is based on a comprehensive analysis of the most realistic, fair, and reasonable valuations provided by the experts and supported by the evidence that accurately reflects the full extent of Violet Port's loss as determined under a preponderance of the evidence standard and a "full extent of loss" constitutional mandate. I find that the majority's analysis is flawed for two reasons. First, the majority failed to fully compensate Violet Port for the full replacement cost of its improvements located on the taken property, contrary to La. Const. Art. I, § 4(B)(5) and *State Through Dep't of Highways v. Constant,* 369 So.2d 699, 701-702 (La. 1979). Second, with respect to the valuation of the land and batture, although the majority recognized the many unique and valuable attributes of the land and batture, it failed to give sufficient weight to these attributes when it accepted the **4 lowest valuation among the four appraisers, contrary to La. Const. Art. I, § 4(B)(5) and to the principles set forth in *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC,* 17-0434, p. 16 (La. 1/30/18), 239 So.3d 243, 255 (where the Court noted that our *de novo* review should recognize that "[i]nadequate ***65** and inaccurate valuations run rampant and we must strive to find valuations that serve the purpose of protecting property rights while allowing public interests to be served." (quoting *Exxon Pipeline Co. v. Hill,* 00-2535, 00-2559, p. 18 (La. 5/15/01), 788 So.2d 1154, 1166)) (hereinafter "*Exxon Pipeline* ").

Furthermore, my determination of just compensation is based on a *de novo* review of the entire record and is in accordance with La. Const. Art. I, § 4(B)(5)(where a private property owner is entitled to just compensation to the "full extent of his loss," which "shall include, but

not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and any other damages actually incurred because of the expropriation"). I further adhere to the principles and guidelines set forth in the following four Louisiana Supreme Court decisions: (1) *Exxon Pipeline,* 00-2535, 00-2559, pp. 12-13, 788 So.2d at 1162, (the Court noted three generally accepted accounting appraisal techniques: (a) the market method where the appraiser considers the market value estimate which is predicated upon prices paid in actual market transactions and current listings, i.e. comparable sales; (b) the cost method where the appraiser derives the value of the property by estimating the replacement or reproduction cost of the improvements and deducting therefrom any estimated depreciation, if any,[9] and then by adding ****5** the market value of the land, if any; and (c) the income method where the appraiser uses an appraisal technique in which the anticipated net income is processed to indicate the capital amount of the investment which produces the net income); (2) *Constant,* 369 So.2d at 701-02 (where the Court held that the phrase "full extent of the loss" in La. Const. Art. I, § 4(B)(5) means that the private property owner must "be put in as good a position pecuniarily as he would have been had his property not been taken" and the fact that a just compensation award may exceed the market value of the property taken is "not constitutionally significant");[10] (3) *State, Dep't of Transp. and Dev. Co. v. Dietrich,* 555 So.2d 1355, 1358 (La. 1990)(where the Court held that La. Const. Art. I, § 4(B)(5) permits compensation in excess of market value because "the landowner should be compensated for 'his loss' not merely the loss of the land"); and (4) *St. Bernard Port,* 17-0434, p. 16, 239 So.3d at 255 (where the Court noted that "opinions of experts regarding valuation are advisory and are used only to assist ***66** the court in determining the amount of ****6** compensation due in an expropriation case and the courts need not accept *in toto* the testimony of any one group or group witnesses").

I am also mindful of our recent case of *Bd. of Sup'rs of Louisiana State Univ. and Agric. and Mech. Coll. v. Villavaso,* 14-1277 (La.App. 4 Cir. 12/23/15), 183 So.3d 757, *writ denied,* 16-0161 (La. 3/24/16), 190 So.3d 1193. In *Villavaso*, LSU expropriated a parking lot to facilitate the construction of a new academic medical center. The property was located near the Superdome and the Central Business District. The property owner had used it for special parking events and some daily parking for the eleven years that he owned the property. We recognized that:

> [I]n this case, the property was both unique in nature due to its location, and indispensable to Villavaso's business. *See Constant,* 369 So.2d at 706. As Villavaso testified at trial, his property was situated in a location convenient to the Superdome with exceptional access to the interstate, both I–10 East and West. The location enabled customers to quickly access the interstate, bypassing much of the game day and event traffic. As a result, he had cultivated a network of regular customers who sought out his parking lot in particular for its unique features. He also testified that he had looked for, but had been unable to find, a comparable location to relocate his business. Thus, by taking Villavaso's land, LSU also effectively took his business, and under our Constitution, Villavaso is entitled to be fully compensated for that loss.

Id., 14-1277, p. 12, 183 So.3d at 765.

The property owner was awarded, among other things, for the land taken and business loss noting that the Louisiana Supreme Court "has endorsed an approach that makes a landowner truly whole, without prescribing a specific methodology to determine such compensation." Our Court affirmed the award to the property owner citing *State v. Estate of Davis,* 572 So.2d 39, 42 (La. 1990), as follows:

> ***67** [S]ince expropriation proceedings derogate from the right of individuals to own property, the law governing these proceedings

> is strictly construed against the expropriating authority.

****7** *Villavaso,* 14-1277, p. 7, 183 So.3d at 763. *See also State, Through Dep't of Highways v. Jeanerette Lumber & Shingle Co., Ltd.,* 350 So.2d 847, 855-56 (La. 1977)("Expropriation 'is special and exceptional in character, in derogation of common right, and must be strictly construed.' " *quoting Orleans-Kenner Electric Ry. Co. v. Metairie Ridge Nursery Co.*, 136 La. 968, 68 So. 93 (1915)).

In the case *sub judice*, the experts applied different methods of accounting to assist the parties and courts in valuing the property. With respect to the cost method of appraisal, each of the four experts calculated the full replacement cost of the improvements with a deduction for depreciation, plus market value of the land and batture. These cost method amounts were as follows: Michael W. Truax, St. Bernard Port's appraiser, valued at $21,650,000; Bennet Oubre, St. Bernard Port's appraiser, valued at $27,477,404; Heyward M. Cantrell, Violet Port's appraiser, valued at $50,926,443; and Dr. Wade Ragas, Violet Port's appraiser, at $51,500,000. [11] None of the experts performed an analysis under a "full extent of loss" standard, pursuant to La. Const. Art. I, § 4(B)(5), because this analysis is the function of the courts. The majority failed to perform this analysis in its acceptance of Oubre's cost method of appraisal regularly used for accounting and tax purposes. Although the determination of fair market value by use of the cost method usually includes a reduction for depreciation, our Louisiana Supreme Court has recognized that in expropriation cases, where the property owner is entitled to damages equal to the "full extent of loss," a property may have such unique and ****8** irreplaceable characteristics that a reduction for depreciation is not warranted, even though such an award may result in a perceived windfall to the property owner.

I do not accept any one appraiser's amounts. As recognized by the Louisiana Supreme Court, "the power of the State and private entities authorized by law to take property competes with the sacred and fundamental rights of citizens to own, control, use, enjoy, protect, and dispose of property." *Exxon Pipeline,* 00-2535, 00-2559, p. 18, 788 So.2d at 1166 (J., Knoll, concurring). As such, it is our job as the finder of fact, to balance those competing interests based on all the evidence in the record and the totality of the circumstances. As further stated by the Court in *State, Dep't of Transp. & Dev. v. Schwegmann Westside Expressway, Inc.*, 95-1261, p. 6-7 (La. 3/1/96), 669 So.2d 1172, 1176: ***68** "[A] trier of fact does not have to accept *in toto* the testimony of any one group or group witnesses."

Using the cost method of appraisal, it seems the majority arrived at the total value of the property ($28,784,625) by first estimating the replacement cost of the improvements with depreciation ($24,802,685) and then by adding the market value of the land ($1,843,000) and the market value of the batture ($2,119,000). I disagree with the majority's valuation findings and derive at the total value of the property ($38,017,803) by first estimating the full replacement cost of the improvements without depreciation ($29,000,000) and then adding the market values of the upland ($3,857,238), Plot Y ($35,565), and batture ($5,125,000). I find that these valuations, based on a preponderance of the evidence, reasonably reflect that amount which fully compensates Violet Port "to the full extent of ... [its] loss" as required by La. Const. Art. I, § 4(B)(5) and as more fully explained below.

****9** I. BACKGROUND

Violet Port owned and operated a 75-acre industrial port facility ("Violet Port site") in St. Bernard Parish and was a privately-held family business in operation for over 40 years prior to the quick-taking. The facility utilized two tracts of land located within St. Bernard Parish's levee system: (1) 38.5 acres on the west side of St. Bernard Highway/State Highway 46 ("upland") and (2) approximately 4 acres on the east side of the highway ("Plot Y"). The Violet Port site also consisted of 12.3 acres of river levee and one mile (4,200 linear feet) of deep-water frontage on the Mississippi River totaling approximately 22 acres located outside the levee ("batture"). The batture was on a relatively straight section of the river that was self-scouring. [12] Violet Port's one mile of river-front property was contained within the ten miles of river-front property located in St. Bernard Port's jurisdiction.

Over many years, Violet Port had built and improved its port facility by reinvesting its profits to construct various site improvements on the property including five steel and concrete docks, numbered 1 through 5. [13] At the time of the quick-taking, Violet Port had a thirty-plus year business relationship with the United States Navy,

Military Sealift Command ("Navy"), to berth and service ocean-going Navy ships. At the time of the quick-taking, Docks 1, 2, and 5 were used to layberth Navy ships. Dock 4 was being used to further Violet Port's **10 development of its solid bulk cargo operations. [14] Violet Port was actively negotiating with Vulcan Materials, Co. ("Vulcan"), a large solid and liquid bulk aggregate company, to establish a business relationship between the two companies. More than a year preceding the quick-taking, Vulcan had approached Violet Port about leasing Dock 4 and ten adjoining acres to transload and store aggregate solid bulk *69 cargo. [15] At the time of the quick-taking, Dock 4's improvements were almost complete. Dock 3 was the only dock that had not undergone extensive renovations in the preceding ten years of the quick-taking and was considered to be in poor condition. Before the quick-taking, Dock 3 could accommodate cranes up to fifteen tons and was used to berth barges, fill water barges, and make some topside repairs.

At the time of the quick-taking, the Violet Port site's access to river and road transportation enabled Violet Port to use the property for layberthing and topside ship repairs. Further, the property's access to river, road, and rail transportation also enabled Violet Port to use and/or market the property for limited solid bulk cargo operations. The property's access to these three forms of transportation, particularly ships, trucks, and trains, would equally enable St. Bernard Port to use the property for liquid bulk cargo operations. In addition, the property had access to electricity, water, sewerage, natural gas, telephone, docks, and other site improvements, all of which were needed for all types of usage, including layberthing, topside ship repairs, and solid and liquid bulk cargo operations. [16]

**11 In areas south of New Orleans, private market demand for river access property featuring access to river, road, and rail transportation capable of transloading solid and liquid bulk cargo had grown over the years, exceeding the supply of available properties in St. Bernard Parish. By 2008, St. Bernard Port was operating at full capacity. In its October 2008 "Strategic Business Plan, 2008-2010," St. Bernard Port recognized that "[l]and on the Mississippi River is finite and already limited. Greenfield sites along the Mississippi River should be considered a national asset for transportation and manufacturing (i.e., the Violet site.)" With regard to the Violet Port facility, St. Bernard Port stated: "It is not expected that any significant maintenance expenses will be incurred by the Port during the 10-year period of this analysis." In 2009, a personal inspection by an engineer hired by St. Bernard Port indicated that the Violet Port docks and ramps "appear to be structurally sound and in good shape."

In late 2008, St. Bernard Port submitted a Port Priority Application ("PPA") for funding to the Louisiana Port Construction and Development Program ("LPCDP") FY 2009-10 requesting the maximum allowable funding of $15 million from the Port Priority Program. This program is administered by the Louisiana Department of Transportation and Development ("DOTD"). The $15 million was sought to perform "Phase 1. Acquisition and Development of the Violet Site." [17] The 2008 PPA stated that in addition to the $15 million from the Port Priority Funds, St. Bernard Port was contributing $1.66 million in funds and Associate Terminals of St. Bernard, LLC ("Associated Terminals") was contributing $1.77 million for equipment acquisition costs, for *70 a total of $18,757,000. Associated Terminals was the private company that already handled **12 most of the cargo operations at St. Bernard Port and eventually took over operations of Violet Port. [18] It was intimately involved in the preparation of the 2008 PPA to acquire and develop Violet Port. [19]

The 2008 PPA stated:

> But, from our perspective, we need additional space now to store dry bulk product on the ground, in rail cars, and in barges. The Violet Site offers us the opportunity to do that in **the short term**, with a minimum of capital investment, other than the cost of acquiring the existing facilities. [Emphasis added.]

Of specific importance in the 2008 PPA is the statement under the heading of "Alternatives:"

> In order for the Port to expand its operations on the Mississippi River, it needs additional river frontage

> and land. This site offers both land and river frontage, plus three existing docks that can be put into use immediately. There are only a couple of other sites in St. Bernard Parish that could possibly be developed for deep draft shipping-at Meraux and Poydras-but **both of these have significant constraints.** The Meraux site is in a severe bend of the river and would impede river traffic; the Norfolk Southern railroad is at the landside toe of the levee and would have to be relocated; and, it's not for sale.
>
> The site at Poydras, a former crevasse, is in an even more severe bend of the river, which would impede river traffic. It is, also, all batture, there are no uplands to support landside operations. Adjacent land inside the level is already developed residentially.

(Emphasis added.)

Referring to the adequacy of components at the Violet Port site, the 2008 PPA stated:

> ****13** All the necessary components are in place and adequate to serve a marine terminal: St. Bernard Highway, the Norfolk Southern Railroad, electricity, water, and sewerage.

In a letter submitted in connection with 2008 PPA, St. Bernard Port identified the Navy lease and represented to the DOTD that "the port will derive from this proposed project a lease with the Navy ships/MARAD in the approximate amount of $550,000 per year...occupying the berths," and that future yearly revenue from the lease could be expected to continue in that amount.

In the 2008 PPA, St. Bernard Port recognized:

> Since the Violet Dock site is a unique facility, located on the Mississippi River with three active docks, and since there have been few comparable sales in recent years, it is very difficult to set a fixed price.

After meeting with two individuals from the Port Priority Program, St. Bernard Port prepared a January 2009 supplemental report ("2009 Supplemental Report") to ***71** answer questions raised in response to its 2008 PPA. It reads:

> The Violet Docks present a unique opportunity to greatly expand the Port's capabilities with regards to handling bulk cargoes. The St. Bernard area continues to be attractive to importers of bulk commodities due to its location on the river which translates into lower transportation costs. Further, these shippers frequently have the desire to transfer cargo to rail or truck, both of which are possible at the Violet docks.

Finally, St. Bernard Port stated in pertinent part:

> The best attribute of this site is that it features three sturdy docks designed to berth some of the largest cargo ships in the world. These docks can be easily modified to support cargo handling operations similar to those currently taking place at the Chalmette Slip, such as ship or barge to truck or rail or to storage. The reverse movement is also available.

In 2010, the DOTD awarded St. Bernard Port the maximum allowable funding of $15 million in Port Priority funds as a result of its 2008 PPA. St. ****14** Bernard Port then passed a resolution authorizing it to file a petition for the quick-taking of Violet Port's property pursuant to Louisiana's quick-taking statutes.

II. PROCEDURAL HISTORY

On December 22, 2010, St. Bernard Port filed a petition for expropriation, alleging that its public purpose was to "spur economic development by constructing a tri-modal dry and liquid bulk cargo facility to be operational in eight to ten years." As estimated compensation to Violet Port for the quick-taking, the St. Bernard Port deposited $16 million into the registry of the court. St. Bernard Port claimed that Violet Port was the **only** site suitable for liquid and solid bulk cargo operations and was "chosen after due consideration of possible alternative locations, along with related factors including costs, long-range planning, and safety considerations."

After a lengthy trial, the district court in St. Bernard Parish held that the quick-taking was constitutionally permissible and awarded Violet Port the sum of $16 million to fully compensate it for its loss, the exact amount deposited by St. Bernard Port into the registry of the court. In a 2-1 decision, this Court affirmed the district court on appeal. *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 16-96,16-262, 16-331 (La. App. 4 Cir. 12/14/16), 229 So.3d 626 [20]

After granting Violet Port's writ application, [21] the Louisiana Supreme Court issued an opinion in which it examined expropriations by governmental bodies. In ****15** a 4-3 decision of the Court in ***72** *St. Bernard Port,* 17-0434 (La. 1/30/18), 239 So.3d 243, it stated:

> In 2005, the United States Supreme Court decided the case *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005) which expressly upheld a taking for economic development purposes. Following *Kelo*, in 2006, voters of Louisiana approved a constitutional amendment enumerating permissible "public purposes" for a political subdivision to expropriate private property. As amended, art. I, § 4 provides, in pertinent part:
>
> > Section 4. (A) Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.
> >
> > (B)(1) Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Except as specifically authorized by Article VI, Section 21 of this Constitution property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity.
> >
> > (2) As used in Subparagraph (1) of this Paragraph and in Article VI, Section 23 of this Constitution, "public purpose" shall be limited to the following:
> >
> > * * *
> >
> > (b) Continuous public ownership of property dedicated to one or more of the following objectives and uses:
> >
> > * * *
> >
> > (vi) ***Public ports and public airports to facilitate the transport of goods or persons in domestic or international commerce***.
> >
> > * * *
>
> (Emphasis added.)

In other words, the Louisiana Constitution expressly includes "public ports" as an enumerated "public purpose." Specifically, a public purpose is ****16** defined as "[p]ublic ports... to facilitate the transport of goods or persons in domestic or international commerce." La. Const. art. I, § 4(B)(2)(b)(vi).

Consistent with the authority given to public ports to expropriate property, **the trial court made a factual determination that the Port's purpose for expropriation was to "build and operate a terminal to accommodate transport of liquid and solid bulk commodities into national and international commerce to and from St. Bernard."** This purpose falls squarely within the constitutional definition of "public purpose" for public ports. La. Const. art. I, § 4(B)(2)(b)(vi). **Based on the record before us, we cannot say that the trial court's finding was manifestly erroneous, and we therefore affirm the finding that this expropriation was for a public purpose. We also find that this expropriation satisfies the broad definition of public purpose under federal law.** *See Kelo*, 545 U.S. at 479, 125 S.Ct. 2655 ("Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.").

Id., 17-0434, pp. 8-10, 239 So.3d at 250-51. (Footnotes omitted; emphasis added.)

After finding that the quick-taking was for a public purpose and, therefore, constitutional, the Court remanded the matter to this court for a determination of "just compensation," based on a *de novo* review of the record.

***73** Our instructions from the Court on remand are clear:

> Turning to the standard by which we review the trial court's findings, in an expropriation proceeding, the trial court's factual determination as to the value of the property will not be disturbed in the absence of manifest error. *West Jefferson Levee Dist.*, 640 So.2d at 1277. "However, where one or more trial court legal errors interdict the fact-finding process, the manifest error standard is no longer applicable, and, if the record is otherwise complete, **the appellate court should make its own independent *de novo* review of the record and determine a preponderance of the evidence."** *Evans v. Lungrin*, 97-0541 (La. 2/6/98), 708 So.2d 731, 735. *See also West Jefferson Levee Dist.*, 640 So.2d at 1278. Legal errors occur when a trial court applies incorrect principles of law and those errors are prejudicial; **when such a prejudicial legal error occurs, the appellate court is required to review the record and determine the facts *de novo*.** *Evans*, 708 So.2d at 735.
>
> ****17** Here, we find the trial court used the incorrect standard for evaluating experts' valuation testimony. Explaining why it accepted the Port's expert testimony rather than Violet's, the court stated: "It is the opinion of this Court that it does not have the discretion to 'split the baby' and arrive at a valuation somewhere in between" the two expert opinions. This is erroneous. **A trier of fact is not required to make a binary choice and accept one side's testimony in its entirety, but is instead empowered to weigh strengths and weaknesses of expert testimony. To the extent the trial court held otherwise, this is legal error.** *See West Jefferson Levee Dist.*, 640 So.2d at 1277 ("The opinions of experts regarding valuation are advisory and are used only to assist the court in determining the amount of compensation due in an expropriation case."). *See also*, *e.g.*, *State, Dep't of Transp. & Dev. v. Schwegmann Westside Expressway, Inc.*, 95-1261, p. 6-7 (La. 3/1/96), 669 So.2d 1172, 1176 ("[A] trier of fact does not have to accept in toto the testimony of any one group or group witnesses."). **Further, this error was prejudicial to Violet insofar as the trial court set just compensation in the exact amount put forward by the Port's experts.**
>
> The court of appeal compounded this error by failing to identify it and conduct a *de novo* review. *St. Bernard Port I*, 229 So.3d at 634-35 (noting that "we cannot find that the trial court was manifestly erroneous or clearly wrong in its ruling that $16,000,000 was just compensation for the property"). Instead, the court of appeal noted the general proposition that a factfinder has "broad discretion" in determining weight to be given to expert testimony. *Id.* While this is, of course, a correct statement of the law, it overlooks that the trial court was apparently operating under an incorrect belief about the extent of its ability to exercise that broad discretion.
>
> In summary, we find that the lower courts erred in the determination of just compensation. **We therefore remand this matter to the court of appeal solely for the purpose of fixing the amount of just compensation based on the evidence in the record and in accordance with the principles set forth in this opinion.** *See Gonzales v. Xerox Corp.*, 254 La. 182, 320 So.2d 163, 165 (1975) (remand to appellate court, rather than trial court, is appropriate when the appellate court has all the facts before it); *Buckbee v. United Gas Pipe Line Co.*, 561 So.2d 76, 87 (La. 1990). *See also* ***74** *Exxon Pipeline*, 00-2535, 00-2559, p.18, 788 So.2d at 1166 (Knoll, J., concurring) ("[V]aluation of property in expropriation cases is an open question and each case should be judged on its own under its individual facts and circumstances. ****18** Inadequate and inaccurate valuations run rampant and we must strive to find valuations that **serve the purpose of protecting property rights while allowing public interests to be served.**"). Although this Court, like the court of appeal, has appellate jurisdiction of both law and fact and may perform an independent review and render judgment on the merits, *see* La. Const. art. V, § 5 (C), we prefer that the court of appeal perform the first appellate review of the entire record under the correct rule of law. *Buckbee*, 561 So.2d at 87.

Id., 17-0434, pp. 14-16, 239 So.3d at 254-55. (Footnote omitted; emphasis added.)

III. SUMMARY OF RELEVANT TESTIMONY

As a result of a review of the record in this case, I find the following testimony critical to an analysis of the issue of "just compensation," that we are required to determine: [22]

A. Testimony Presented by St. Bernard Port

St. Bernard Port's first witness was Robert J. Scafidel, Ph.D., [23] St. Bernard Port's Executive Director since 1998. He testified that St. Bernard Port submitted the 2008 PPA to the LCPDP, "Development of the Violet Site, Phase I." Although St. Bernard Port would be developing the site in three phases, [24] St. Bernard Port was first seeking an initial $15 million from the state to fund Phase I. [25] The application represented that the site had good access over road, rail, and water; it would be great for "maritime shipping, cargo operations, and stevedoring operations." "With respect to the river, site is located in a gentle curve of the Mississippi, with a moderate to deep water bank line. Further, the property has a ****19** favorable location regarding the steerage channel, which is more or less midstream at this location."

The 2008 PPA also noted that the U.S. Corp of Engineers had permitted Violet Port to moor large vessels, as many as three abreast; it represented that the docks could handle some of the largest cargo ships in the world. It also had electricity, water, natural gas, telephone (six lines per ship), and sewerage on site. As for ancillary facilities, the 2008 PPA stated that these included: interior circular roads; parking lots; security gates; perimeter and interior security fencing for the crews and maintenance personnel aboard the ships; and an office building.

Scafidel testified that St. Bernard Port would not incur significant maintenance expenses over the next ten years. An inspection, ***75** by an engineer hired by St. Bernard Port in January 2009, revealed that three of the docks were structurally sound, in good shape, and could be used immediately as heavy-duty docks.

In its 2008 PPA, St. Bernard Port described the Violet Port property: "The acquisition and development of the Violet site is an unusual project, perhaps **unique** within the experience of the Louisiana Port Construction and Development Priority Program." (Emphasis added.)

Scafidel stated that St. Bernard Port would be turning the property over to a private entity, Associated Terminals, to operate the site; Associated Terminals ran the St. Bernard Port facility. In addition to cargo services, it would also service the Navy contracts held by Violet Port at the time of the quick-taking.

St. Bernard Port's next witness was Michael W. Truax, who had a degree in engineering, was a certified real estate appraiser, and accepted by the court as an expert in both. On January 29, 2013, he prepared an update to his original August 27, 2010 appraisal for the valuation of the Violet Port site as of the date of quick-taking, ****20** December 22, 2010. In his 2010 appraisal, he appraised the value of the property to be $16 million; this amount did not change in his 2013 revised appraisal. The appraisal was for a "leased fee" rather than a "fee simple" analysis. [26] However, he stated that a leased fee analysis at market rent is equivalent to a fee simple analysis.

In his original report, Truax performed a highest and best use analysis. As vacant land, the upland's best use was for industrial development. As for the batture, its potential uses would include construction of a layberth/ship dock facility and construction of a marine service facility. Truax's report stated that the most typical uses for a batture are for development with a ship dock or marine service facility and/or barge fleeting. He believed that Plot Y should be sold separately for speculation.

As improved, Truax stated that layberthing and topside repairs could continue at Docks 1, 2, and 5. Because Dock 4 was under construction, he did not know if aggregate solid bulk cargo operations could take place there. [27] He was looking for the economic value of the docks and site improvements, which in his opinion was the full replacement cost less depreciation. He testified that the economic value of the site improvements was $290,000 after depreciation. He estimated the replacement cost of the docks to be $30,955,980 before depreciation ****21** was deducted. [28] Depreciation ***76** of the docks was estimated based on what he called "an age life premise." Using an age life premise of thirty years for the docks, he determined the effective age of each dock and then deducted depreciation arriving at a total of

$17,069,269. After adding in his estimate of total site value of $4,580,000 (upland-$2,130,000, including $43,745 for Plot Y; batture-$2,450,000), his total value indication was $21,650,000.

Truax also applied an income approach to value the property. This is a valuation method whereby one projects the rental income that a property can be derived by being put to its highest and best use. This analysis yielded a property assessment of $12,550,000 to $13,500,000. After looking at the factors and recognizing that appraisals can be somewhat subjective, he concluded that $16 million was a reasonable value.

The next witness testifying for St. Bernard Port was Bennet Oubre, who was also accepted as an expert in real estate appraisal. [29] Oubre has been an appraiser for all of his career and works through his real estate and brokerage firm, A.R.E. Real Estate Services, where he was the senior appraiser. Oubre was hired by St. Bernard Port to perform three tasks: (1) perform an appraisal review of the August 2010 report prepared by Truax; (2) perform a separate and independent evaluation of the Violet Port site that would conform to just compensation methodologies; and (3) prepare an appraisal review of Violet Port's appraisers. Based on his review of Truax's appraisal and relevant market data available on December 22, 2010, he testified that Truax's appraisal was credible. [30]

**22 In his report of December 15, 2010, Oubre stated that the highest and best use of the property as vacant land was to "hold for future marine/industrial development, and as improved to continue its use as a marine lay-berth facility." With this in mind, he appraised the land ($1,843,328 for 1,843,328 square feet at $1.00 per square foot) and the batture ($2,119,000 for 4,238 linear feet at $500 per linear foot) totaling $3,962,328. [31] However, later in his testimony, he stated that Dock 4 was designed to accommodate the transfer of aggregate or bulk material from water to the landside. Violet Port already had a permit to install a conveyer system there.

In terms of full replacement cost of the docks, Oubre admitted that he was relying on numbers provided by both Truax and Dr. Patrick C. Flower, a civil engineer, to arrive at a full replacement cost (direct and indirect) of $38,737,105 for Docks 1, 2, 4, and 5, and general site improvements before depreciation. He stated that only an engineer could determine what it would cost to reconstruct the docks. This amount also included a 10% entrepreneurial incentive of $3,521,555. [32] He further valued the administrative building at $48,000. From the full replacement cost, Oubre deducted $10,898,146 for physical incurable obsolescence [33] and $4,371,055 for functional obsolescence, *77 [34] arriving at total of $23,515,404 as the economic value of the docks or replacement cost less depreciation.

**23 In his appraisal of December 2010, Oubre stated that, based on his analysis using an income approach, the compensation due as a result of the expropriation of the property was $16 million. [35] His determination of highest and best use was for it to continue as a marine layberth facility with topside repairs and limited bulk material. Oubre thought that the income analysis was stronger than a cost analysis because the former used relevant market data and actual revenues.

Under cross-examination, Oubre admitted that an appraisal is not based on a mathematical formula. It is an opinion of value; one has to rely on the available data and one's experience. The question then becomes, is the number realistic; is it reasonable within the market data and the parameters one knows about the market? He noted that it was just a coincidence that he and Truax arrived at the same value of $16 million; Oubre believed that the value was reasonable.

Oubre stated that the intended use of Truax's appraisal was for acquisition, not expropriation; therefore, he used a leased fee interest. Oubre's independent appraisal was of the fee simple value. Oubre agreed that he did an appraisal of the highest and best most profitable use to which the property could be put. In other words, the property is always valued from the highest and best use, its current use does not limit his determination. Contrary to his report, Oubre stated that the highest and best use of the property was "layberths, some topside repair, and some bulk cargo—bulk material." He testified that the demand for aggregate bulk cargo operations was growing and would continue to grow in the future.

David Fennelly, St. Bernard Port's next witness, was the director of Associated Terminals, a stevedoring and logistics company. Associated Terminals is a separate company that is focused on operations in St. Bernard

Parish and its **24 port. As such, it transloads cargo to and from ocean vessels, barges, trucks, and railcars, and stores cargo. It handles non-hazardous dry bulk and break-bulk cargo.

Fennelly worked with Burk-Kleinpeter, Inc. ("BKI") to prepare the 2008 PPA submitted to DOTD by St. Bernard Port. Fennelly helped prepare conceptual designs of the potential uses for the property and provided information relating to the need for the property, market demand, and projected tonnage.

Although Associated Terminals had not yet been awarded a contract by St. Bernard Port to run the Violet Port facility, it was marketing the facility to prospective users. It had a significant customer base and it had already received inquiries about the potential availability of the site. Associated Terminals had been interested in Violet Port since 2007.

Fennelly testified that a limitation of Violet Port was its proximity to a neighborhood *78 with a playgrounds and a school. As such, the site could not work with certain types of cargo, such as those producing dust and causing noise. The type of cargos excluded would include coal, petroleum coke, pig iron, and hot briquetted iron.

Overall, Fennelly stated that Associated Terminals would like to be the leaseholder and operator of the Violet Port site should the right agreement be reached. He testified that as of December 2010, the Violet Port site was adequate for a proposed terminal facility because of the following attributes: (1) access to the river; (2) on stable ground; (3) road access; (4) immediately adjacent to a Norfolk Southern track; and (5) considered "deep draft." It was his belief that the property could be developed to include solid bulk storage and a liquid bulk terminal facility in less than eight to ten years. Fennelly had already discussed with Norfolk Southern Railroad about putting trackage along the property, something in which some of the railroad's clients were interested.

**25 St. Bernard Port's next witness was Flower, who had an undergraduate degree in civil engineering and a Ph.D. in financial economics. He was self-employed by his own company, Optimum Concept Consulting, LLC. Flower was accepted by the court as an expert in civil engineering, design and construction of marine cargo facilities, as well as replacement costs and condition analyses of same.

Flower was retained by St. Bernard Port to estimate the value of the docks currently existing at Violet Port. He did this by determining their replacement costs new and then deducted depreciation to come to a final number. Physical depreciation is based on the ratio of expected remaining useful life over useful life. To make this calculation, Flower assigned a useful life of 50 years for each dock, [36] except for Dock 3, which was quite deteriorated. Flower was asked to prepare a replacement cost for the improvements present on December 2010, less curable physical deterioration, [37] incurable physical deterioration, and functional obsolescence. He was not asked to identify any external obsolescence. [38]

Flower inspected the docks on three separate occasions: November 2010; February 2013; and August 2013. In 2010, Truax gave him blueprints of the docks. His report and testimony were based on a component by component basis and then converted to the dollars per square foot. He developed comparables to disagree with the $450 per square foot for the dock platforms and the $350 per square foot units for trestles that Violet Port's expert engineering company, Lanier & **26 Associates Consulting Engineers ("Lanier"), had used. Instead, Flower's prices per square foot were considerably lower, ranging from $120 to $391 per square foot.

Flower testified that he arrived at unit prices per square foot using the database kept by Kinder Morgan Terminals, in whose building his office is located. Kinder Morgan is the largest solid bulk and liquid bulk terminal operator in the United *79 States, although their primary business is pipelines. Flower had a continuing relationship with its technical and developmental personnel with access to information it compiled.

Flower calculated the replacement cost and depreciated values of the docks as follows: Dock 1-replacement of $10,025,370 and depreciation of $5,361,470; Dock 2-replacement of $12,686,278 and depreciation of $6,527,378; Dock 3-replacement of $2,669,624 and depreciation of $140,671; Dock 4-replacement of $3,481,000 and depreciation of $2,530,200 (construction not completed at time of analysis); and Dock 5-replacement of $8,406,500 and depreciation of $4,369,700.

Thus, according to Flower, the replacement cost of the docks totaled $37,268,772, with a total depreciated value of $18,949,419.

Flower did not give separate values for mechanical and electrical improvements. These items were included in his total replacement cost for each dock. Under "soft costs," he gave estimates for a conceptual and preliminary phase, *i.e.*, soil investigation, design, and permits ($266,000), final design and construction ($621,000), and interim interest for construction financing ($266,000).

Under cross examination, Flower admitted that he was accepted as a cost expert in only one case, however, he was not allowed to testify regarding replacement costs. It had been over 20 years since he had directly supervised the construction of a dock.

****27** ***B. Testimony Presented by Violet Port***

For its first witness, Violet Port presented engineering testimony from Joseph Emile Jacquat, who held both a B.S. and a M.S. in Civil Engineering. He was senior vice president for Lanier where he had worked for about 23 years. His engineering work has consisted of docks, wharfs, and bulkheads on marine projects for a number of companies in Louisiana and Texas, including the Port of New Orleans and the Port of Port Arthur, Texas. Lanier had also worked for St. Bernard Port in the past. Jacquat was accepted by the court as an expert in the field of engineering.

Lanier began working for Violet Port in 2000 and had worked with Violet Port off and on ever since. He had probably been to Violet Port to see the docks 12-15 times since then. While no renovations to Dock 3 were made, Lanier had performed the required renovations to Docks 1, 2, and 5, for the Navy to park its sealift vessels; Jacquat did not believe that the Navy used Dock 4. He stated that Navy specifications changed over the years so additional renovations were needed. Dock 4 was in the process of being renovated to handle aggregate bulk cargo.

In mid-July 2010, Lanier was asked by Violet Port to prepare a report on the replacement cost for both the marine and landside items on site. The goal was to determine what it would take to rebuild the various structures in 2010. To do so, a team of engineers, civil/structural, mechanical, and electrical, spent most of a week on site, taking photographs and verifying dimensions of structures, both on shore and offshore. After doing so, the team, along with Jacquat, assembled that information into tabulated values and items. For unit costs, cost data was compiled from ongoing projects at Violet Port and recent projects at other facilities on which Lanier was working.

In Jacquat's report, the replacement costs were broken down into three categories: civil/structural, mechanical, and electrical. No depreciation was ****28** applied. The total estimated marine terminal cost using replace-in-kind values are as follows: Dock ***80** 1-$15,656,678; Dock 2-$22,030,156; Dock 3-$6,095,168; Dock 4-$6,308,950; Dock 5-$10,244,672; General Facility-$5,091,341; and Equipment/Mechanical-$3,571,881. Because Violet Port was "robustly designed and well-constructed, [was] well maintained and experienced relatively low repetitive wear, it was reasonable to expect that a useful life of the facility will be 60 years or more." The report also stated that the facility had an average of 70% to 80% remaining service life and with continued proper maintenance, a useful life of 60 years could be achieved.

On cross-examination, Jacquat admitted that his team did not perform an inspection of the docks in 2010. The approximate $68 million replacement cost was based on a unit cost per square foot for the trestle and the apron and the other features that were at the facility. The unit price used for the dock aprons of Docks 1, 2, 4, and 5 was $450 per square foot and the unit price for the trestle of all five docks was $350 per square foot. The prices per dock did not vary. He used prices from comparable projects in the office; he spoke to project managers and pulled out the costing information from recent bids. Jacquat conceded that each dock was designed differently and had different numbers and sizes of piles with different wall thickness.

Violet Port's next witness was Randolph Carmichael, an urban planner. His career has focused on economic development. He began working at BKI in 1980. Shortly after joining the firm, Carmichael was assigned to the St. Bernard Port, which was created in 1981. St. Bernard Port was one of the firm's clients; he worked with St. Bernard Port until his retirement in June 2011.

Carmichael helped prepare the 2008 PPA for the Violet Port site on behalf of St. Bernard Port. The proposed use

was a multi-purpose terminal for the movement of solid and liquid bulk products. It took him months to prepare the application; **29 BKI engineers assisted him. He also met with Associated Terminals two or three times to explore the site's possibilities.

The attributes of the Violet Port site that made it suitable for its proposed use included: (1) 4000 or more feet on a relatively straight section of the river; (2) deep water access; (3) some existing docks could be used relatively quickly; (4) access to road and rail; (5) a favorable steerage channel; (6) utilities, *i.e.*, water, gas, electrical, telephone, and sewerage; (7) heavy industrial zoning; (8) ability to berth some of the largest cargo ships in the world; and (9) fenced secure areas with paved parking.

Carmichael also noted in the 2008 PPA that substantial commercial utility was found in the upland 38 acres and 22 acres of batture. It stated that **"a strategic analysis led to the conclusion that the site best [highest and best use] leant itself to the transfer and storage of solid and liquid bulk commodities."** In reaching this conclusion, the application stated that the site was unique. The built drawings obtained from Lanier revealed that the docks had a live load design of 450 pounds per square foot, but that mats placed under cranes could further increase the load capacity in a cost-effective manner. The application also stated that the docks were personally inspected by a BKI engineer who indicated that the docks and ramps appeared to be structurally sound and in good shape. Carmichael also agreed that a number of physical improvements would be needed at the Violet Port site and that the application presented a phased development of the property that could take a number of years.

Carmichael also prepared and signed the 2009 Supplemental Report. The purpose of the supplemental report was to *81 provide additional information after he met with two representatives from the Port Priority Program. With regard to the Navy leases, the St. Bernard Port stated that it would continue to service the existing ones and compete for additional contracts.

**30 Heyward M. Cantrell, a certified general appraiser, was the next witness presented by Violet Port. He had been an appraiser for over 40 years and owned his own company, Cantrell Real Estate. He was accepted by the district court as an expert in real estate appraisal.

Cantrell was hired by Violet Port to perform an appraisal of the property and improvements as of December 22, 2010. He testified that he had considerable experience appraising port properties in Louisiana and Florida. He determined that the highest and best use of the property was continued layberthing along with a bulk commodities terminal.[39] He recognized that the conceptual drawings by St. Bernard Port also included a liquid commodities terminal, but did not include that in his highest and best use determination.

Cantrell's highest and best use analysis looked at the property as both vacant and improved and as physically possible, legally permissible, financially feasible, and maximally productive. He concluded that the highest and best use of the batture as vacant was for dockage of deep water vessels engaged in international shipping of bulk commodities.

Applying the same type of analysis to the upland, he determined that the highest and best use as vacant was for the storage of solid bulk and nonhazardous liquid bulk commodities brought to and from the site on deep draft vessels and barges as well as railroad and highway transportation. As improved, he found that Dock 2, under a long-term lease with the Navy, should continue as such. However, he thought the remaining property would be best served by transitioning into bulk commodities storage with highway and railroad access. This conclusion was confirmed by an agreement to lease the property by Vulcan dated March 12, **31 2010. This was an option agreement that would allow Vulcan to lease portions of the property as an aggregate distribution facility.

Cantrell stated that total for land and depreciated improvements was $50,926,443.[40] The amount of $8,211,000 was the total of his estimate of the land ($3,860,000 as rounded), the batture ($4,200,000), and Plot Y ($151,000).[41] Cantrell included "indirect costs" of permitting and other legal expenses ($500,000), construction financing interest ($2,208,160), and construction financing costs ($981,404).

He used a replacement cost approach method with regard to the property's improvements and arrived at $76,028,182 before depreciation. Cantrell then applied a rate of depreciation based on the age and construction of the dock, using a useful life of 60 years.[42] As

for the cost of the docks, ***82** Cantrell adopted the numbers as determined by Lanier. Cantrell admitted that he submitted a revised report lowering the value of Plot Y after he obtained new zoning information from St. Bernard Parish authorities.

Cantrell included 10 percent for entrepreneurial incentive ($6,911,653);[43] he was the only appraiser who did. Both Truax and Oubre said no market evidence existed that someone would pay a premium for the property. However, looking at a brand new facility (full replacement costs), Cantrell stated that a buyer would be willing to pay a bonus to receive a facility that it would neither have to develop nor build what is already there.

****32** Cantrell also increased his calculation of depreciation from $18,216,764 to $33,312,740 based on Oubre's review of his report and additional information from the owners of Violet Port. These two changes decreased his original appraisal by $15,000,000. Cantrell believed that this different methodology better reflected the market than his initial analysis. Thus, his depreciated value of the docks was $50,993,000.

Cantrell made two "extraordinary assumptions" when determining the highest and best use of the property in order to value it correctly; these were identified in his revised report. To make an extraordinary assumption, one must have a reasonable basis for the assumption of an unknown fact.

One assumption was that the depth of the water was 50-60 feet; he relied on information from the owners, but did not independently check the depth. He acknowledged that soundings performed by the Corp of Engineers published in 2003 indicated a depth of 45 feet. Cantrell did not know if that depth was correct in 2010. Cantrell stated that a depth of 45 feet would not change his calculation of value.

The other assumption was that the Corp of Engineers and/or the Levee District of St. Bernard Parish would issue the requisite permits to allow solid bulk and nonhazardous liquid material to be transported over the levee. He spoke with St. Bernard Parish to learn that the upland area could be used to store products and materials, assuming that the materials were nonhazardous.

In coming to the conclusion that the highest and best use of the property is bulk cargo operations, Cantrell noted that Vulcan, one of the largest aggregate dealers in the world, was highly interested in an agreement to locate at Violet Port. It certainly was why St. Bernard Port wanted the property. Therefore, the proposed use for the property was neither speculative nor unreasonable.

****33** The next witness was Daniel Dieudonne, one of the owners of Violet Port. He began working at Violet Port in the early 1990's. Before that, his father ran the day-to-day operations. At the time of the quick-taking, Dieudonne was the president and general manager. He testified that Violet Port was involved in various projects such as, topside and some bottom-side repairs, bid on government contracts, and some cargo operations. He also described the layberthing services being provided to the Navy, something Violet Port had been doing for many years.

In December 2010, Violet Port was actively renovating and updating Dock 4 in anticipation of signing a lease with Vulcan to start handling increasing amounts of ***83** aggregate bulk cargo. All renovations and updates ceased upon the quick-taking.

Violet Port also presented the testimony of Dr. Wade Ragas, an appraiser with a Ph.D. in finance. The court accepted Ragas as an expert in real estate appraisal. Ragas prepared an initial report. However, after reviewing the appraisals by Truax and Oubre, he revised his estimates. Ragas acknowledged that this was a complicated appraisal assignment and that experts' opinions could differ about many of its components.

In performing his job, Ragas visited the site at least six times. To begin a valuation of the land, batture, and Plot Y, he was required to arrive at the highest and best use of the property. In his revised report dated January 30, 2013, he stated in pertinent part:

> Violet Dock is a special purpose property best suited for multiple bulk cargo (dry and liquid) plus existing contracts with the U.S. Navy MSC for layberth and servicing of large, medium-speed

> roll-on/roll-off Navy cargo ships (contract to 2018)[.][44]

After issuing his initial report, Ragas found five different matters he wanted to reevaluate. The first had to do with nonlinear depreciation. He decided that more ****34** depreciation was warranted than what he had originally taken. In this regard, he consulted again with the engineers. The second issue was that of the effective age being used by St. Bernard Port's appraisers. The third issue was the measure of width in one of the comparables used. He could not get a survey performed, so Ragas used 1,660 feet in width at the water line; this altered the price per foot.

The fourth issue had to do with the fact that no appraiser had submitted any comparable sales commensurate with the existing docks. As a result, he allowed for a 10% bulk sale discount and deducted that from his total valuation. Finally, he understood that water depth was a matter of dispute when earlier he thought it was not. While he changed his report to reflect an average depth of 45 feet from the 50-60 feet he was originally told, it did not affect his total valuation of $51,500,000. This amount represented a depreciated amount of the docks and site improvements, his values for the land and batture, less the bulk sale discount.

Ragas testified that he first looked to as much information he could gather about market conditions and demand for facilities that might include docks. He came to the conclusion that he was dealing with a bulk cargo-type property; that such use was likely. He used the engineering expertise of Lanier believing that it was a reasonable expert on this property and other maritime facilities.

Ragas then searched comparables and used those that he thought were most appropriate, although he admitted that none were on point. In this way, he came to the conclusion that the indicated value of the batture at about four and one-half million. Next, he looked at the upland and tried to ascertain landside industrial uses.

As did other appraisers, Ragas analyzed the highest and best use of the property both as vacant and improved. He stated that the vacant site's best use was ****35** as "a multimodal import and export bulk cargo dry and liquids shipping site particularly ***84** well suited for 900 foot or longer ships with a beam up to 160 feet. The site can also support topside repair berths and numerous configurations of barge tow berthing." As improved, the site's highest and best use would be for general bulk cargo transfer, topside repair, layberth and specialized cargo facilities and aggregate bulk transfer. Of course, the site would continue to dock and layberth the Navy ships pursuant to the lease currently in place.

In arriving at his numbers, Ragas followed generally accepted appraisal principles. Normally one uses comparables to value land, but none seemed to be available. He stated that the same issue arose for all the appraisers. He believed that an income approach to value would be inappropriate for this property; he used a cost analysis. As he interpreted their reports, all the appraisers agreed that Violet Port was a special-use property.

Violet Port's next witness was Paul Simmons, president and general manager of Boland Marine and Industrial ("Boland"). He also became a shareholder of Violet Port in 2009 and sits on its Board of Directors.

Before the quick-taking, Violet Port was in the business of providing berthing for vessels, ship repairs, and some cargo operations. In the year or two preceding the taking, Violet Port was expanding its docks and looking into increasing its cargo business. Immediately before the taking, Violet Port was poised to enter into a contract with Vulcan to provide Dock 4 as an aggregate terminal. To accomplish this, improvement efforts were focused on Dock 4 and the necessary permits had been obtained.

Simmons testified that it would have cost millions of dollars to relocate in order to continue to service the Navy's ships as it had done so for many years. Although Violet Port looked, it found no available sites that would meet the Navy's specifications.

****36** Violet Port recalled Scafidel, St. Bernard Port's Executive Director, to the stand. He was familiar with the document entitled, "Dock Rehabilitation Industrial Renewal and Expansion of Facilities Status Report on Ongoing Projects," prepared by St. Bernard Port in March 2006. St. Bernard Port referred to the Violet Port site as one of the last major properties on the Mississippi River suitable for cargo trans-shipping. In November 2008, it claimed that Violet Port was the only remaining site in St. Bernard that could be a deep draft marine terminal.

C. Rebuttal Testimony by St. Bernard Port

St. Bernard Port presented two of their appraisers as rebuttal witnesses after Violet Port rested its case: engineer Truax, and appraiser Oubre. Both were questioned about the conclusions by appraiser Ragas; Oubre was also questioned about appraiser Cantrell's reports and testimony.

In summary, Truax criticized Ragas' report in many respects, including: (1) his batture value was too high; (2) Ragas claimed to have used Truax's numbers to conform his valuation but did not property utilize Truax's allocations; and (3) Ragas did not use the entirety of Truax's report, but instead picked and chose information to support his conclusions. Truax also testified that the Violet Port site was not unique, he properly valued the entire site at $16 million, and that other properties existing on the Mississippi River could be modified at or less than that amount to service the Navy contracts.

On cross-examination, Truax admitted that he neither used any of the information contained in St. Bernard Port's 2008 PPA to acquire the Violet Port site nor utilized the reports by Oubre and engineer Flower. ***85** Oubre testified that he prepared appraisal reviews of the appraisals by Cantrell and Ragas and found them not to be credible for a number of reasons.

With regard to Ragas, Oubre stated that he did not believe that the appraisal satisfied the intended use. He also stated that the report included personal business ****37** property, which was inappropriate. Oubre found that Ragas made several assumptions that he would consider "extraordinary." These are assumptions that are unknown but presumed to be true. These must be necessary to achieve a credible value appropriate of the intended use; have a reasonable basis; and result in a credible analysis and value opinion. These extraordinary assumptions are: St. Bernard Parish would issue the necessary permits for intensive bulk cargo operations; the Corp of Engineers would likewise issue the requisite permits for solid and/or liquid cargo operations at docks other than Dock 4; the water depth was at least 45 feet; the Mississippi River would dredge to 50 feet; and that the docks were strong enough to berth fully-laden cargo vessels and intensive cargo loading and offloading.

He also stated that Ragas did not adjust his values by functional obsolescence; his valuation is based on new constructs rather than on market value estimates, thus, his estimate of $73 million new without depreciation was not credible. Ragas based his valuation on future uses of the property, not on the activities at the time of expropriation.

With regard to Cantrell's appraisals, Oubre noted that valuation in his initial report was between $63-$64 million, his revised report gave a valuation of about $51 million, and testified that the value was about $40 million. As for extraordinary assumptions, Cantrell's were similar to those made by Ragas.

Under cross-examination, Oubre agreed that all appraisals are opinions and judgment calls. He also agreed that an appraisal review is also an opinion; it is not an opinion of whether another's conclusions are correct or incorrect. He noted that appraisers often differ on market values and choice of comparable sales.

Oubre stated that Truax offered a cost analysis based on the reproduction of docks of similar functional utility. Oubre considered Truax sufficiently capable of preparing his report.

****38 IV. DISCUSSION**

As stated by the Louisiana Supreme Court, where one or more legal errors by the lower court interdict the fact-finding process, the manifest error standard is no longer applicable, and, if the record is otherwise complete, the appellate court should make its own independent *de novo* review of the record and determine an award by a preponderance of the evidence. *McLean v. Hunter,* 495 So.2d 1298, 1304 (La.1986); *Picou v. Ferrara,* 483 So.2d 915, 918 (La.1986); *Suhor v. Gusse,* 388 So.2d 755, 758 (La.1980) and cases cited therein. "Proof by a preponderance of the evidence simply means that taking the evidence as a whole, such proof shows that the fact or cause sought to be proved is more probable than not." *Crescent City Cabinets & Flooring, L.L.C. v. Grace Tama Develop. Co., L.L.C.*, 16-0359, p. 9 (La.App. 4 Cir. 10/19/16), 203 So.3d 408, 414.

Throughout this remand, St. Bernard Port asserts that we are bound by the factual conclusions made by the

district court, such as the land's "highest and best use" and credibility determinations regarding the expert witnesses. It is mistaken. This is a *de novo* review based on the evidence in the record, and we are charged with determining an award of damages under a preponderance of the evidence ***86** standard. In other words, we are performing the duties normally undertaken by a district court. The Supreme Court remanded this case "solely for the purpose of fixing the amount of just compensation based on the evidence in the record," *St. Bernard Port*, 17-0434, pp. 16-17, 239 So.3d at 255, and, therefore, the issue of the constitutionality of the taking was decided; in other words, we are not free to revisit that issue.

****39** ***A. Docks and Other Site Improvements***

With respect to the amount of full replacement costs of Violet Port's improvements,[45] I find St. Bernard Port's engineers' amounts not to be determinative but useful.[46] Flower's full replacement cost without depreciation totaled $37,268,772, and Truax's full replacement cost without depreciation totaled $31,245,980. I find that a reasonable full replacement cost for Violet Port's improvements to be $29 million based on a totality of circumstances analysis and recognizing that there is a margin of error inherent in the determination of the ultimate replacement cost of improvements due the nature of the competitive bidding process.

I now address the majority's ruling that Violet Port should not receive full replacement cost but a depreciated replacement cost of the improvements. I find this is clearly contrary to the "full compensation" language in the Constitution[47] ****40** and *Constant.*[48] The majority's deduction of the ***87** depreciation amount of $12,466,087 is a legal error and results in Violet Port receiving less than its full loss as mandated by La. Const. Art. I, § 4(B)(5) and in accordance with the Louisiana Supreme Court's interpretation of La. Const. Art. I, § 4(B)(5).[49]

A property owner is entitled to just compensation to the "full extent of his loss," which "shall include, but not be limited to, the appraised value of the property and all costs of relocation, inconvenience, and any other damages actually incurred because of the expropriation." La. Const. Art. I, § 4(B)(5).[50] The phrase "full extent of the loss" means that the owner must "not only be paid the market value of property taken...but also that such an owner be put in as good a position pecuniarily as he would have been had his property not been taken." *Constant,* 369 So.2d at 701. The fact that a just compensation award may exceed the market value ****41** of the property taken is "not constitutionally significant." *Id.* at 702; *see also Dietrich,* 555 So.2d at 1358 (Article I, § 4 permits compensation in excess of market value because "the landowner should be compensated for 'his loss' not merely the loss of the land.").

In 1974, the Louisiana Constitution was re-worded to provide that an "owner shall be compensated to the full extent of his loss" when land is expropriated by the state. Previously, a property owner could only receive the fair market value and any severance damages for property taken through expropriation. The change permitted a property owner to remain in an equivalent financial position to that which he enjoyed before the taking. *See generally, State Through Dep't of Highways v. Bitterwolf,* 415 So.2d 196 (La. 1982)

The *Constant* Court examined the changes made to Article 1, § 4 in the 1974 Constitution:

> We have considered in detail the delegates' discussion of amendments to proposed Article 1, Section 4, as submitted to the Constitutional Convention by the committee which drafted the provision. ***88** Numerous amendments were offered when the Committee provision came before the convention for adoption; virtually all proffered amendments were rejected and the committee's submitted version adopted with no significant change. The arguments posed in opposition to proposed amendments make it clear beyond doubt that the intent of the submitted Article was to enlarge, liberalize, and expand the scope of the "just and adequate compensation" measure of damages contained in the Constitution of 1921, by inclusion of the phrase "the owner shall be compensated to the full extent of his loss" so that his award for property value and severance damages would not be eroded to the extent of such expenses incurred by him in litigating the damages due.
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> ***
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> In this regard, we note the committee comment appearing in the Records of the Louisiana Constitutional Convention of 1973, Convention

Transcript, Volume I, 11th day proceedings, July 6, 1973, page 86, to the effect that "The term 'full extent of the loss' is intended to permit an owner whose property has been taken to remain in equivalent financial circumstances after the taking".

**42 The explanation of Delegate Lanier, when the article was before the convention for final adoption, indicates that the provision "full extent of the loss" was meant to cover elements of damage formerly considered damnum absque injuria, such as costs of removal and similar costs. Records of the Louisiana Constitutional Convention of 1973, Convention Transcript VII 46th days proceedings, September 13, 1973, pages 1240-1242.

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Professor Hargrave aptly noted:

> "No doubt this provision will spawn much litigation, but it is clear that the level of expropriation awards must be expanded to include moving expenses, business losses because of change of location and compensation for some intangible losses not covered under prior law."

We find no merit in the Department's argument that the hereinabove mentioned legislation adopted subsequent to the effective date of La.Const. 1974, Article 1, Section 4, shows intent to retain the former measure of compensation due for expropriated property. In determining constitutionality, legislation may be persuasive but is never controlling upon the courts. The function of interpreting the constitution and laws of the state, in final analysis, rests exclusively upon the courts. La.Const.1974, Article 5, Section 1.

Id., 359 So.2d at 671-72. (Emphasis added.) [51]

*89 **43 In *Constant,* the state highway department expropriated certain property of the defendants in order to construct a new bridge and the highway approaches to it. The property taken consisted of the marina business' loading dock and parking area. The award by the district court represented the replacement cost of the facility taken without depreciation. The Supreme Court noted that the taking had essentially destroyed the business on the entire parent tract.

The Court framed the "essential issue" before it:

> Under the new constitutional provision that "the owner shall be compensated to the full extent of his loss", La.Const. of 1974, Art. 1, Section 4, may the award to the defendant owners be sufficient to restore their business facilities to their condition prior to the taking, even though the amount so required is in excess of the market value of the parent tract from which a portion is taken for highway purposes?
>
> We answer this question in the affirmative, for the reasons below to be stated.

Id. at 701.

The Court found that under the "new constitutional provision," and considering the property was unique and indispensable to their business, the property owners were entitled for the direct and indirect costs of constructing a replacement loading area and improvements on the loading strip plus the value of the land upon which the replacement loading area would be constructed. *Id.* at 707.

Despite St. Bernard Port's protestations to the contrary, the majority correctly finds that the improvements in question were unique and indispensable to Violet Port's business; the record is replete with evidence supporting this finding. **44 As recognized by the majority, Violet Port's business ceased to exist when the property was taken. St. Bernard Port admits to the uniqueness of the property for purposes to expand its bulk cargo business. Its own expert, Oubre, on whom the majority relies to support its award, stated that the property was unique; a " 'special use property' with highly specialized improvements." St. Bernard Port concedes that the Violet Port property was the "only piece of property in the entire parish, along the Mississippi River that could serve as a deep draft marine terminal." Consequently, the law provides that Violet Port is entitled to full replacement value as an award from this court.

This conclusion is further supported by the majority's finding that the facility and business operations were

highly specialized. Many improvements were made on the property so it could service Navy ***90** ocean-going ships, including installing transformers, a potable water supply, six telephone lines per ship, and a boiler for steam. In addition to the mechanical and electrical support for the ships, numerous landside improvements were performed to comply with Navy specifications.

Just compensation for the taking of property that is "both unique in nature and location and also indispensable to the conduct of the property owners' business operations" is the **full replacement costs of the improvements without a depreciation deduction.** [52] *Constant,* 369 So.2d at 706; *see also Orleans Parish Sch. Bd. v. State, Div. Of Admin.,* 12-1312, p. 5 (La. App. 4 Cir. 2/27/13), 177 So.3d 711, 713, *writ denied,* 13-0683 (La. 5/3/13), 113 So.3d 216 (a property owner is "entitled" to recover replacement costs "upon a showing that the location ****45** of the property or some physical feature of it is unique and indispensably related to the success of the business"). An award of replacement costs recognizes that market value is not a proper measure of just compensation when (as in the present case) "there is an absence of sales of similar properties." *Id.,* 12-1312, p. 4, 177 So.3d at 713.

In *State, Dep't of Transp. and Dev. v. Hecker*, 493 So. 2d 125, 129 (La.App. 5th Cir. 1986), the court awarded full replacement costs without deducting depreciation:

> We find that the defendants are correct in maintaining that they are entitled to recover the replacement cost without deduction for depreciation. The factual situation here is very much like the facts of the *Constant* case, supra, and of *Monroe Redevelopment Agency v. Succession of Kusin,* 398 So.2d 1159 (La.App. 2nd Cir.1981). Both those cases involved partial taking, but the courts found that the property expropriated was unique and indispensable to the occupants' continuing in business. [53]

***91** To demonstrate "uniqueness," one need not prove that the property is one of a kind or that its improvements cannot be replicated elsewhere. Rather, "unique" properties are simply those located, designed, and tailored to serve a particular business' needs. For example, in *Constant,* just compensation included replacement costs of a marina loading dock and underlying land necessary for the ****46** marina's business. 369 So.2d at 706. Likewise, in *State ex rel. Dep't of Transp. and Dev. v. Wade,* 07-1385 (La. App. 3 Cir. 5/28/08), 984 So.2d 918, *writ denied,* 08-1896 (La. 12/12/08), 997 So.2d 561, the court awarded replacement costs for a farm equipment supply business, finding that its showroom, warehouse, and outdoor storage areas were "designed to fit the specific business plan" of the business. *Id.*, 07-1385, p. 7, 984 So.2d at 923.

Property is "indispensable" to a business when the expropriation of the property causes the business thereon to be "destroyed, or at least affected to a substantially detrimental extent." *State, Dep't of Transp. and Dev. v. Lobel,* 571 So.2d 742, 744-45 (La. App. 2 Cir. 1990). Under those circumstances, the "uniqueness and indispensability of the expropriated property would render it more valuable to the property owner than it would be to the average buyer. In such a case, the market value of the property would inadequately compensate the defendant and, based on his unique, indispensable need for the property, would place the defendant in a worse pecuniary position than he had been in before the taking." *State, Dep't of Transp. and Dev. v. Griffith,* 585 So.2d 629, 632 (La. App. 2 Cir. 1991), *writ denied,* 589 So.2d 1055 (La. 1991); *see also Wade,* 07-1385, p. 6, 984 So.2d at 923. An award of replacement costs is proper, even if the business does not in fact relocate because, for example, it cannot locate replacement property or because "the high cost of the [replacement] land together with the added construction costs ma[ke] relocation cost-prohibitive." *State v. G & B Oil Prod., Inc.,* 99-1248, p. 6 (La. App. 3 Cir. 6/21/00), 762 So.2d 1123, 1127, *writ denied*, 00-2196 (La. 10/27/00), 772 So.2d 649. No "prerequisite" exists that the replacement improvements actually be built. *Polk v. State, through Dep't of Transp. and Dev.,* 538 So.2d 239, 254 (La. 1989); ****47** *State* v. *Latiolais,* 95-1441, p.9 (La. App. 3 Cir. 11/6/96), 690 So.2d 66, 71, *writs denied*, 97-0138, 97-0169 (La. 4/25/97), 692 So.2d 1082 (awarding full replacement costs without depreciation while finding "no requirement that the Latiolaises actually construct a new facility").

Even where the property's improvements are not in fact new, where, as here, the property's improvements are "structurally sound, with no functional obsolescence," a replacement-costs award should not include any deduction for depreciation. *City of Shreveport v. Standard Printing Co. of Shreveport, Inc.,* 427 So.2d 1304, 1308 (La. Ct. App.), *writ denied,* 434 So. 2d 1106 (La. 1983), and *writ granted,* 435 So. 2d 426 (La. 1983), *writ recalled,* 441 So.2d 737 (La. 1983); *Constant,* 369 So.2d at 706 (district court erred in deducting for depreciation because, "more probably than not, despite its theoretical 30-year life expectancy, the expropriated loading strip at the end of thirty years would have still been as serviceable to them as on the date of taking"). [54]

Thus, full replacement costs in the case *sub judice* is the amount of money necessary for Violet Port to replace the docks ***92** and other site improvements plus the price to purchase a comparable piece of property on which the improvements could be installed, as St. Bernard Port argues Violet Port could have done. [55] And because the property is "unique and indispensable," I find that the majority erroneously applied depreciation to the improvements.

****48** *B. Upland, Plot Y, and Batture*

As stated above, I agree with the majority opinion in its application of the cost method of appraisal, which bifurcates the valuation of improvements and land by first valuing the replacement cost of the improvements and then valuing the land and batture. The record demonstrates that the two experts for St. Bernard Port (Oubre and Truax) and the two experts for Violet Port (Cantrell and Ragas) testified as to the value of the land and batture. The upland and Plot Y were valued per square foot ("SF") and the batture was valued per linear foot ("LF"). [56] All experts valued the land and batture separately by considering market value estimates, which were predicated upon prices paid in actual market transactions and current listings, *i.e.* comparable sales. They also adjusted these comparables based on their opinions as to attributes of the land and batture, any good or bad assumptions associated with the land and batture, and the "highest and best use" of the land and batture. Oubre and Truax placed a low value on the land and batture, determining values of $3,962,000 and $4,580,000, respectively; whereas, Cantrell and Ragas placed values of $8,211,000 and $11,470,000, respectively.

In essence this was a battle of the experts on their valuations based on an analysis of attributes, assumptions, and usages associated with the land and batture. Thus, this valuation analysis becomes a totality of the circumstances review. After reviewing the evidence, I find Oubre's valuation of the land and batture, as used by ****49** the majority, to be inadequate and his "highest and best use" analysis confusing. [57] I find ***93** error with the majority's reliance on Oubre. [58] I find Cantrell's value of the upland at $3,857,435 and Ragas' value of the batture at $5,125,000 to be the most reflective of the many great attributes associated with the upland and batture, which allowed for the "highest and best use" of property to be multi-modal bulk cargo operations that could be undertaken in the "not too distant future." [59] I accept Truax's value of $35,565 for Plot Y. [60]

"Fair market value," has consistently been defined as "the price a buyer is willing to pay after considering all of the uses that the property may be put to where such uses are not speculative, remote or contrary to law." *W. Jefferson Levee Dist. v. Coast Quality Constr. Corp.,* 93-1718 (La. 5/23/94), 640 So.2d 1258, 1273, *cert. denied,* 513 U.S. 1083, 115 S.Ct. 736, 130 L.Ed.2d 639 (1995). In determining the fair market value of land taken in an expropriation case, consideration is to be given to the ****50** most profitable use to which the land can be put by reason of its location, topography, and adaptability, also known as the "highest and best use" doctrine. *Exxon Pipeline,* 00-2535, 00-2559, p. 8, 788 So.2d at 1160. Factors to be considered in determining the "highest and best use" of the taken land and batture include: (1) market demand; (2) proximity to areas already developed in a compatible manner with the intended use; [61] (3) economic development ***94** in the area; (4) specific plans of business and individuals, including action already taken to develop the land for that use; (5) scarcity of the land available for that use; (6) negotiations with buyers interested in the property taken for a particular use; (7) absence of offers to buy the property made by the buyers who put it to the use urged; and (8) the use to which the property was being put at the time of the taking. *Id.,* 00-2535, 00-2559, pp. 8-9, 788 So.2d at 1160. On remand, the Supreme Court instructed that a determination as to "highest and best use" of the

property at the time of the quick-taking requires a review of testimony as to whether Violet Port demonstrated, by a preponderance of the evidence, that the property could be used in a different, more valuable way, that the potential use is not speculative, and that it could be undertaken in the "not too distant future." *St. Bernard Port,* 17-0434, p. 14, 239 So.3d at 254, *quoting W. Jefferson Levee Dist.,* 93-1718, 640 So.2d at 1273.

****51** The current use of the property is presumed to be the "highest and best use," and the property owner bears the burden of proving the existence of a different "highest and best use" based on a potential, future use. *Id.* While a property owner is entitled to compensation based on a potential use of the property even though the property is not being so utilized at the time of the taking, he must show that "it is reasonably probable that the property could be put to this use in the not too distant future, absent the expropriation and project for which the land was expropriated, and provided such a use would have an effect on the price a buyer is willing to pay." *W. Jefferson Levee Dist.,* 640 So.2d at 1273. If the property owner demonstrates that the potential future use is within the reasonably near future, he is entitled to compensation on the basis of such use, notwithstanding the property is not being utilized for such use at the time of the taking. *Id.*

Although the experts seem to agree on the unique and extraordinary attributes of the land and batture, which would allow for multi-modal cargo operations, Ragas and Cantrell were the only experts who gave these attributes great weight and applied these attributes to his valuations. All experts struggled to find comparable sales due to the unique attributes of Violet Port's land and batture. However, the experts all agree that the land and batture, without taking into consideration the improvements, and looking at it as vacant land, have the following two extraordinary unique attributes: (1) direct access to river, road, and rail transportation and all utilities and (2) one mile (4,200 LF) of relatively straight batture on the Mississippi River, which is deep-water, self-scouring, and totals approximately 22 acres outside the levee. The experts also agree that access to river and road transportation is necessary for the use of layberthing and topside ship repairs and that access to river, road, and rail transportation is necessary for the use of the property for solid and liquid bulk cargo operations. The property's access to all types of utilities was necessary for all types of usage.

****52** The majority's opinion correctly lays out a description of Violet Port's property with respect to the various mechanical and electrical support and public utilities available in the neighborhood adjoining or on the site included electricity, water, natural gas, telephone, and sanitary sewer. What the majority omits, however, are the many unique locational and physical attributes of the land and batture. These include: (1) over 4,200 LF of straight batture of near 45 or more feet in water depth; (2) self-scouring water depth; (4) location within a four-hour sail of the mouth of the Mississippi River; (5) location across from anchorage ***95** and at a river width with suitable use as a turning basin; and (6) the site was zoned I-2 Heavy Industrial District, a liberal zoning classification that would permit general industrial, warehouse, and storage, including certain open or enclosed storage of products, materials, and vehicles. These attributes among others are what attracted St. Bernard Port to the Violet Port site in the first place.

Moreover, all the experts recognized the unique attributes of the batture. I find that St. Bernard Port's experts fail to properly value the batture in accordance with these attributes and its obvious scarcity. Even St. Bernard Port admitted that this is the only piece of property on the river that was suitable for its immediate and future plans. Thus, I accepted Ragas' value of the batture.

With respect to assumptions made by the experts, I do not place great weight on Oubre's criticism of Ragas' valuation of the batture. Oubre was concerned in what he called "extraordinary assumptions" made by Ragas when arriving at his determination of "highest and best use." First, Oubre questioned the assumption that St. Bernard Parish would issue the requisite permits for intensive bulk operations. However, Cantrell testified that he spoke with parish personnel who indicated that the upland could be used to store products and non-hazardous materials. Next, Oubre questioned Ragas' assumption that the water depth was at least 45 feet. Evidence in the record supports Ragas' conclusion. Oubre's criticism ****53** that the Mississippi River would dredge to 50 feet was again a concern unsupported by the record. Fennelly of Associated Terminals testified that one of the attributes of the Violet Port site was that it was "deep draft." Finally, I find Cantrell's assumptions as to the land reasonable and consistent with St. Bernard Port's experts.

With respect to "highest and best use," the district court found that the property's "highest and best use" was for layberthing with limited cargo operations.[62] Normally, this finding is reviewed under the manifest error standard. However, upon remand, we are reviewing the record *de novo* and making a determination based on the preponderance of the evidence in the record.

The record reflects that the testimony of urban planner, Carmichael, who helped prepare the 2008 PPA for the Violet Port site on behalf of St. Bernard Port, and the 2008 PPA revealed that **"a strategic analysis led to the conclusion that the site best [highest and best use] leant itself to the transfer and storage of solid and liquid bulk commodities."**[63] I find that St. Bernard Port cannot, in good faith, argue that the site's "highest and best use" is something less than what it stated in its application.

It is highly important to again quote St. Bernard Port in its evaluation of the Property **before** the quick-taking in 2010 and why it wanted this particular piece of land. In 2008, the St. Bernard Port recognized that "[l]and on the Mississippi River is finite and already limited. Greenfield sites along the Mississippi River should be considered a national asset for transportation and manufacturing (i.e., the Violet site.)" In its 2008 PPA, St. Bernard Port noted that the Violet Port site would allow it to expand its storage of solid bulk cargo on the ground, in rail cars, and in barges immediately. In the 2009 Supplemental Report, St. Bernard Port noted that ****54** "shippers frequently have the desire to ***96** transfer cargo to rail or truck, both of which are possible at the Violet docks."

The law is clear that St. Bernard Port cannot now argue that the "highest and best use" of the property is layberthing, a position that "flies in the face of its prior public position" made a part of the record. *Natchitoches Parish Port Comm'n v. Deblieux & Kellye, Inc.,* 99-313, p. 23 (La.App. 3 Cir. 3/22/00), 760 So.2d 393, 407, *writ denied*, 00-1121 (La. 6/2/00), 763 So.2d 601. In *Bd. of Com'rs of the Port of New Orleans v. Lomm,* 220 So.2d 489, 492 (La.App. 4th Cir. 1969), this court rejected the Board of Commissioners' argument that the taken property must be valued "as it is" and not based on its intended use. Therein we stated:

> Mr. Frilot [one of the landowner's appraisers] considers what has already taken place in that locality as clearly indicative of greater future activity and development to be reflected in property values. He quotes from the book entitled 'Appraisal of Real Estate' published by the American Institute of Real Estate Appraisers, page 41 (4th Edition), as follows:
>
> > "The principle of anticipation affirms that **value is created by anticipated benefits to be derived in the future.** It is not the past but the future which is important in estimating value * * *."
>
> and at page 25 as follows:
>
> > "Change is ever present, irresistibly affecting individual properties, neighborhoods and cities. * * * The appraiser must always view real property and its environments with the law of change uppermost in mind. * * * **For it is the future, not the past, which is of prime importance in estimating value."** (Emphasis added.)

Therefore, based on the evidence in the record before us, I find the amount of $9,017,803 more probably than not reflects the full compensation owed to Violet Port for the quick-taking of its upland, Plot Y, and batture.

****55 V. CONCLUSION**

Based on my *de novo* review of the record, I would award Violet Port the following: (1) the deficient amount of $22,017,803, pursuant to La. Const. Art. I, § 4(B)(5) and La. R.S. 19:156; (2) interest on this deficient amount from the date of the quick-taking, December 22, 2010, to date of final payment; and (3) reasonable attorney's fees. I would amend the December 1, 2015 district court's judgment accordingly and affirm and remand the case to the district court for a determination of interest and attorney's fees.

JENKINS, J., DISSENTS

For the reasons that follow, I disagree with the foundation of the majority's conclusion that the "highest and best use" of the Property is for layberthing, rather than use as a multimodal bulk cargo facility. This decision, obviously, greatly impacts the valuation of the Property. My concern is not necessarily about the result reached on that issue, but about the shortfalls in reaching that result.

On *writ of certiorari*, the Supreme Court found that the trial court legally erred by using the incorrect standard for evaluation of the experts' valuation testimony, where it decided that it did not have the discretion to arrive at a valuation somewhere "in between" the two expert opinions, i.e., "split the baby." *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc.*, 17-0434, p. 15 (La. 1/30/18), 239 So.3d 243, 254. According to the Supreme Court, a trier of fact is not required to make a binary choice and accept one side's testimony in its entirety, ***97** but is instead empowered to weigh strengths and weaknesses of expert testimony. *Id.* The Court also found that the trial court compounded this error by failing to identify the error and conduct a *de novo* review. *Id.*

The Supreme Court reversed and remanded the matter to this court solely for the purpose of fixing the amount of just compensation based on the evidence in the entire record and in accordance with the principles set forth in its opinion. In its remand, the Court stated "we prefer that the Court of Appeal perform the first appellate review of the entire record under the correct rule of law." *Id.*, 17-0434. p. 16, 239 So.3d at 255. For the reasons outlined below, I find the majority does not accomplish this directive.

In *State v. Bitterwolf,* 415 So.2d 196 (La. 1982), the Supreme Court explained that the legislature and the courts have developed rules which accept the fair market value of the property as a relevant consideration in determining just compensation for purposes of expropriation. Fair market value has consistently been defined as the price a buyer is willing to pay after considering all of the uses that the property may be put to where such uses are not speculative, remote or contrary to law. *West Jefferson Levee Dist. v. Coast Quality,* 93-1718 (La. 5/23/94), 640 So.2d 1258. In determining fair market value of the land taken in an expropriation case, consideration is to be given to the most profitable use to which the land can be put by reason of its location, topography, and adaptability. *City of Shreveport v. Abe Meyer Corp.,* 219 La. 128, 52 So.2d 445, 447 (1951), *affirmed as amended*, 223 La. 1079, 67 So.2d 732 (1953); *State, Dep't of Highways v. Rapier,* 246 La. 150, 164 So.2d 280 (1964). This theory, of taking the latter factors into consideration, is commonly known as the "highest and best use" doctrine. The highest and best use of land in expropriation cases involves several factors. Factors which may be considered include:

- market demand;
- proximity to areas already developed in a compatible manner with the intended use;
- economic development in the area;
- specific plans of business and individuals, including action already taken to develop the land for that use;
- scarcity of the land available for that use; negotiations with buyers interested in the property taken for a particular use; absence of offers to buy the property made by the buyers who put it to the use urged; and
- the use to which the property was being put at the time of the taking.

State, through the Dept. of Highways v. Constant, 369 So.2d 699, 702 (La. 1979).

It is "well established" that the current use of the property is presumed to be the highest and best use and the burden of overcoming that presumption by proving the existence of a different highest and best use based on a potential, future use is on the landowner. *Exxon Pipeline*, 00–2535, 00–2559, p. 8, (La. 5/15/01), 788 So.2d 1154, 1160. Where a landowner overcomes the presumption, the landowner is entitled to compensation based on a potential use of the property, even though the property is not being so utilized at the time of the taking, provided he can show it is reasonably probable the property could be put to this use in the "not too distant future." *West Jefferson Levee Dist.*, 640 So.2d at 1273.

In this case, the use to which Violet was putting the Property at the time of the expropriation — layberthing with a limited cargo operation — is presumed to be the Property's highest and best use. Violet, ***98** however, may overcome this presumption by demonstrating, by a

preponderance of the evidence, that the property could be used in a different, more valuable way, that the potential use is not speculative, and that it could be undertaken in the "not too distant future." *Exxon Pipeline*, 00–2535, 00–2559, pp. 8–9, 788 So.2d at 1160–61; *West Jefferson Levee Dist.*, 640 So.2d at 1273.

The majority's failure to provide a complete analysis of the "highest and best use" gives me pause. As stated above, the current value of the Property is presumed to be the highest and best use, and the burden of overcoming that presumption by proving the existence of a different highest and best use based on a potential, future use is on Violet, the landowner. The majority fails to provide any substantive discussion of Violet's expert's analysis of the factors supporting the "highest and best use" of the Property as a multimodal bulk cargo facility, so as to satisfy Violet's burden. Instead, the majority addresses only the conclusions of the Port's expert that the attributes of the Property were "problematic," and that Violet's experts used "extraordinary assumptions" and a "flawed" rationale. There is no express finding that Violet failed to overcome the presumption, and why.

Although I do not, at this time, challenge the majority's conclusion with respect to the "highest and best use" of the Property, I cannot support it, as I find the majority's analysis of this issue provides an incomplete roadmap for reaching its decision.

I respectfully dissent.

All Citations

255 So.3d 57, 2016-0096 (La.App. 4 Cir. 9/12/18)

Footnotes

1 *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC,* 2017-0434 (La. 1/30/18), 239 So.3d 243.

2 La. Const. art. I, § 4 reads in pertinent part:

> Section 4. (A) Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.
>
> (B)(1) Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Except as specifically authorized by Article VI, Section 21 of this Constitution property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity.

La. Const. Ann. art. I, § 4

3 *St. Bernard Port, supra*.

4 *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC,* 2016-96, 2016-262, 16-331 (La.App. 4 Cir. 12/14/16), 229 So.3d 626, *writ granted*, 2017-0434 (La. 5/26/17), 221 So.3d 853, *and aff'd in part*, *rev'd in part*, 2017-0434 (La. 1/30/18), 239 So.3d 243.

5 *State, Dept. of Highways v. Constant*, 369 So.2d 699 (La.1979).

6 *Id.*

7 *See, State ex rel. Dept. of Transp. and Dev. v. Wade*, 07-1385 (La. App. 3 Cir. 5/28/08), 984 So.2d 918, *writ denied*, 08-1896 (La. 12/12/08), 997 So.2d 561; *State, DOTD v. McKeithen*, 42,830 (La. App. 2 Cir. 2/20/08), 976 So.2d 832; *City of Shreveport v. Standard Printing Co. of Shreveport, Inc.*, 427 So.2d 1304 (La. App. 2d Cir. 1983); and *Monroe Redevelopment Agency v. Kusin*, 398 So.2d 1159 (La. App. 2d Cir. 1981), *writ denied*, 405 So.2d 530 (La. 1981).

8 In the application the Port was seeking State funding for the purchase of the Property.

9 At the time of the application, the Port thought VDP had accepted its offer of $14 million.

10 The initial value was $25,764,685, but after adjustments for omissions the value was increased to $28,764,685.

11 According to the Supreme Court:

> Factors which may be considered include: market demand; proximity to areas already developed in a compatible manner with the intended use; economic development in the area; specific plans of business and individuals, including action already taken to develop the land for that use; scarcity of the land available for that use; negotiations with buyers interested in the property taken for a particular use; absence of offers to buy the property made by the buyers who put it to the use urged; and the use to which the property was being put at the time of the taking.

Exxon Pipeline Co. v. Hill, 2000-2535 (La. 5/15/01), 788 So.2d 1154, 1160.

12 *Id.*

13 "The characteristics examined by the experts cannot be speculative and must consider the property in its use at the time of expropriation." *Exxon,* 2000-2535, p. 11, 788 So.2d at 1162.

14 This figure was arrived at by valuing the depreciated replacement cost of docks 1,2,4, and 5 (as per the Port's expert engineer, Dr. Flowers), plus land ($3,962,000) at $27,477,404; plus a depreciated value for dock 3 of $667,406 (using Dr. Ragas' valuation); plus $619,875, the depreciated replacement cost for site improvements.

1 St. Bernard Port is a public corporation and political subdivision of the State of Louisiana. La. R.S. 34:1701, *et seq.*

2 Violet Dock Port, LLC, is a privately-held family business that was in operation for over 40 years until it ceased to exist after St. Bernard Port's quick-taking of its business and assets.

3 La. R.S. 19:141 states:

> In any suit for the expropriation of property, including the fee simple title and servitudes, all port commissions and port authorities created by the constitution or statutes of Louisiana; Louisiana State University and Agricultural and Mechanical College; the Department of Public Works, State of Louisiana and the Sabine River Authority, State of Louisiana, may acquire the property prior to judgment in the trial court in the manner provided in this Part.

Pursuant to this statute, St. Bernard Port is allowed to effectuate statutory quick-takings where title and possession transfers immediately upon the filing of an expropriation suit and estimated compensation is deposited in the registry of the court prior to final judgment deciding whether the taking was for a public purpose and the final amount of compensation-a benefit which does not apply to general expropriations. *See generally,* La. R.S. 19:1 *et seq.*

4 In 1974, the Louisiana Constitution was re-worded to provide that an "owner shall be compensated to the full extent of his loss" when land is expropriated. La. Const. Art. I, § 4(B)(5). Previously, a property owner could only receive the fair market value and any severance damages for property taken through expropriation. The change permits a property owner to remain in an equivalent financial position to that which he enjoyed before the taking. *See generally, State Through Dep't of Highways v. Bitterwolf,* 415 So.2d 196 (La. 1982).

5 The differing valuations of the total just compensation awarded in my dissent and the majority opinion are set forth on the following chart:

Property Expropriated	Lobrano Dissent	Majority Opinion
Docks and Other Improvements	$ 29,000,000 Not depreciated	$ 24,802,685 Depreciated
Upland	$ 3,857,238	$ 1,843,000
Plot Y	$ 35,565	Included in totals
Batture	$ 5,125,000	$ 2,119,000
Total Just Compensation	$ 38,017,803	$ 28,764,685

6 La. R.S. 19:156 states:

> If the compensation finally awarded exceeds the amount so deposited, the court shall enter judgment against the plaintiff and in favor of the persons entitled thereto for the amount of the deficiency.

The $16 million deposited into the registry of the court has been released to Violet Port.

7 La. R.S. 19:155 states:

The judgment rendered therein shall include, as part of the just compensation awarded, interest at the rate of five per centum per annum on the amount finally awarded as of the date title vests in the plaintiff to the date of payment; but interest shall not be allowed on so much thereof as has been deposited in the registry of the court.

8 La. R.S. 19:8(A)(3) states in pertinent part:

After hearing evidence on the issue, the court shall determine the highest amount offered. If the highest amount offered is less than the compensation awarded for the property and severance damages, if any, the court may award reasonable attorney fees to the defendant.

9 "Although the usual method of calculating replacement cost includes a reduction for depreciation, this is not necessarily required in every case. Depreciation is designed to deduct for functional obsolescence, i.e., incurable depreciation....We conclude from all of this that depreciation is only deductible in appropriate circumstances." *Monroe Redevelopment Agency v. Succession of Kusin,* 398 So.2d 1159, 1161 (La.App. 2 Cir. 1981)(citations omitted). In this case, the property owners presented uncontradicted evidence that two warehouses and a showroom were indispensable parts of their furniture business. The court found that under the *Constant* principle, the trial court was completely justified in awarding the replacement cost of replacing the taken improvements to the land. The trial court's award for the full amount it would take to replace the warehouses and showroom, without allowance for depreciation of the buildings, which admittedly were old, was affirmed. *Id.*

10 The development of our public ports is critical to promote economic development in our state. But we must be mindful that a public port expropriates property in furtherance of port business and, at times, may be in competition with private industry. In its *amici brief*, various port authorities argue that they have "a vested interest in assuring that all public ports throughout the State, including the St. Bernard Port & Harbor Terminal District, are not forced to pay an amount above fair market value for property that must be acquired through expropriation." First, the proper measure of damages is not fair market value, but rather the "full extent of loss" standard. Second, an equally compelling argument can be made that if a private owner of property is not compensated to the full extent of the loss, private port development will be stifled for fear that an investment made in port facilities today will be subject to expropriation tomorrow at a value less than the full extent of its loss or less than replacement cost. Unlike an expropriation for levee improvements, roads, bridges, drainage servitudes, and other similar public purpose projects, where governmental agencies, such as public ports, possessing power to quick-take private property and compete with private industry, courts should use heightened scrutiny and analysis when balancing the rights of private ownership with the state's rights to expropriate property for a public purpose. Moreover, a governmental agency's fiscal ability to ultimately pay a just compensation award in a quick-taking suit is not a factor that courts are allowed to consider. The courts should not be used as a safety net to rescue governmental agencies that make risky financial decisions affecting the public fisc. Although governmental agencies can quick-take private property, nothing prevents them from utilizing the more fiscally conservative general expropriation procedures.

11 Oubre depreciated the improvements by $10,898,146 due to "physical incurable obsolescence," *see infra* n. 33 at p. 76–77, and further deducted $4,371,055 for "entrepreneurial incentive." This latter term has been defined as compensation to the entrepreneur for going at risk to build an asset, and relies on the principle that any building project would include economic reward above and beyond direct and indirect costs sufficient to convince an take risk associated with that project in that market. Appraisal Institute, *The Appraisal of Real Estate* entrepreneur to 573 (14th ed. 2013). "Entrepreneurial incentive" has also been defined as "a marker-derived figure that represents the amount an entrepreneur expects to receive for his or her contribution to a project and risk." *The Appraisal of Real Estate,* 389 (13th ed. 2012). Notably, Cantrell, added, rather than deducted, entrepreneurial incentive in his calculation of an appropriate valuation of the property.

12 The fact that this batture is self-scouring means that the movement of water in the area removes any build-up of any debris and vegetation that might decrease the level of the water and, thus, reduces or eliminates dredging maintenance costs.

13 Other site improvements included parking lots, interior circular roads, elevated office building, warehouse, fencing and gates, perimeter and interior security fencing for the crews and maintenance personnel aboard the ships, fill material, mechanical equipment, sewage pump, diesel tanks, and electrical components for the office building and warehouse. In addition, Violet Port owned all its own construction equipment.

14 Some of the experts refer to "dry bulk," others to "solid bulk;" these terms are interchangeable for most part and for the purpose dissent.

15 Violet had entered into an option agreement with Vulcan.

16 The experts referred to this as a "multi-modal" or "tri-modal" bulk cargo facility. "Multi-modal transport" usually refers to in this case as the transportation of goods with at least two different means of transport. "Tri-modal" as used herein means three different modes of transportation, such as river, road, and rail.

17 Phase I consisted of land acquisition and short-term improvements at strategic locations within the site to make the existing facilities useful for stevedoring activities. The basis of the application was the immediate need for additional laydown on shore for dry bulk commodities; the initial phase would be at Dock 5, the furthest downstream.

18 *See* La. Const. Art. I, § 4(B)(1), which prohibits the taking or damaging property for predominant use by any private person or entity. La. Const. Art VI, § 21(A) permits public ports to acquire land through expropriation and lease that land to a private entity for management of the operations. *Cf. Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005).

19 Contained in the 2008 PPA was a letter from Associated Terminals to St. Bernard Port, wherein Associated Terminals outlined its commitment to lease and operate the "Violet Dock terminal."

20 In *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 16-96,16-262, 16-331 (La. App. 4 Cir. 12/14/16), 229 So.3d 626, I dissented, finding that the quick-taking was unconstitutional because St. Bernard Port made no pretext about taking over Violet Port's Navy contracts and business and that such a quick-taking violated Louisiana's Private Business Enterprise Protection Clause fund in La. Const. Art. I, § 4(B)(6), which reads that "[n]o business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting completion with a government enterprise...." I found that this protection clause was violated because one of the purposes for taking Violet Port's business

enterprise and its assets was to operate its layberthing business and to halt its expanding cargo operations that were competing with St. Bernard Port's own business activities.

21 *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 17-0434 (La. 5/26/17), 221 So.3d 853.

22 Because both the majority and I agree that "just compensation" in this case requires a determination of replacement costs of the property's improvements plus the market value of the land and batture, I have omitted the testimony of those who had no direct bearing on these issues. Although I mention the income method of appraisal as used by St. Bernard Port's expert in arriving at the $16 million value, I find this amount deficient and not supported by the evidence.

23 Scafidel's Ph.D. is in Education Administration.

24 Phase II represented the solid bulk terminal, which would feature the development of a solid bulk tank farm, rail access and storage facilities, a pipe network, and other dock improvements. Phase III represented the liquid bulk terminal, featuring the development of a liquid bulk tank farm, rail access and storage facilities, a pipe network, and other dock improvements.

25 It was estimated that Phase I would take approximately nineteen months to complete.

26 Leased Fee is the ownership interest that the landlord or lessor maintains in a property under a lease with the rights of use and occupancy being conveyed or granted to a tenant or lessee, i.e., the ownership interest in a leased property. Fee Simple is absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat. Appraisal Institute, *The Dictionary of Real Estate Appraisal*, 5th ed. (Chicago: Appraisal Institute, 2010). Thus, Truax's leased fee analysis looked not only at the lease in place but also assumed two additional leases, the Navy lease and a lease for bulk cargo. It should be noted, however, that Ragas testified that, based on his review of Truax's report, Truax basically treated a leased-fee analysis and a fee-simple analysis as synonymous in terms of what he tendered. Even if Truax performed a leased-fee analysis while Oubre performed a fee-simple analysis, they both agreed on the same number of $16 million.

27 Truax testified that it was his understanding that Violet Port did little by the way of cargo operations. He denied knowledge of the number of cargo jobs performed by Violet Port over the years.

28 Using a replacement cost approach, Truax's 2010 appraisal lists total replacement costs for the Docks: Dock 1, $8,116,680; Dock 2, $11,932,800; Dock 4, $4,856, 500; and Dock 5, $6,050,000. Due to the condition of Dock 3, no replacement cost was given by him.

29 Oubre admitted that he had not previously done any appraisal work of this nature.

30 Oubre was not asked to review Truax's updated report of 2013.

31 The majority rounded this number down to $3,962,000.

32 Oubre later removed the entrepreneurial incentive finding no reason to apply it to the circumstances of this case.

33 "Incurable physical deterioration," is defined as: "[A] form of physical deterioration that cannot be practically or economically corrected as of the date of appraisal." Appraisal Institute, *The Dictionary of Real Estate Appraisal*, 5th ed. (Chicago: Appraisal Institute, 2010).

34 "Functional obsolescence," is defined as: "[T]he impairment of functional capacity of property according to market tastes and standards." *Id.*

35 As reflected in his report, using an income approach, Oubre valued the property at $14,700,000. Because it was a special use property, he gave a final value of $16 million. Oubre stated that, while he had seen Truax's report before performing his own appraisal, he did his own independent review and that Truax's report did not influence him in any way.

36 Conversely, Truax made his depreciation calculations based on a useful life of 30 years for the docks.

37 "Curable physical deterioration," is defined as: "[A] form of physical deterioration that can be practically and economically corrected as of the date of appraisal." Appraisal Institute, *The Dictionary of Real Estate Appraisal*, 5th ed. (Chicago: Appraisal Institute, 2010).

38 "External obsolescence," is defined as: "[A]n element of depreciation; a diminution in value caused by negative externalities and generally incurable on the part of the owner, landlord, or tenant." *Id.*

39 Cantrell stated that building a commodities terminal would require a significant investment but that it was reasonably and physically feasible based on comparable sales and the conceptual drawings by St. Bernard Port.

40 Cantrell used the numbers provided by Lanier.

41 Plot Y is 4.02 acres on the east side of St. Bernard Highway. Cantrell stated in his review of Truax's report that the highest and best use of this acreage is parking for Violet Port employees. Truax thought that the "excess" land was not necessary for effective use of the site and "should be sold separately for speculation."

42 Cantrell originally applied 25 percent depreciation to all the docks. After Oubre reviewed his report, Cantrell realized that he was wrong in that all the docks had different designs, used different materials, had different replacement costs, and different useful lives.

43 *See supra* n. 3 at p. 63.

44 Ragas testified that the seller does not dictate the property's highest and best use in the market. The seller can only offer the property for sale and the buyers ascertain that they think they can and cannot do with it and bid accordingly. Based on the evidence in the record, St. Bernard Port believed that it could use the subject property for dry and liquid bulk cargo.

45 The following chart reflects the three engineer's valuations for the full replacement cost of the improvements without a deduction for depreciation:

IMPROVEMENTS	TRUAX	FLOWER	JACQUAT
Dock 1	$ 8,116,680	$ 10,025,370	$ 15,656,678
Dock 2	$ 11,932,800	$ 12,686,278	$ 22,030,156
Dock 3	$ 0	$ 2,669,624	$ 6,095,168
Dock 4	$ 4,856,500	$ 3,481,000	$ 6,308,950
Dock 5	$ 6,050,000	$ 8,406,500	$ 10,244,672
SITE	$ 290,000	Included in totals	$ 5,091,341
EQUIPMENT	Included in totals	Included in totals	$ 3,571,881
TOTAL	$ 31,245,980	$ 37,268,772	$ 68,998,846

I agree with the majority in awarding Violet Port the value of other site improvements and equipment located on the property. It is unclear from the majority opinion as to the amount that was awarded for these other site improvements. Nevertheless, my replacement cost award of $29 million includes site improvements and equipment. Also, Dock 3 could be viewed as not indispensible to Violet Port's business and, as such, I do not give it any significant value.

46 I find that the full replacement cost of the improvements of $68,998,846 provided by Jacquat on the high end. Jacquat used uniform unit prices of $350 and $450 per square foot to reconstruct the docks without taking into account the differences between the docks and their improvements. Other experts indicated that this amount was high and Violet Port failed to produce sufficient evidence to support this amount.

47 The revision in 1974 to include expansive constitutional language has prompted courts, when referring to a property owner's due in expropriation cases, to abandon the term “just compensation” in favor of the more comprehensive “full compensation.” *Villavaso,* 14-1277, p. 7, 183 So.3d at 763, citing *State, Dep't of Transp. & Dev. v. Sonnier*, 503 So.2d 1144, 1146 (La.App. 3d Cir.), *writ denied*, 506 So.2d 1230 (La. 1978).

48 In *Constant*, the Court stated:

In the present case, however, the depreciation theories are of an essentially theoretical nature insofar as their effect upon the actual serviceability and economic value of the nature of the property (the loading strip) taken. Its replacement cost is appropriate, because of its unique and indispensable value to the defendants' business operations conducted at the site. Therefore, under the evidence in the present record, **we find the replacement cost of the asset taken is an appropriate measure of the damages by which to compensate fully the landowners for their holding area taken, and without any deduction for alleged depreciation occasioned by their prior use of the taken asset to be replaced.** (Emphasis added.) *Id.* at 707.

49 In *Burnette v. Stalder*, 00-2167, pp. 6-7 (La. 6/29/01), 789 So.2d 573, 577, the Court stated:

The function of statutory interpretation and the construction to be given legislative acts rests with the judicial branch of government. Louisiana Rev. Stat. § 1:3 also provides that, when interpreting the revised statutes, courts shall read and construe statutory words and phrases in their context and in accordance with the common and approved usage of the language. *See also* La. Code Civ. Proc. art. 5053 (same).

Accordingly, the starting point for the interpretation of any statute is the language of the statute itself, while being mindful that the paramount consideration for statutory interpretation is always the ascertainment of the legislative intent and the reason or reasons which prompted the legislature to enact the law. Therefore, when the apparent meaning of the statute appears doubtful or the language can reasonably be interpreted in more than one manner, courts must search deeper to discover the legislative intent. *Id.* (Citations omitted.)

50 Nevertheless, Art. I, § 4 does not specify how to fully compensate a property owner whose property is taken. *Dietrich,* 555 So.2d at 1358.

51 In his dissent to the majority opinion in *St. Bernard Port*, Justice Weimer continued the legislative history of Article 1 § 4 of the 1974 Constitution:

> With the above-detailed protections added to and enshrined in Article I, § 4, the 1974 Constitution "goes beyond other state constitutions, including our 1921 Constitution, and the federal constitution in limiting the power of government to regulate private property." *State v. 1971 Green GMC Van*, 354 So.2d 479, 486 (La. 1977).
>
> However, the citizens of Louisiana did not stop there, demonstrating an adamant and emphatic determination to protect private business from government takeover. When property rights protected by the federal constitution were seemingly eroded by the United State Supreme Court's ruling in *Kelo v. City of New London, Connecticut,* 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), the Louisiana electorate responded by enshrining additional protections in our state constitution. *See* 2006 La. Acts 851, § 1 (approved September 30, 2006). These protections include a prohibition from taking property "for predominant use by" or "transfer of ownership to any private person," and the inclusion of a more "limited" definition of "public purpose." *See* La. Const. art. I, § 4(B)(1)(a) and (b); *Id.*, § 4(B)(2). Furthermore, in a rejection of the core holding of *Kelo*, the Louisiana electorate added the following prohibition: "Neither economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the taking or damaging of property is for a public purpose ...." La. Const. art. I, § 4(B)(3).
>
> **As evidenced by the above, Louisiana has a long and storied history of protecting private property interests from undue governmental interference.** Nowhere is that strong interest more evident than in the protections extended under La. Const. art. I, § 4(B)(6), ["Louisiana's Private Business Enterprise Protection Clause"], protections unique to Louisiana, but entirely consistent with the core principles underlying Louisiana's interest in protecting private property rights.

St. Bernard Port, 17-0434, pp. 3-4, 239 So.3d at 256-57 (Weimer, J., dissenting). (Emphasis added.)

52 St. Bernard Port argues that in determining the fair market value of the upland, Plot Y, and batture, *Exxon Pipeline*, supports its position that Violet Port should only be awarded for a depreciated replacement value as opposed to a full replacement value. This argument lacks merit. While instructive, *Exxon Pipeline* is quite distinguishable and does not support this argument The facts of *Exxon Pipeline* did not deal with improvements such as those owned by Violet Port, and the property in *Exxon Pipeline* was not considered to be "unique and indispensable" as discussed in *Constant*.

53 In *Hecker*, the DOTD expropriated for highway purposes property operated by the defendants/property owners as a bulk oil distribution facility, a business successfully operated by them for many years. From the property owner's point of view, it was essential to continue the business in that he was not ready to retire and had expected to continue his business at the old plant indefinitely. The facility required little maintenance and he had adequate storage if the business expanded. Finding no replacement facility in New Orleans, they purchased another property in Jefferson Parish and built a new facility. The improvements were basically a duplication of the old facility, consisting of large storage tanks, warehouse, loading dock, paving, and fencing. The property owners' position was that the only appropriate method of valuation was the actual cost of replacement, undiminished by any allowance for depreciation of the expropriated property. In order to be fully compensated for their loss, they argued that they be awarded total land acquisition and construction costs, financing costs, and income foregone from other assets which they liquidated to pay for the new facility. The defendants' appraisers testified that the site purchased was the only available property with the correct zoning, M-2 heavy industrial. No improved property existed to which the property owners' operation could move. One appraiser stated that because of new rules and requirements a larger site was required to produce the same storage capacity. In order to build at the new site, the property owners had to get a variance from the Jefferson Parish moratorium for building bulk plants.

54 In general terms, "depreciation," includes physical depreciation, functional obsolescence, and external obsolescence, the application of which is contrary to *Constant* and its line of cases.

55 I find St. Bernard Port's argument, that Violet Port could have easily moved its layberth business and rebuilt the necessary improvements to continue, disingenuous at best. In 2008, St. Bernard Port represented to the DOTD that Violet Port was the only place where it could expand its business; the two other alternatives were undesirable for a number of reasons. These alternatives would have also prevented Violet Port from using them for its own operations.

56

[56]		UPLAND PRICE/SF	UPLAND TOTAL	BATTURE PRICE/LF	BATTURE TOTAL	LAND & BATTURE
OUBRE Majority		$ 1.00	$ 1,843,000	$ 500	$ 2,119,000	$ 3,962,000
TRUAX		$ 1.25	$ 2,129,180	$ 575	$ 2,450,000	$ 4,580,000
CANTRELL		$ 2.30	$ 3,857,238 Lobrano Dissent	$ 1,000	$ 4,200,000	$ 8,211,000
RAGAS		$ 4.00	$ 6,440,000	$ 1,250	$ 5,125,000 Lobrano Dissent	$ 11,470,000

The majority rounds down Oubre's value of the upland to $1,843,000.

57 The majority opinion is unclear as to whether it found that the "highest and best use" of the land and batture was "layberthing with a limited cargo operation" or that "the highest and best use of the property to be layberthing." Also, Oubre gave various opinions on "highest and best use." When explaining the "vast discrepancy" in the values set by the myriad of experts, the majority states that the "lower calculations were based on **layberthing with a limited cargo operation**." Later in the opinion, the majority accepts the testimony of Oubre, whose testimony "supports the highest and best use of the property to be the **layberthing operations that Violet Port was using the property for at the time of the expropriation**." (Emphasis added.) However, Oubre also testified that, in his opinion, **the property was not suitable for liquid terminals, he did think that bulk cargo was feasible.** Clearly, the majority awards nothing to Violet Port for the loss of its current and/or proposed cargo operations in light of the option it had entered into with Vulcan Materials for expanded cargo operations at Dock 4, which was renovated for this specific purpose.

58 The majority states that: "In reviewing the testimony regarding the rationale for the differing appraisals, we find that Mr. Oubre's testimony realistically evaluated the character of the property. Mr. Oubre acknowledged how specialized the property was while also taking into account the attributes that were problematic." I cannot reasonably determine on which "problematic attributes" the majority relies in reaching its conclusions and relying on Oubre.

59 Cantrell testified that, in his opinion, the highest and best use was layberthing and transitioning into bulk commodities storage with highway and railroad access. Ragas testified that, in his opinion, the highest and best use of the property was "a Special Purpose Multi Modal Cargo and Berthing Facility...suitable for Bulk (Dry and Liquid)" with layberthing for the Navy ships, topside repairs, dry bulk cargo storage/shipment and a variety of liquid bulk cargo types for shipping internationally.

60 Ragas valued Plot Y at $99,000, and Cantrell valued Plot Y at $151,000. Violet Port failed to produce sufficient evidence to allow for these higher values.

61 La. R.S. 19:9 recognizes that a property owner should receive "any general or specific benefits" that he or she derives from any "contemplated improvement or work" but "the basis of compensation shall be the value which the property possessed before the contemplated improvement was proposed." It is noted that the general rule is that the value of the property expropriated should be determined and fixed considering the property as of the time of the taking but not enhanced by the purpose of the taking. Nevertheless, property owners are entitled to receive compensation for land at an enhanced value by reason of its "proximity to areas already developed in a compatible manner with the intended use" of the property by the expropriating authority. *See St. Charles Land Co. II, L.L.C. v. City of New Orleans ex rel. New Orleans Aviation Bd.,* 14-0101, p. 10 (La.App. 5 Cir. 12/23/14), 167 So.3d 128, 136. St. Bernard Port's argument that any amount over $16 million would be a prohibited enhanced amount lacks merit. The market demand for cargo operations, scarcity of quality river frontage, and the location and great attributes of the Violet Port site are some of the factors for arriving at a value over $16 million. St. Bernard Port failed to show otherwise.

62 *See supra* n. 57 at p. 92.

63 Of course, this conflicts with one of Oubre's opinion of "highest and best use" of the property.

422 P.3d 1243
Supreme Court of Nevada.

CLARK COUNTY, a Political Subdivision of the State of Nevada, Appellant,
v.
HQ METRO, LLC, an Arizona limited liability company; Project Alta, LLC, a Nevada limited liability company; Project Alta II, LLC, a Nevada limited liability company; Project Alta III, LLC, a Nevada limited liability company; and Project Alta Liquidating Trust U/A/D 12/31/09, by and through Mark L. Fine & Associates, a Nevada corporation, individually and as Trustee, Respondents.

No. 71877
|
FILED AUGUST 02, 2018

Synopsis

Background: Electric utility filed eminent domain complaint to obtain permanent easement for installation of electrical transmission lines on landowner's property that had been leased to county but then later sold to county after entry of order granting utility immediate occupancy but before utility physically entered property to begin construction. The Eighth Judicial District Court, Clark County, Ronald J. Israel, J., ordered apportionment of just compensation proceeds for landowner. County appealed.

[Holding:] The Supreme Court, Cherry, J., held that right to compensation vested upon entry of order of immediate occupancy, and thus landowner was entitled to compensation.

Affirmed.

West Headnotes (8)

[1] Eminent Domain
Appeal and error

Whether a taking has occurred presents a question of law that the Supreme Court reviews de novo. U.S. Const. Amend. 5; Nev. Const. art. 1, § 8.

Cases that cite this headnote

[2] Eminent Domain
What Constitutes a Taking;Police and Other Powers Distinguished

A "taking" can arise when the government regulates or physically appropriates an individual's private property. U.S. Const. Amend. 5; Nev. Const. art. 1, § 8.

Cases that cite this headnote

[3] Eminent Domain
What Constitutes a Taking;Police and Other Powers Distinguished

A government's "physical appropriation" of private property, giving rise to a taking, exists when the government seizes or occupies private property or ousts owners from their private property. U.S. Const. Amend. 5; Nev. Const. art. 1, § 8.

Cases that cite this headnote

[4] Eminent Domain
Persons Entitled

The owner of the property at the time of the taking is the one entitled to compensation rather than a subsequent purchaser who owned the property when compensation was paid. U.S. Const. Amend. 5; Nev. Const. art. 1, § 8.

Cases that cite this headnote

[5] Eminent Domain
Property and Rights Subject of Compensation

The bundle of property rights that may be subject of a taking includes all rights inherent in ownership, including the inalienable right to possess, use, and enjoy the property. U.S. Const. Amend. 5; Nev. Const. art. 1, § 8.

Cases that cite this headnote

[6] **Eminent Domain**
Electricity;power lines
Eminent Domain
Time with reference to which compensation to be made
Eminent Domain
Landlord or tenant

Order granting immediate occupancy to electric utility as condemnor constituted a taking of landowner's property rights, and the right to compensation vested at that time, and therefore landowner, and not county as landowner's former lessee that purchased property before utility physically entered property to begin construction, was entitled to compensation for the permanent easement for electrical transmission lines, where the order authorized utility to permanently occupy the easement area and restrained and enjoined landowner from interfering with that occupancy and performance of the work required for the easement. U.S. Const. Amend. 5; Nev. Const. art. 1, § 8; Nev. Rev. St. § 37.100.

Cases that cite this headnote

[7] **Eminent Domain**
Effect of Abandonment or Dismissal of Proceedings

With respect to a determination of the date of a taking, the abandonment of a condemnation proceeding by a condemnor that has obtained an order of immediate occupancy merely results in an alteration in the property interest taken from full ownership to one of temporary use and occupation. U.S. Const. Amend. 5; Nev. Const. art. 1, § 8; Nev. Rev. St. §§ 37.100, 37.180(1), (2).

Cases that cite this headnote

[8] **Eminent Domain**
Necessity of just or full compensation or indemnity

The award of just compensation is a substitute for the owner's loss occasioned by the taking, and the owner sells what remains of her property. U.S. Const. Amend. 5; Nev. Const. art. 1, § 8.

Cases that cite this headnote

***1244** Appeal from a final judgment in an action for eminent domain. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Attorneys and Law Firms

Steven B. Wolfson, District Attorney, and Leslie A. Nielsen and Laura C. Rehfeldt, Deputy District Attorneys, Clark County, for Appellant.

Law Offices of Brian C. Padgett and Amy L. Sugden, Brian C. Padgett, and Jeremy B. Duke, Las Vegas, for Respondents.

BEFORE THE COURT EN BANC. [1]

OPINION

By the Court, CHERRY, J.:

This appeal challenges a district court order apportioning just compensation proceeds in an action for eminent domain. Nevada Power Company, d/b/a Nevada Energy (NV Energy), filed a complaint in eminent domain to obtain an easement for the installation of electrical transmission lines on property owned by respondent HQ Metro, LLC, and leased to appellant Clark County. In October 2013, the district court entered an order allowing NV Energy to occupy the easement area and construct the transmission lines. Before NV Energy physically entered the property to begin construction, however, HQ Metro sold the property to Clark County. The district court concluded that HQ Metro was entitled to compensation for the permanent easement because it was the owner at the time of the order granting occupancy, and the court apportioned the proceeds accordingly. On appeal, HQ Metro and Clark County dispute which one is entitled to compensation for the permanent easement.

We conclude that the right to compensation vested when the district court entered the order granting immediate occupancy in October 2013, which permitted NV Energy to permanently occupy the easement area and to construct and maintain the transmission lines. Thus, the district court properly concluded that HQ Metro, as the property's owner at the time of the taking, was entitled to compensation for the permanent easement.

FACTS AND PROCEDURAL HISTORY

In May 2013, NV Energy filed a complaint in eminent domain to acquire certain easements ***1245** to construct, operate, and maintain electrical transmission lines on property located at 400 S. Martin Luther King Boulevard in Las Vegas, Nevada. NV Energy sought both a temporary construction easement of 36,863 square feet and a permanent easement of 16,861 square feet for the transmission lines across the property. HQ Metro was named in the complaint as the property's record owner. The complaint also named Clark County as a tenant based on a recorded memorandum of lease and purchase option with four Project Alta entities.[2] The lease provided for the development and 30-year lease of office space and a parking garage on the property to Clark County for sublease to the Las Vegas Metropolitan Police Department (LVMPD), The lease also gave Clark County the option to purchase the property three years after LVMPD commenced operations on the property.

After filing the complaint, NV Energy moved for immediate occupancy under NRS 37.100. Negotiations ensued and the parties entered into a stipulation and order for immediate occupancy, conditioned on NV Energy depositing $281,000 with the district court. The stipulation provided that NV Energy was acquiring the easements for public use and authorized NV Energy to immediately occupy both the temporary and permanent easement areas for the purposes of permitting, construction, operation, and maintenance of the transmission lines and associated facilities on the property. The stipulation further restrained and enjoined HQ Metro from interfering with NV Energy's occupancy and performance of the work required for the easements. On October 15, 2013, the district court filed an order granting immediate occupancy pursuant to the stipulation's terms. Shortly thereafter, NV Energy deposited the sum with the court, and the order granting immediate occupancy was recorded against the property.

About a year after the order granting immediate occupancy was entered, but before NV Energy began construction on the project, HQ Metro sold the property to Clark County for $205 million. The September 2014 purchase and sale agreement transferred from HQ Metro to Clark County the real property together with "any and all of [HQ Metro's] rights, easements, licenses and privileges presently thereon or appertaining thereto." Attached to the agreement was a list of title exceptions that included the order granting occupancy, but the agreement did not mention the compensation from the condemnation case or who was entitled to it. The grant, bargain, and sale deed, recorded in October 2014, conveyed title to Clark County subject to an attached list of exceptions, which also included the order granting occupancy to NV Energy.

In January 2015, NV Energy entered the property to begin construction of its facilities. Construction of the transmission lines was completed four months later in May 2015.

HQ Metro and Clark County each moved for summary judgment and claimed entitlement to the just compensation proceeds. HQ Metro argued that it was entitled to the proceeds as the landowner at the time NV Energy obtained the order granting immediate occupancy on October 15, 2013. Conversely, Clark County asserted that the right to compensation did not vest until NV Energy physically entered the property to install the transmission lines in January 2015.

The district court entered a summary judgment order determining that HQ Metro was entitled to damages for the permanent easement because it owned the property when the permanent construction easement was granted in October 2013. The court also determined that LVMPD was entitled to damages under the temporary construction easement. Thereafter, the parties reached a global settlement for the total amount of $850,000 as compensation due for both the temporary and permanent easements. Consistent with its summary judgment order, the district court apportioned $775,000 to HQ ***1246** Metro as damages for the permanent easement. Clark County filed this appeal.

DISCUSSION

Under both the Nevada and United States Constitutions, the government may not take private property for public use without the payment of just compensation. Nev. Const. art. 1, § 8(6) ("Private property shall not be taken for public use without just compensation having been first made."); *see also* U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation."). The parties agree that the owner of the property at the time of the taking is entitled to the compensation proceeds but they disagree as to the event that constituted the taking. HQ Metro argues that the taking occurred when the court entered the order granting immediate occupancy in October 2013, whereas Clark County argues that the taking did not occur until NY Energy entered the property to begin construction in January 2015.

[1] **[2]** **[3]** Whether a taking has occurred presents a question of law that we review de novo. *See City of Las Vegas v. Cliff Shadows Prof'l Plaza, LLC,* 129 Nev. 1, 11, 293 P.3d 860, 866 (2013). "A taking can arise when the government regulates or physically appropriates an individual's private property. Physical appropriation exists when the government seizes or occupies private property or ousts owners from their private property." *ASAP Storage, Inc. v. City of Sparks,* 123 Nev. 639, 647, 173 P.3d 734, 740 (2007). When a condemnation proceeding is commenced, NRS 37.100 allows the district court to permit a plaintiff, upon a deposit with the court, to occupy the premises sought to be condemned pending the entry of judgment. *See* NRS 37.100(2), (6). The court may "restrain the defendant from hindering or interfering with the occupation of the premises and the doing thereon of the work required for the easement, fee or property rights." NRS 37.100(8).

[4] The owner of the property at the time of the taking is the one entitled to compensation rather than a subsequent purchaser who owned the property when compensation was paid. *Argier v. Nev. Power Co.,* 114 Nev. 137, 139, 952 P.2d 1390, 1391 (1998). In *Argier,* the power company filed a complaint to obtain an easement across land owned by the Argiers. *Id.* at 138, 952 P.2d at 1390. The district court granted immediate occupancy and the power company installed the power lines, but the Argiers sold the property to the county before the court determined the value of the easement and the amount of compensation. *Id.* at 138, 952 P.2d at 1390-91. Consequently, the power company argued it no longer had a duty to compensate the Argiers for the easement because the property was sold before the taking occurred when the agency received title in the final order of condemnation, whereas the Argiers argued that the taking occurred at the point of physical occupation of the property, before it was sold. *Id.* at 138-39, 952 P.2d at 1391. We held that the power company "effected a taking once it entered upon the land," and that equity mandates that the right to compensation vests when the condemning agency enters into possession of the landowner's property. *Id.* at 141, 952 P.2d at 1392-93. Because the Argiers' right to compensation vested when the power company entered their property, before the sale to the county, the Argiers were entitled to compensation. *Id.* at 142, 952 P.2d at 1393.

The decision in *Argier,* however, is not directly dispositive of the issue before us because, in that case, the power company physically entered the property to install the power lines before the land was sold, and, thus, the *Argier* court made no distinction between the order for immediate occupancy and the physical entry onto the land. Nonetheless, the reasoning in *Argier* is instructive. In particular, the *Argier* court explained that because compensation for a taking is intended as a substitute for the owner's lost interest in the property, the person who owns the property at the time of the taking is entitled to the compensation:

> When the government interferes with a person's possession of his/her property, the owner loses an interest in that property. The award of just compensation is a substitute for that lost interest in the property. When the owner sells what remains of her property, she does not also sell the right to compensation. If she did, the original owner ***1247** would suffer a loss and the purchaser would receive a windfall.

Id. at 140, 952 P.2d at 1392 (recognizing agreement amongst other jurisdictions on the issue).

[5] **[6]** In this case, the order granting immediate occupancy constituted a substantial governmental interference with HQ Metro's property rights. "The bundle of property rights includes all rights inherent in ownership, including the inalienable right to possess, use, and enjoy the property." *ASAP Storage,* 123 Nev. at 647, 173 P.3d at 740 (internal quotations omitted). The order authorized NV Energy to permanently occupy the easement area for the purpose of constructing and maintaining the transmission lines and associated facilities on the property, and restrained and enjoined HQ Metro from interfering with NV Energy's occupation and performance of the work required for the easement. The order restricted HQ Metro's full use and enjoyment of the property, and the entitlement to compensation is a substitute for that lost interest. When HQ Metro sold the property, it conveyed title subject to the occupancy order. Thus, we conclude that the order granting immediate occupancy constituted a taking of property rights and the right to compensation vested at that time. Because HQ Metro was the owner of the property, it was entitled to compensation for the permanent easement. [3]

[7] Clark County maintains that a taking did not occur until NV Energy could no longer abandon the proceeding, when construction on the project commenced. We reject this argument because the order granting immediate occupancy constituted an injury to HQ Metro's property rights. *See Argier,* 114 Nev. at 140, 952 P.2d at 1391 ("Damages for the taking of land or for the injury to the land not taken belong to the one who owns the land at the time of the taking or injury, and they do not pass to a subsequent grantee of the land except by a provision to that effect in the deed or by separate assignment." (quoting 29A C.J.S. Eminent Domain § 194 (1992))). Although a plaintiff may abandon the proceeding at any time until 30 days after the final judgment, if the plaintiff has been placed in possession of the premises under NRS 37.100, the defendant is entitled to damages from occupancy of the abandoned property. NRS 37.180(1), (2). Abandonment "merely results in an alteration in the property interest taken—from full ownership to one of temporary use and occupation." *United States v. Dow,* 357 U.S. 17, 26, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958). Because the order granting occupancy constitutes an injury to property rights, the right to compensation vested at that time. *See Argier,* 114 Nev. at 141, 952 P.2d at 1393 (holding that equity mandates vesting occurs when the condemning agency enters into possession of the landowner's property).

[8] Finally, Clark County argues that allowing HQ Metro to keep the condemnation proceeds will result in a windfall to HQ Metro because there is no evidence that the purchase price was discounted for any taking by NV Energy, and that an appraisal obtained by HQ Metro in 2013 did not mention the condemnation proceeding or the easement. This court will not speculate on whether the purchase price accounted for the property interest taken by the condemnation proceeding as it has no bearing on the legal issue of whether the order granting immediate occupancy constituted a taking of property rights. As we explained in *Argier,* the award of just compensation is a substitute for the owner's loss occasioned by the taking, and the owner sells what remains of her property. 114 Nev. at 140, 952 P.2d at 1392. "Presumably, the purchaser will pay the seller only for the real property interest that the seller possesses at the time of the sale and can transfer." ***1248** *Brooks Inv. Co. v. City of Bloomington,* 305 Minn. 305, 232 N.W.2d 911, 918 (1975). Moreover, Clark County had notice of the condemnation proceeding and stipulated to entry of the order granting immediate occupancy, and Clark County could have contracted for the right to the just compensation proceeds when it purchased the property from HQ Metro. *See Dow,* 357 U.S. at 27, 78 S.Ct. 1039 (rejecting an equitable argument where the purchaser had full notice of the condemnation proceeding and had "available contractual means by which he could have protected himself vis-a-vis his grantors against the contingency that his claim" for compensation would be subsequently invalidated under the law). Thus, the equities do not lie in Clark County's favor.

CONCLUSION

We conclude that the right to compensation vested when the district court entered the order for immediate occupancy, permitting NV Energy to occupy the permanent easement area and enjoining HQ Metro from interfering with that occupancy. Consequently, HQ Metro as landowner was entitled to compensation for the permanent easement, and we affirm the district court's order apportioning the proceeds.

We concur:

Douglas, C.J.

Gibbons, J.

Pickering, J.

Hardesty, J.

Stiglich, J.

All Citations

422 P.3d 1243, 134 Nev. Adv. Op. 56

Footnotes

1 The Honorable Ron D. Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

2 The Project Alta entities identified in the complaint included respondents Project Alta, LLC; Project Alta II, LLC; Project Alta, III, LLC; and Project Alta Liquidating Trust U/A/D 12/31/09, by and through Mark L. Fine & Associates. Although the nature of their interest in the property is not entirely clear from the record, they moved collectively with HQ Metro for summary judgment as the prior landowners entitled to the condemnation proceeds. Therefore, we refer to the prior landowners collectively as HQ Metro.

3 Clark County cites *Buzz Stew, LLC v. City of North Las Vegas* for the holding that a former property owner had failed to establish that a taking occurred while it owned the property, and therefore, a provision in the sales contract retaining only the right to proceeds from a future condemnation action reserved no property interest in the former owner, 131 Nev. 1, 7, 341 P.3d 646, 650 (2015). *Buzz Stew* is distinguishable, however, because here, the parties entered into a stipulation and order providing that the easements were being acquired for public use and establishing the date of occupancy as October 15, 2013. Thus, a taking occurred and the right to compensation vested while HQ Metro owned the property.

817 S.E.2d 62
Court of Appeals of North Carolina.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Plaintiff,
v.
LAXMI HOTELS OF SPRING LAKE, INC.; Ciena Capital Funding, LLC; and American Business Lending, Inc., Defendants.

No. COA17-951
|
Filed: May 15, 2018

Synopsis

Background: Department of Transportation (DOT) and hotel entered into a consent judgment, in which DOT acquired part of hotel's property through eminent domain to widen a ride. Hotel brought a motion to set aside the consent judgment, alleging that DOT did not inform hotel about a retaining wall that would limit hotel's parking spaces. The Superior Court, Cumberland County, Mary Ann Tally, entered an order setting aside the consent judgment. DOT appealed.

Holdings: The Court of Appeals, Zachary, J., held that:

[1] trial court's order setting aside parties' consent judgment did not affect a substantial right and was not immediately appealable;

[2] the Court of Appeals would grant certiorari to address the merits of whether the trial court improperly granted hotel's motion to set aside consent judgment;

[3] trial court properly exercised its discretion in granting hotel's motion for relief from judgment, even though it brought the motion after the one-year limit to bring the motion expired.

[4] evidence was sufficient to support trial court's order to aside consent judgment;

[5] hotel had no duty to request additional information regarding a retaining wall and slope easement effect; and

[6] evidence was sufficient for trial court to find that DOT did not provide just compensation to hotel.

Affirmed.

West Headnotes (22)

[1] Eminent Domain
Decisions on motion to set aside award or for new trial

Trial court's order setting aside parties' consent judgment did not affect a substantial right and was not immediately appealable in dispute regarding value of property Department of Transportation (DOT) sought to acquire from hotel through eminent domain to widen road, where the issue of just compensation for hotel's property was not fully litigated. N.C. Gen. Stat. Ann. § 7A-27(b).

Cases that cite this headnote

[2] Judgment
Final judgment

A judgment is final if it leaves nothing further to be done in the trial court. N.C. Gen. Stat. Ann. § 7A-27(b).

Cases that cite this headnote

[3] Motions
Form and Requisites of Orders

An order is interlocutory if it does not determine the issues but directs some further proceeding preliminary to final decree. N.C. Gen. Stat. Ann. § 7A-27(b).

Cases that cite this headnote

[4] Appeal and Error
Interlocutory and Intermediate Decisions

Because an interlocutory order is not yet final, with few exceptions, no appeal lies to an appellate court from an interlocutory order or

ruling of the trial judge. N.C. Gen. Stat. Ann. § 7A-27(b).

Cases that cite this headnote

[5] **Appeal and Error**
Interlocutory and Intermediate Decisions
Appeal and Error
Certificate as to grounds

Notwithstanding its lack of finality, an interlocutory order may be immediately appealed if the trial court certifies that there is no just reason for delay of the appeal, or if the order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment. N.C. Gen. Stat. Ann. § 7A-27(b)(3)(a); N.C. R. Civ. P. 54(b).

Cases that cite this headnote

[6] **Appeal and Error**
Interlocutory and Intermediate Decisions

In the context of an interlocutory order that may be immediately appealed since it involves a substantial right, a "substantial right" is a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which one is entitled to have preserved and protected by law. N.C. Gen. Stat. Ann. § 7A-27(b)(3)(a).

Cases that cite this headnote

[7] **Appeal and Error**
Interlocutory and Intermediate Decisions

In the context of an interlocutory order that may be immediately appealed since it involves a substantial right, the Court of Appeals considers whether a right is substantial for purposes of determining if an order is immediately appealable, on a case-by-case basis. N.C. Gen. Stat. Ann. § 7A-27(b)(3)(a).

Cases that cite this headnote

[8] **Appeal and Error**
On motion for judgment

In the context of an interlocutory order that may be immediately appealed since it involves a substantial right, collateral estoppel triggers a substantial right since it ensures that parties are not forced to re-litigate issues that were fully litigated and actually determined in previous legal actions.

Cases that cite this headnote

[9] **Certiorari**
Nature and scope of remedy in general

Appropriate circumstances exist to issue a writ of certiorari when review will serve the expeditious administration of justice or some other exigent purpose. Rules App.Proc., Rule 21(a).

Cases that cite this headnote

[10] **Eminent Domain**
Review on certiorari

The Court of Appeals would grant certiorari to address the merits of whether trial court properly granted hotel's motion to set aside consent judgment in dispute with the Department of Transportation (DOT) regarding value of property DOT sought to acquire from hotel through eminent domain, even though the judgment was not immediately appealable; DOT had more than 1,750 condemnation cases pending, of which approximately 95% were settled by consent judgment, and power to acquire rights of way and other interests by condemnation was crucial to DOT's mission. N.C. R. Civ. P. 60(b).

Cases that cite this headnote

[11] **Appeal and Error**
Grant of relief in general

The Court of Appeals reviews a trial court's order granting a motion for relief from final

judgment for abuse of discretion. N.C. R. Civ. P. 60(b).

Cases that cite this headnote

[12] **Appeal and Error**

Abuse of discretion

A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason.

Cases that cite this headnote

[13] **Judgment**

Right to relief in general

Trial court properly exercised its discretion in granting hotel's motion for relief from judgment for any reason justifying relief from operation of the judgment in dispute between Department of Transportation and hotel regarding value of property Department of Transportation (DOT) sought to acquire from hotel through eminent domain to widen road, even though hotel brought the motion after the one-year limit to bring the motion expired, where construction began one year after consent judgment was filed, and was not completed until more than one year after entry of the consent judgment. N.C. R. Civ. P. 60(b)(6).

Cases that cite this headnote

[14] **Judgment**

Time for Application

One of the conditions precedent that must be proven before a court will consider a motion for relief from final judgment is timeliness. N.C. R. Civ. P. 60(b).

Cases that cite this headnote

[15] **Judgment**

Time for Application

A motion for relief from a final judgment must be brought forward within a reasonable time. N.C. R. Civ. P. 60(b).

Cases that cite this headnote

[16] **Judgment**

Time for Application

What constitutes a reasonable time for bringing a motion for relief from final judgment depends on the circumstances of the individual case. N.C. R. Civ. P. 60(b).

Cases that cite this headnote

[17] **Judgment**

Opening or vacating judgment

Evidence was sufficient to support trial court's order to aside consent judgment based on extraordinary circumstances in dispute regarding value of property Department of Transportation (DOT) sought to acquire from hotel through eminent domain, in which DOT allegedly did not inform hotel that construction plans included a retaining wall that would cause hotel to lose parking spaces; trial court accepted hotel president's version of events, including that DOT did not adequately inform hotel that it changed its project plans, and its second offer for the property that was the same amount as hotel's counteroffer was due to the change in plans, even if DOT maintained that its right of way agent informed president. N.C. R. Civ. P. 60(b)(6).

Cases that cite this headnote

[18] **Judgment**

Right to relief in general

Relief is appropriate under the rule governing relief from final judgments if extraordinary circumstances exist and justice demands relief. N.C. R. Civ. P. 60(b)(6).

1 Cases that cite this headnote

[19] **Judgment**

Right to relief in general

While not technically a "catch-all" provision, the provision of rule governing motions for

relief from final judgment that provides for relief if extraordinary circumstances exist and justice demands relief, provides trial courts with a vast reservoir of equitable power; the provision gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice. N.C. R. Civ. P. 60(b)(6).

1 Cases that cite this headnote

[20] Judgment

Discretion of court

Exercise of equitable power to grant motion for relief from final judgment is within the full discretion of the trial judge. N.C. R. Civ. P. 60(b)(6).

1 Cases that cite this headnote

[21] Eminent Domain

Negotiations, offer to purchase, and inability to agree with owner

Hotel had no duty to request additional information regarding a retaining wall and slope easement effects in its dispute with Department of Transportation (DOT) regarding value of property DOT sought to acquire from hotel through eminent domain to widen road, in which DOT allegedly did not inform hotel that construction plans included a retaining wall that would cause hotel to lose parking spaces; dispute did not involve an arm's-length transaction, since DOT was exercising eminent domain and taking the property in a condemnation proceeding and hotel had no option but to enter into the transaction, and DOT told hotel president that the State was looking out for president's best interest. U.S. Const. Amend. 5.

Cases that cite this headnote

[22] Eminent Domain

Depreciation of value

Evidence was sufficient for trial court to find that Department of Transportation (DOT) did not provide just compensation to hotel when it acquired part of its property through eminent domain and constructed a retaining wall that reduced hotel's parking spaces, supporting relief from consent judgment; DOT's appraisal did not account for the loss of hotel's parking spaces, even though DOT right of way agent testified that normally, that would be considered in an appraisal, appraisal did not account for height of retaining wall or loss of visibility suffered by the hotel, and sum agreed upon as just compensation was the same amount the parties had agreed upon two weeks prior to the revision of DOT's plans, in which the retaining wall was added to the plans. U.S. Const. Amend. 5; N.C. R. Civ. P. 60(b)(6).

Cases that cite this headnote

***65** Appeal by plaintiff from order entered 18 April 2017 by Judge Mary Ann Tally in Cumberland County Superior Court. Heard in the Court of Appeals 22 February 2018. Cumberland County, No. 13 CVS 6416

Attorneys and Law Firms

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Opinion

ZACHARY, Judge.

The North Carolina Department of Transportation ("DOT") appeals from the trial court's order granting defendant Laxmi Hotels of Spring Lake's ("Laxmi") 60(b) motion to set aside the parties' Consent Judgment. After careful review, we affirm.

I. Background

Laxmi owns real property abutting South Main Street in Spring Lake, upon which it operates a Super 8 Motel franchise ("the Hotel"). DOT intended to acquire a portion of the Hotel's property in order to widen and improve South Main Street. On 8 February 2012, DOT right of way agent Greg Kolat met with Laxmi's president Dev Rajababoo and informed him that DOT would be exercising its power of eminent domain to take a portion of the Hotel's property in order to execute DOT's South Main Street project. Kolat informed Rajababoo that DOT was going to acquire a small portion of the property fronting South Main Street in addition to taking a permanent utility easement along the frontage of the property. According to Kolat's testimony and the DOT Negotiating Diary admitted into evidence, Kolat explained the DOT "acquisition procedure and why it is fair" to Rajababoo.

DOT maintains that Kolat informed Rajababoo that DOT would also build a retaining wall to run adjacent to South Main Street along the Hotel property; Rajababoo testified that no one from DOT told him about the retaining wall. The appraisal that DOT provided to Rajababoo showed a retaining wall along the property's frontage, but did not indicate the height of the prospective wall. Rajababoo also testified that DOT assured him that the Hotel would not lose any parking spaces as a result of the taking, and the appraisal did not indicate a loss of parking spaces.

Based on these plans, DOT's initial appraisal reflected a $25,700 "offer of just compensation" for the taking. On 6 June 2012, Laxmi made a counteroffer of $35,000. DOT accepted Laxmi's counteroffer; however, Laxmi was unable to obtain the consent of one of its lenders, so the parties did not complete the settlement at that time.

At some point after accepting Laxmi's counteroffer, DOT made various changes to its South Main Street project plans. These changes were reflected in a modified appraisal summary. The modified appraisal indicated that the right of way would be enlarged, and added a temporary construction easement and a slope easement. DOT provided Laxmi with a copy of the revised offer and appraisal summary, but Laxmi maintains that it was never orally informed by DOT of the change in construction plans. The revised appraisal reflected a settlement offer to Laxmi of ***66** $35,000 as just compensation for the taking, which Laxmi accepted. According to Laxmi, it believed that the increase of DOT's offer to $35,000 was in response to Laxmi's counteroffer rather than in response to an increase in the scope of the taking. On 23 July 2014, the parties entered into a Consent Judgment in which the parties agreed to settle for $35,000 as just compensation for the taking. DOT prepared the Consent Judgment.

Laxmi contends that it did not realize that DOT had changed its project plans until after construction began. The DOT project eliminated several of Laxmi's parking spaces, which caused the Hotel's parking lot to be in violation of local codes. In addition, when the Department completed construction of the retaining wall, the wall was roughly fifteen feet tall, completely blocking the Hotel's visibility from the street. The Hotel, which prior to the taking was fully visible from the main thoroughfares in the area, was, according to Rajababoo, now in a "dungeon." The pictures taken after the construction show the Hotel to be invisible from the main roadways because of the retaining wall.

DOT maintains that it informed Laxmi of the plan changes by providing Laxmi with copies of the modified appraisal and increased settlement offer. In support of this contention, DOT points to the Consent Judgment, which incorporated by reference the revised project plans. However, the Consent Judgment "states there is a slope easement under a heading entitled 'TEMPORARY CONSTRUCTION EASEMENT,' but does not mention the height of the retaining wall or the loss of parking spaces."

In contrast, Rajababoo testified that he was never informed of the changes to the plans regarding the loss of parking spaces or the increased height of the retaining wall. At trial, no one from DOT testified that he or she told Laxmi or Rajababoo that DOT's plans had changed. While the documents that DOT provided to Laxmi mentioned a "retaining wall," no document, including the modified appraisal summary, referenced a loss of parking spaces. Moreover, while the retaining wall was mentioned, none of the documents indicated how tall that wall would be.

Rajababoo testified that he first discovered that the Hotel was going to lose parking spaces "[w]hen they were already gone. ... They just started the work. And one fine day I come to work and all the land is bulldozed, and there's—they are putting in dirt to make a ramp to

come in. ... Nobody had ever approached me for that." Laxmi maintains that "the construction of the wall in front of [the] hotel has severely impacted the value of the hotel ... and that the taking of the additional parking space from the available usable parking spaces has also severely impacted the value of the hotel." When asked whether Laxmi would have entered into the Consent Judgment if it had been told about the wall or the loss of parking spaces, Rajababoo responded, "Absolutely no way."

On 15 February 2017, Laxmi filed a motion to set aside the Consent Judgment pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure. Laxmi's motion alleged that in persuading Laxmi to enter into the Consent Judgment, DOT misrepresented (1) the nature and extent of Laxmi's property that DOT intended to take, and (2) the effect that the taking would ultimately have on "the ability of [Laxmi] to operate or work on the site after the taking."

A hearing on Laxmi's motion was conducted before the Honorable Mary Ann Tally in Cumberland County Superior Court. Judge Tally determined that Laxmi "reasonably relied upon the representations made by [DOT]" and that Laxmi "was never informed of the loss of parking spaces or the change in the height of the retaining wall placed in front of the Hotel." Based on these facts, Judge Tally concluded that DOT "did not adequately inform [Laxmi] of the extent of the taking of the Hotel property, and did not provide just compensation to the Hotel." Judge Tally concluded that these facts warranted the setting aside of the Consent Judgment pursuant to Rule 60(b)(6) of the North Carolina Rules of Civil Procedure. Accordingly, Judge Tally granted Laxmi's motion and ordered that the case proceed to trial in order to determine the appropriate amount of compensation for the taking. DOT timely appealed.

***67** On appeal, DOT argues that the trial court erred in setting aside the Consent Judgment (1) because Laxmi's motion was not timely, and (2) because there was no substantive basis to justify overturning the judgment.

II. Grounds for Appellate Review

We initially consider whether this Court has jurisdiction to review the trial court's order granting Laxmi's Rule 60(b) motion.

DOT maintains that this Court has jurisdiction over the trial court's order setting aside the Consent Judgment because the trial court's order "affects a final judgment" pursuant to N.C. Gen. Stat. § 7A-27(b)(1). However, even if we deem DOT's appeal to be interlocutory, DOT asserts that the trial court's order is immediately appealable because it affects a substantial right. Finally, in the event that this Court determines that the trial court's order does not affect a substantial right, DOT has filed a petition for writ of certiorari asking this Court to assert jurisdiction and address the merits of its arguments.

A. Interlocutory Appeals

[1] **[2]** **[3]** **[4]** This Court customarily entertains appeals only from final judgments. *See* N.C. Gen. Stat. § 7A-27(b) (2017). A judgment is final if it "leaves nothing further to be done in the trial court." *Campbell v. Campbell*, 237 N.C. App. 1, 3, 764 S.E.2d 630, 632 (2014) (citing *Steele v. Hauling Co.*, 260 N.C. 486, 491, 133 S.E.2d 197, 201 (1963)). In contrast, "[a]n order is interlocutory 'if it does not determine the issues but directs some further proceeding preliminary to final decree.' " *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978) (quoting *Greene v. Laboratories, Inc.*, 254 N.C. 680, 693, 120 S.E.2d 82, 91 (1961)). Because an interlocutory order is not yet final, with few exceptions, "no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge[.]" *Consumers Power v. Power Co.*, 285 N.C. 434, 437, 206 S.E.2d 178, 181 (1974).

DOT first argues that even though the order setting aside the parties' Consent Judgment was interlocutory, this Court nevertheless "has jurisdiction to review the trial court's order because it set aside a final judgment." This argument is not persuasive. Judge Tally's order set aside the Consent Judgment in order for the parties "to put on evidence at trial ... to determine the amount of damages to which [Laxmi] is entitled pursuant to the General Statutes of North Carolina." Clearly, as it contemplates further proceedings at the trial level on the issue of just compensation—the crux of the Consent Judgment—Judge Tally's order is interlocutory. *See Campbell*, 237 N.C. App. at 3, 764 S.E.2d at 632.

[5] **[6]** **[7]** However, notwithstanding its lack of finality, an interlocutory order may be immediately appealed if "the trial court certifies, pursuant to N.C.G.S. § 1A-1, Rule 54(b), that there is no just reason for delay of the

appeal," *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (citation omitted), or if the "order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment." *Consumers Power*, 285 N.C. at 437, 206 S.E.2d at 181 (citation omitted); N.C. Gen. Stat. § 7A-27(b)(3)(a) (2017). "A substantial right is 'a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which one is entitled to have preserved and protected by law: a material right.' " *Gilbert v. N.C. State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009) (quoting *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976)). "We consider whether a right is substantial on a case-by-case basis." *Id.*

In the instant case, the trial court did not certify the order setting aside the Consent Judgment for immediate appellate review. Nevertheless, DOT argues that "the trial court's setting aside the consent judgment deprived the Department of a substantial right, *i.e.*, the benefit of its bargain in the court-sanctioned settlement of the case." **[PWC p 15]** In support of its argument, DOT turns our attention to *Turner v. Hammocks Beach Corp.* We do not find *Turner* persuasive in the case at bar.

In *Turner*, the defendant had previously "filed a declaratory judgment action seeking to quiet title" to a tract of property which ***68** was the subject of a charitable trust. *Turner,* 363 N.C. at 557, 681 S.E.2d at 773. The plaintiffs contested the quiet title action and the case was set for trial. *Id.* However, "[p]rior to trial ..., the parties reached a settlement and signed a consent judgment, which was entered by the trial court[.]" *Id.* Nearly twenty years later, the plaintiffs brought an action seeking termination of the trust "alleging that fulfillment of the trust terms has become impossible or impracticable[.]" *Id.* The defendant filed a motion to dismiss the plaintiffs' action on the grounds that the "plaintiffs' rights to the property now in question ... had already been determined by [a prior] consent judgment and that relitigation is barred by collateral estoppel." *Id.* The trial court denied the defendant's motion to dismiss, which the defendant argued was immediately appealable because "the denial of a motion to dismiss a claim for relief affects a substantial right when the motion to dismiss makes a colorable assertion that the claim is barred under the doctrine of collateral estoppel." *Id.* at 558, 681 S.E.2d at 773. Our Supreme Court agreed with the defendant, and explained that "[u]nder the collateral estoppel doctrine, 'parties and parties in privity with them are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination.' " *Id.* (quoting *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973)) (internal citations omitted) (alteration omitted). Thus, because the doctrine of collateral estoppel "is designed to prevent repetitious lawsuits," our Supreme Court concluded that the defendant had "a substantial right to avoid litigating issues that have already been determined by a final judgment." *Id.* at 558, 681 S.E.2d at 773.

[8] Here, DOT cites the language from *Turner* and maintains that the trial court's order is immediately appealable because "parties have a substantial right to avoid litigating issues that have already been determined by a final judgment[,]" that is, the parties' Consent Judgment. *Id.* However, DOT overlooks "*why* our appellate courts hold that ... collateral estoppel" triggers a substantial right: it "ensures that parties ... are not forced to re-litigate issues that were *fully litigated* and *actually determined* in previous legal actions." *Campbell*, 237 N.C. App. at 5, 764 S.E.2d at 633 (citing *Turner*, 363 N.C. at 558, 681 S.E.2d at 773) (emphasis added). In this instance, the trial court's order setting aside the parties' Consent Judgment "will not force [DOT] to re-litigate [just compensation] issues that already were determined by a court in an earlier proceeding[,]" *Campbell*, 237 N.C. App. at 5, 764 S.E.2d at 633, nor would the denial of an immediate appeal require DOT to endure "repetitious lawsuits." *Turner,* 363 N.C. at 558, 681 S.E.2d at 773. In fact, the issue of just compensation was never "fully litigated"; rather, the Consent Judgment prevented the need for litigation, as it was designed to do. *Id.* "Indeed, in the only similar proceeding between the parties," Laxmi agreed to accept a settlement of $35,000 as just compensation for DOT's taking, thereby "preventing the trial court from determining that issue on the merits." *Id.* In effect, DOT

> argues not that [it] is compelled to re-litigate an issue previously determined by a court, but instead that [it] must fully litigate—for the first time—an issue that [it] thought was precluded by the [consent] judgment [it] obtained. But that

> argument can be made in virtually every Rule 60(b) case and our appellate courts have long rejected it as a basis for immediate appeal.

Campbell, 237 N.C. App. at 5, 764 S.E.2d at 633 (citing *Waters*, 294 N.C. at 208, 240 S.E.2d at 344 (1978) and *Robinson v. Gardner*, 167 N.C. App. 763, 768, 606 S.E.2d 449, 452 (2005)). Collateral estoppel is thus no bar in the instant case. *See Turner*, 363 N.C. at 558-59, 681 S.E.2d at 773-74 ("To successfully assert collateral estoppel ..., defendant would need to show that [an] earlier suit resulted in a final judgment on the merits [and] that the issue in question was identical to an issue *actually litigated* and necessary to the judgment[.]") (citation and quotation marks omitted) (emphasis added).

In that "no court has yet adjudicated" the just compensation issue in the instant case, DOT "cannot rely on our collateral estoppel precedent to immediately appeal the trial court's Rule 60(b) order." *Id.* Moreover, while DOT points out that the ultimate jury verdict in the instant case "may not be as ***69** favorable as the" Consent Judgment and that DOT would be liable for court costs and "interest on a jury verdict[,]" it has not offered an explanation as to why a verdict that demonstrates that the Consent Judgment failed to provide Laxmi with just compensation would deprive *DOT* of a substantial right. *See e.g.*, *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) ("It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right[.]"). Accordingly, we conclude that the trial court's order setting aside the parties' Consent Judgment does not affect a substantial right and is therefore not immediately appealable.

B. Petition for Writ of Certiorari

DOT has filed a petition for writ of certiorari asking this Court to invoke its powers under Rule 21 of the North Carolina Rules of Appellate Procedure in order to address the merits of the instant appeal, notwithstanding its interlocutory nature.

[9] "The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals ... when no right of appeal from an interlocutory order exists[.]" N.C. R. App. P. Art. V, Rule 21(a) (2017). Such "appropriate circumstances" exist when " 'review will serve the expeditious administration of justice or some other exigent purpose.' " *Amey v. Amey*, 71 N.C. App. 76, 79, 321 S.E.2d 458, 460 (1984) (quoting *Stanback v. Stanback*, 287 N.C. 448, 453, 215 S.E.2d 30, 34 (1975)).

[10] In its petition for writ of certiorari, DOT explains that its "power to acquire rights of way and other interests by ... condemnation" is crucial to its mission as a state department. According to DOT, it "has more than 1750 condemnation cases pending ... across the State," approximately ninety-five percent of which are settled by consent judgment. We choose to exercise our discretion to grant certiorari so that this Court can address the merits of this matter.

III. Rule 60(b)

Because we choose to grant DOT's petition for writ of certiorari, we must determine whether the trial court erred when it granted Laxmi's Rule 60(b) motion to set aside the Consent Judgment.

Where a final judgment or order has been entered in a particular case, Rule 60(b) will nevertheless allow for a party to obtain relief from that judgment or order "[o]n motion and upon such terms as are just[.]" N.C. Gen. Stat. § 1A-1, Rule 60(b) (2017). "Rule 60(b) has been described as 'a grand reservoir of equitable power to do justice in a particular case.' " *Sloan v. Sloan*, 151 N.C. App. 399, 404, 566 S.E.2d 97, 101 (2002) (quoting *Branch Banking & Trust Co. v. Tucker*, 131 N.C. App. 132, 137, 505 S.E.2d 179, 182 (1998)). Pursuant to Rule 60(b), a trial court may relieve a party from operation of a final judgment for the following reasons:

> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> ...
>
> (6) Any other reason justifying relief from the operation of the judgment.

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2017).

[11] **[12]** This Court reviews a trial court's order granting a Rule 60(b) motion for abuse of discretion. *State ex rel. Davis v. Adams*, 153 N.C. App. 512, 515, 571 S.E.2d 238, 240 (2002) (citations omitted). "Our Supreme Court has stated that this Court should not disturb a discretionary ruling of a trial court unless it 'probably amounted to a substantial miscarriage of justice[.]' " *Sloan v. Sloan*, 151 N.C. App. at 404, 566 S.E.2d at 101 (quoting *Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982)). Otherwise, "[a] judge is subject to reversal for abuse of discretion only upon a showing by a litigant ***70** that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980) (citation omitted).

A. Timeliness of Laxmi's Rule 60(b) Motion

[13] DOT first argues that the trial court erred in granting Laxmi's Rule 60(b) motion because Laxmi's motion was not timely filed.

[14] **[15]** **[16]** "One of the conditions precedent that must be proven before a court will consider a Rule 60(b) motion is timeliness." *Bruton v. Sea Captain Properties, Inc.*, 96 N.C. App. 485, 488, 386 S.E.2d 58, 59 (1989). A Rule 60(b) motion for relief made pursuant to subsections (b)(1), (2), or (3), *supra*, must be made "not more than one year after the judgment, order, or proceeding was entered or taken." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2017). Conversely, a motion made pursuant to Rule 60(b)(6) (on the grounds of any other reason justifying relief), must only be brought forward "within a reasonable time[.]" *Id.* "What constitutes a reasonable time depends on the circumstances of the individual case." *McGinnis v. Robinson*, 43 N.C. App. 1, 8, 258 S.E.2d 84, 88 (1979) (citation omitted).

In the instant case, the trial court set aside the parties' Consent Judgment pursuant to Rule 60(b)(6). In order for the trial court to have properly granted Laxmi's Rule 60(b) motion pursuant to Rule 60(b)(6), Laxmi must have made its motion "within a reasonable time." DOT, however, maintains that the Consent Judgment could have been set aside *only* "on the limited grounds of fraud, mutual mistake, duress, or undue influence" pursuant to Rule 60(b)(3), rather than Rule 60(b)(6). DOT argues that Laxmi cannot circumvent the one year time limitation imposed under Rule 60(b)(3) "simply by failing to identify its arguments as falling within [that] section[ ]." Therefore, DOT contends that the trial court erred in granting Laxmi's Rule 60(b) motion because the motion was not brought within the requisite one year period under Rule 60(b)(3).

DOT correctly notes that "Rule 60(b)(6) cannot be the basis for a motion to set aside judgment if the facts supporting it are facts which more appropriately would support one of the five preceding clauses." *Bruton*, 96 N.C. App. at 488, 386 S.E.2d at 59-60. "We have repeatedly held that a movant may not be allowed to circumvent the requirements for clauses (b)(1) through (b)([3]) by 'designating [the] motion as one made under Rule 60(b)(6)[.]' " *Id.* at 488, 386 S.E.2d at 60 (quoting *Akzona, Inc. v. American Credit Indem. Co.*, 71 N.C. App. 498, 505, 322 S.E.2d 623, 629 (1984)).

That facts illustrative of fraud and misrepresentation exist, however, does not mean that the trial court is limited to applying those facts as grounds for relief under Rule 60(b)(3). A trial court will err in couching a Rule 60(b) order in terms of Rule 60(b)(6) only to the extent that "the facts supporting [the motion] are facts which *more appropriately* would support" judgment under Rule 60(b)(3) rather than under Rule 60(b)(6). *Bruton*, 96 N.C. App. at 488, 386 S.E.2d at 59-60 (emphasis added). Even where a case involves various indicia of fraud or misrepresentation, relief may be appropriate pursuant to Rule 60(b)(6) if those facts are accompanied by circumstances that "justify[ ] relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2017).

We conclude that the trial court did not abuse its discretion in concluding that the facts of the instant case more appropriately supported relief pursuant to Rule 60(b)(6), as explained in subsection *B* below. Accordingly, in order for Laxmi to be entitled to relief from the judgment pursuant to Rule 60(b)(6), Laxmi must have

made its Rule 60(b) motion "within a reasonable time." N.C. Gen. Stat. § 1A-1, Rule 60(b) (2017).

In the instant case, we find no abuse of discretion on the part of the trial court in concluding that, under the particular circumstances of the case, Laxmi brought its Rule 60(b) motion within a reasonable period of time. While the Consent Judgment was filed on 23 July 2014, construction on the retaining wall did not begin until almost one year later, on 19 May 2015. The retaining wall was not completed until 22 October 2015. As the trial court noted, Laxmi "could not have sought relief from the judgment less than one (1) ***71** year after entry of the consent judgment because construction on the wall and the slope easement resulting in the loss of parking spaces was not completed until more than one (1) year after the entry of the consent judgment." Laxmi then filed its motion to set aside the Consent Judgment less than a year and a half after construction of the wall had completed. This, according to DOT, was an unreasonable delay. We do not find a year and a half delay to be so inherently unreasonable as to constitute an abuse of discretion. Rather, given the complexities of this case, we conclude that the trial court did not abuse its discretion when it determined that Laxmi's "motion to set aside the judgment was brought within a reasonable time pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure."

B. Substantive Grounds for Laxmi's Rule 60(b) Motion

[17] Lastly, the Department argues that the trial court erred in setting aside the Consent Judgment because there was no substantive basis to justify the trial court's order. We disagree.

[18] **[19]** **[20]** As explained *supra*, Rule 60(b)(6) "authorizes relief from final judgments for 'any other reason justifying relief from the operation of the judgment.' " *Lumsden v. Lawing*, 117 N.C. App. 514, 517, 451 S.E.2d 659, 661 (1995). "Relief is appropriate under Rule 60(b)(6) if 'extraordinary circumstances exist' and 'justice demands relief.' " *Id.* at 518, 451 S.E.2d at 662 (quoting *Thacker v. Thacker*, 107 N.C. App. 479, 481, 420 S.E.2d 479, 480 (1992)). While not technically a "catch-all" provision, Rule 60(b)(6) provides trial courts with a "vast reservoir of equitable power." *Lumsden*, 117 N.C. App. at 517, 451 S.E.2d at 661 (citation and quotation marks omitted). "The broad language of clause (6) gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice." *Brady v. Chapel Hill*, 277 N.C. 720, 723, 178 S.E.2d 446, 448 (1971) (citation and quotation marks omitted). Exercise of this equitable power is within the full discretion of the trial judge. *Thacker*, 107 N.C. App. at 482, 420 S.E.2d at 480 (citation omitted).

Initially, we note that DOT has not argued before this Court that the trial court abused its discretion when it concluded that the facts of the present case were sufficient to support the trial court's grant of relief to Laxmi pursuant to Rule 60(b)(6). Rather, DOT directs our attention to the conflicting evidence presented at the hearing to support its argument that there was not a sufficient showing of *fraud* to justify relief pursuant to Rule 60(b)(3). As explained *supra*, a trial court is not prevented from granting relief pursuant to Rule 60(b)(6) merely because the "extraordinary circumstances" involved contain aspects of fraud or misrepresentation.

In the instant case, we agree with Laxmi that extraordinary circumstances existed to support, and that justice so demanded, the trial court's setting aside of the Consent Judgment pursuant to Rule 60(b)(6).

The record is replete with evidence to support the trial court's conclusion that DOT "did not adequately inform [Laxmi] of the extent of the taking of the Hotel property." For instance, DOT maintains that its second offer of $35,000 provided notice to Laxmi that DOT had changed its project plans since the initial offer of $25,700. However, DOT's modified offer of $35,000—which DOT contends reflected the amended calculation of just compensation in light of the plan revisions—was the exact amount of Laxmi's counteroffer to DOT's initial offer of $25,700. Rajababoo testified that DOT "didn't tell me [the updated $35,000 offer] was for the change. That's what we had asked for. There was no change mentioned to me. It was the amount we had countered with[.]" DOT, on the other hand, maintains that its "right of way agent explained the plan changes to Laxmi[.]" As the sole judge of credibility, the trial judge acted well within her discretion when she accepted Laxmi's version of events. *See e.g.*, *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994) ("We note that it is within the trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial."). The same principle applies to the remaining conflicting testimony that DOT urges us to consider on appeal.

***72** **[21]** Additionally, in attacking the substantive grounds on which the Consent Judgment was set aside, DOT maintains that "Laxmi, through reasonable diligence, could have requested additional information regarding the retaining wall and slope easement effects." Thus, according to DOT, it "had no duty to disclose additional information absent a request for it and violated no such duty." This contention is surprising, however, considering the representations made by the DOT Right of Way agent and the fact that Laxmi had no option but to enter into a transaction with DOT.

The present case does not involve two entities that were conducting arm's-length negotiations, in which it was clear that neither party had any incentive to act against its best interest. In fact, Kolat represented to Rajababoo that this was not a regular arm's-length transaction. Kolat's testimony was unambiguous: he explained to Rajababoo that "the State's ... looking out for ... [the landowner's] best interest ...."

> Q.... Line Item No. 2, it says, "Did you explain acquisition procedure and why it is fair," and a box mark is checked, what does that indicate? Can you just describe for us what you mean by explaining the acquisition procedure and why it's fair?
>
> A. The process—
>
> Q. Yeah.
>
> A. —of the appraisal and explaining to them what's going to take place on their property, explain the process of fair market value, just compensation to the property owner, and I guess that's the way, you know, that *the State's, you know, looking out for, you know, their best interest, too.*
>
> Q. So the State is looking out for the landowner's best interest?
>
> A. Yes.
>
> Q. Did you tell them that—
>
> THE COURT: Wait a minute. What did you just say?
>
> THE WITNESS: I said the State would be—you know, they're concerned about the—you know, the property owner—
>
> THE COURT: Uh-huh. Uh-huh.
>
> THE WITNESS: —and how it affects what they're doing.
>
> * * *
>
> Q. (By Mr. Dantinne) And what do you mean by why it is fair?
>
> A. I can't answer that. I don't know.
>
> Q. Did you check the box saying that you explained why it was fair?
>
> A. Well, yes, I explained it. *It's fair. It's the process. It's the DOT's policies and procedures.*
>
> Q. Did you explain to him—
>
> A. I followed the rules.
>
> Q. *Did you explain to him that the appraisal conducted on the property is fair?*
>
> A. *Yes, it would be fair.* And he has the opportunity to get one himself, also.
>
> Q. Did you give him the appraisal that you told him was fair?
>
> A. Yes.

In contrast to DOT's assertion that it "had no duty to disclose additional information," DOT was obligated to deal in a fair manner with Laxmi. The transaction was a *condemnation* proceeding—that is, a forced sale of Laxmi's private property for public use. As such, DOT was *required* to provide Laxmi with just compensation. *Eller v. Bd. of Educ.*, 242 N.C. 584, 586, 89 S.E.2d 144, 146 (1955) ("When private property is taken for public use, just compensation must be paid."); *Dep't of Transp. v. Rowe*, 353 N.C. 671, 676, 549 S.E.2d 203, 208 (2001) ("Just compensation is clearly a fundamental right under both the United States and North Carolina Constitution.").

Such constitutional protections do not exist in ordinary arm's-length transactions, which is precisely why the facts at hand are not compatible with, and would not "more appropriately" support, the traditional elements of fraud and misrepresentation. *Bruton*, 96 N.C. App. at 488, 386 S.E.2d at 59-60. However, we find no abuse of discretion

on the part of the trial court in concluding that the various *indicia* of fraud and misrepresentation, at the very least, established that DOT "did not adequately inform [Laxmi] of the extent of the taking of the Hotel property." Moreover, in light of the constitutional protections at hand, we are satisfied that the fact that DOT inadequately informed Laxmi ***73** of the extent of its taking was sufficient to establish "(1) that extraordinary circumstances exist, and (2) that justice demands relief." *Sloan*, 151 N.C. App. at 405, 566 S.E.2d at 101 (citing *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987)). Accordingly, we are not convinced that the trial court abused its discretion when it concluded that relief was appropriate pursuant to Rule 60(b)(6) in light of such inadequate information.

[22] In addition to its determination that DOT did not adequately inform Laxmi of the extent of the taking of the Hotel property, the trial court also determined that DOT did not provide just compensation to Laxmi. This finding is fully supported by the evidence.

Just compensation is measured by "the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking[.]" N.C. Gen. Stat. § 136-112(1) (2017); *Dep't of Transp. v. Mahaffey*, 137 N.C. App. 511, 517, 528 S.E.2d 381, 385 (2000) ("The measure of compensation provided by section 136-112 ... provides 'just compensation' within the scope of both the federal and state constitutions.").

It is undisputed that the amount reflected in DOT's second appraisal did not account for the loss in parking spaces. The DOT right of way agent who modified the appraisal testified that normally, "the taking of parking spaces would be considered" in an appraisal. The appraisal also did not account for the height of the retaining wall or the loss of visibility suffered by the Hotel. Moreover, DOT agreed to pay Laxmi the sum of $35,000 as just compensation for the taking, which was the same amount that the parties had agreed upon as just compensation two weeks *prior to* the revision of DOT's plans. If the sum of $35,000 was just compensation in May 2012 for a lesser taking, then it could not be just compensation in July 2014 after DOT substantially increased the scope of the taking. This evidence supports the trial court's finding that the Consent Judgment did not provide just compensation to Laxmi, and the trial court did not abuse its discretion in concluding that, in light of such constitutional deficiency, justice demanded relief pursuant to Rule 60(b)(6).

Accordingly, we conclude that the evidence supports the trial court's determination that Laxmi was not adequately informed of the extent of DOT's taking of the Hotel property, and that the Consent Judgment did not provide just compensation for DOT's taking. In light of the constitutional protections involved, the trial court did not abuse its discretion when it concluded that these facts warranted the setting aside of the Consent Judgment pursuant to Rule 60(b)(6).

IV. Conclusion

For the reasons expressed herein, the trial court's order setting aside the parties' Consent Judgment is

AFFIRMED.

Judges HUNTER, JR. and DIETZ concur.

All Citations

817 S.E.2d 62

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Supreme Court of Appeals of West Virginia.

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, and Byrd White, Interim Secretary/ Commissioner, Petitioners Below, Petitioners
v.
Victor Morton ECHOLS, Regina Louise Smith, Ramona Gail Ellison, and Veronica Jane Delbrugge, Defendants Below, Respondents

No. 18-0226
|
Submitted: January 9, 2019
|
Filed: April 12, 2019

Synopsis

Background: Landowners, after the state Department of Transportation brought condemnation proceedings for a road project, brought counterclaim for inverse condemnation. The Circuit Court, Grant County, James W. Courrier, Jr., J., certified questions.

Holdings: The Supreme Court of Appeals, Jenkins, J., held that:

[1] when the Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project that is subject to the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act, the question of whether the residue has become an "uneconomic remnant" is a question to be determined exclusively by the Commissioner of Highways;

[2] when the Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project, and when, as a result of the project, the residue is rendered landlocked by the destruction of the preexisting public road access, the Division of Highways may, without the landowner's consent, mitigate the damage to the residue by ensuring that the work performed by the Division of Highways is completed or revised in a manner that assures reasonable public road access thereto; and

[3] when the Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project, and when, as a result of the project, a residue tract that is not needed by the State for public road purposes has been rendered landlocked, the trial court cannot require the Division of Highways to acquire the landlocked residue by condemnation.

Questions answered; case remanded.

West Headnotes (10)

[1] Appeal and Error

The appellate standard of review of questions of law answered and certified by a circuit court is de novo.

Cases that cite this headnote

[2] Statutes

The primary object in construing a federal statute is to ascertain and give effect to the intent of the Congress.

Cases that cite this headnote

[3] Statutes

When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.

Cases that cite this headnote

[4] Eminent Domain

When the West Virginia Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project that is subject to the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act, the question of whether the residue has become an "uneconomic remnant" is a question to be determined exclusively by the Commissioner of Highways. 42 U.S.C.A. § 4601 et seq.; W. Va. Const. art. 3, § 9.

Cases that cite this headnote

[5] Eminent Domain

The right of access to and from a public highway is a property right of which the owner cannot be deprived without just compensation. W. Va. Const. art. 3, § 9.

Cases that cite this headnote

[6] Eminent Domain

One whose real estate is taken for public use is entitled to just compensation for the value of the land taken at the time of taking and to damages to the residue. W. Va. Const. art. 3, § 9.

Cases that cite this headnote

[7] Eminent Domain

The measure of just compensation to be awarded to one whose interest in real estate is taken for a public use in a condemnation proceeding is the fair market value of the property at the time of the taking. W. Va. Const. art. 3, § 9.

Cases that cite this headnote

[8] Eminent Domain

The state constitution does not undertake to guarantee to a property owner the public maintenance of the most convenient route to his door; the law will not permit him to be cut off from the public thoroughfares, but he must content himself with such route for outlet as the regularly constituted public authority may deem most compatible with the public welfare, and when he acquires property, he does so in tacit recognition of those principles. W. Va. Const. art. 3, § 9.

Cases that cite this headnote

[9] Eminent Domain

When the West Virginia Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project, and when, as a result of the project, the residue is rendered landlocked by the destruction of the preexisting public road access, the Division of Highways may, without the landowner's consent, mitigate the damage to the residue by ensuring that the work performed by the Division of Highways is completed or revised in a manner that assures reasonable public road access thereto. W. Va. Const. art. 3, § 9.

Cases that cite this headnote

[10] Eminent Domain

When the West Virginia Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project, and when, as a result of the project, a residue tract that is not needed by the State for public road purposes has been rendered landlocked, the trial court cannot require the Division of Highways to acquire the landlocked residue by condemnation. W. Va. Const. art. 3, § 9.

Cases that cite this headnote

Syllabus by the Court

***1** 1. When the West Virginia Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project that is subject to the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4601 *et seq.*, the question of whether the residue has become an "uneconomic remnant" is a question to be determined exclusively by the Commissioner of Highways.

2. One whose real estate is taken for public use is entitled to just compensation for the value of the land taken at the time of taking, and to damages to the residue.

3. When the West Virginia Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project, and when, as a result of the project, the residue is rendered landlocked by the destruction of the preexisting public road access, the Division of Highways may, without the landowner's consent, mitigate the damage to the residue by ensuring that the work performed by the Division of Highways is completed or revised in a manner that assures reasonable public road access thereto. The Division of Highways must commit to ensure access by more than a mere promissory statement or declaration. Instead, the Division of Highways must protect the rights of the parties concerned by obligating itself to provide public road access by amending its condemnation petition, filing a new petition, or by some form of binding stipulation that is definite and certain in its terms.

4. When the West Virginia Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project, and when, as a result of the project, a residue tract that is not needed by the State for public road purposes has been rendered landlocked, the trial court cannot require the Division of Highways to acquire the landlocked residue by condemnation.

Certified Questions from the Circuit Court of Grant County, The Honorable James W. Courrier, Jr., Judge, Case No. 10-C-14

Attorneys and Law Firms

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Opinion

Jenkins, Justice:

The instant matter is before this Court upon questions certified by the Circuit Court of Grant County arising from a condemnation proceeding initiated by the West Virginia Department of Transportation, Division of Highways, a respondent herein, in relation to a federally-funded highway construction project that resulted in residue property being rendered landlocked. After exercising our authority to reformulate the questions certified, and after considering the parties' briefs, relevant portions of the appendix record, oral arguments, and the pertinent law, we answer the reformulated certified questions as follows:

***2** 1. When the West Virginia Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project that is subject to the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4601 *et seq.*, and when, as a result of the project, a residue tract has been rendered landlocked, is the question of whether the residue has become an "uneconomic remnant" a question of fact to be determined by a jury? Answer: No.

2. When the West Virginia Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project, and when, as a result of the project, the residue is rendered landlocked by the destruction of the preexisting public road access, may the Division of Highways, over the objection of the landowner,

mitigate the damage to the residue by restoring reasonable public road access thereto? Answer: Yes.

3. When the West Virginia Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project, and when, as a result of the project, a residue tract that is not needed by the State for public road purposes has been rendered landlocked, can the trial court require the Division of Highways to acquire the landlocked residue by condemnation? Answer: No.

I.

FACTUAL AND PROCEDURAL HISTORY

This proceeding arises from a dispute involving the construction of Corridor H, which is a federally-funded project. Respondents, Victor Morton Echols, Regina Louise Smith, Ramona Gail Ellison, and Veronica Jane Delbrugge (collectively "Property Owners"), own a tract of land along the route of Corridor H in Grant County. In furtherance of the construction of Corridor H, a federally-funded highway project subject to the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4601 *et seq.*, the Petitioners, the West Virginia Department of Transportation, Division of Highways, and Byrd White, Interim Secretary/Commissioner [1] (collectively "the DOH"), condemned a 58.70 acre portion of Property Owners' land. [2] Property Owners' residue, the land that was not condemned by the DOH, was divided by Corridor H into two parts. One tract of approximately 18.81 acres is located south of Corridor H. The other tract exceeds 120 acres [3] and is located to the north of Corridor H ("the northern tract").

The dispute underlying this proceeding arose after the DOH filed its petition to condemn a portion of Property Owners' land in February 2010. The circuit court entered its "ORDER FILING THE PETITION" in March 2010, and thereby granted the DOH the right to condemn the real estate and begin construction of the Corridor H project. Shortly thereafter, the DOH deposited into the circuit court's receivership account an amount equal to its estimate of just compensation for the condemned property, which was $334,400. Once the date of take was established, the DOH revised its estimate and deposited an additional $21,300. Another order entered by the circuit court in March 2010 directed that the condemnation proceeding would be delayed until construction on the subject property was complete, which completion occurred in 2014.

***3** As a result of the construction of Corridor H, the northern tract of Property Owners' land was rendered landlocked. [4] The DOH's appraiser valued the northern tract at $2,100 per acre, for a total of $261,093. [5] Property Owners' appraiser valued the northern tract at $3,500 per acre, for a total of $449,190. [6] The DOH proposed to construct an access road to Property Owners' northern tract at an estimated cost of $100,000. [7] Property Owners opposed the proposal claiming that the area where the access road would be located is very steep and is "in a slide area;" thus, they contend, maintaining a road in that area would be unreasonably costly. As a result, Property Owners filed, in the condemnation proceeding before the circuit court, their amended motion for leave to file an answer and counterclaim. Property Owners sought to compel the DOH to condemn the landlocked northern tract as an "uneconomic remnant" pursuant to 42 U.S.C. § 4651(9) (2012). The DOH filed its response essentially asserting, in part, that it could not be compelled to purchase the northern tract as an "uneconomic remnant."

The circuit court, by order entered August 26, 2016, concluded that the Property Owners would be permitted to present their claims to the jury. In so ruling, the circuit court reasoned that,

> [i]n every condemnation case, there is always a two-step determination on damages. First is a determination of the fair market value of the land actually taken. Second is a determination of the damages, if any, to any remainder property of the landowner. In the second determination, if the remainder property is rendered ... damaged to the extent that it has no reasonable value to the landowners, and is thus an uneconomic remnant, then that remainder must be purchased for fair market value by the condemning entity. Both of these determinations are questions for the jury.
>
> Therefore, the Court FINDS that the issues of whether any remaining tracts are uneconomic remnants which must be purchased by the DOH or, in the alternative,

whether any remaining tracts have been damaged, but still retain some value, are properly before the Court for consideration by the jury. The [Property Owners] are free to present evidence that the remainder has no reasonable value and that the DOH must purchase the tract(s) for fair market value. Likewise, the DOH can offer evidence that the property retains value and that it should only have to pay for the reasonable damages to the residue.

The Court will offer a special interrogatory to the jury for it to determine whether the remainder tract(s) is an uneconomic remnant. If the answer is yes, a second special interrogatory will ask the jury to state the amount the DOH is to pay for the tract(s). If the answer to special interrogatory number one is no, then the jury will consider the amount of damages to the remainder tract(s) that should be paid to the [Property Owners].

The case was then set for trial on December 8, 2016. At a pretrial conference, Property Owners filed a motion in limine to prohibit the DOH from introducing any evidence of its offer to construct an access road to the northern tract. The circuit court found no binding precedent regarding the DOH's introduction of evidence of its offer to build an access road. Additionally, the court found no authority as to whether the DOH was entitled to mitigate damages to residue property by providing an access road to property landlocked by virtue of the DOH's construction project (Corridor H in this instance). The court requested proposed certified questions from the parties and, thereafter, entered its order certifying three questions to this Court. The three questions, and the circuit court's answers thereto, are as follows:

***4** 1. When the completion of a highway construction condemnation project by [the DOH] has rendered a large parcel of land (which is otherwise economic) landlocked, is the DOH required to institute a formal condemnation proceeding on the residue or remainder tract without first being given the opportunity to construct an access road to mitigate the landlocked nature of the real estate?

Answer: No because it would be unreasonable to require the DOH to purchase a large tract of land when the landlocked nature of the real estate could be remedied by the construction of an access road at potentially a lesser expense to the taxpayer than the purchase of the entire remainder tract and if the real estate is economic with the provision of an access road.

2. When the DOH offers to construct an access road to a landlocked remainder tract following the completion of a highway construction project, do the landowners have the right to refuse the construction of the access road?

Answer: Yes because the landowners should be able to reject an offer which they feel does not provide reasonable access to the real estate or is unreasonable for other reasons, such as that it diminishes the value of the real estate or will create an unreasonable cost to maintain. Should the landowners reject the offer, the matter should proceed to trial in due course for a determination of the fair market value of the taking due to the condemnation action, with consideration given to the landowners' refusal to allow the DOH to construct reasonable access to the real estate.

3. If landowners should be able to reject an offer to construct an access road to the real estate that has been landlocked following a highway construction project, may the DOH present evidence during the condemnation jury trial that the landowners refused the DOH's offer to construct reasonable access and present to the jury the projected amount to construct an access road in order to mitigate damages to the remainder tract?

Answer: Yes because the jury should be able to consider the mitigation of damages by the proposed access road construction should they find the proposed access road is reasonable and the land would be economic if an access road is provided.

II.

STANDARD OF REVIEW

[1] Our standard for reviewing certified questions presented from a circuit court is well established: "[t]he appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." Syl. pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996). Thus, we afford plenary consideration to the reformulated certified questions.

III.

DISCUSSION

Prior to addressing the issues raised in this proceeding, we exercise our authority to reformulate the questions certified by the circuit court in order to fully address the legal issues therein presented.

> "When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under both the Uniform Certification of Questions of Law Act found in *W. Va. Code*, 51-1A-1, *et seq.* and *W. Va. Code*, 58-5-2 [1967], the statute relating to certified questions from a circuit court of this State to this Court." Syl. Pt. 3, *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993).

Syl. pt. 2, *Pyles v. Mason Cty. Fair, Inc.*, 239 W. Va. 882, 806 S.E.2d 806 (2017).[8] Consistent with our authority to do so, we reformulate the questions herein certified as follows:

> ***5** 1. When the West Virginia Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project that is subject to the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4601 *et seq.*, and when, as a result of the project, a residue tract has been rendered landlocked, is the question of whether the residue has become an "uneconomic remnant" a question of fact to be determined by a jury?
>
> 2. When the West Virginia Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project, and when, as a result of the project, the residue is rendered landlocked by the destruction of the preexisting public road access, may the Division of Highways, over the objection of the landowner, mitigate the damage to the residue by restoring reasonable public road access thereto?
>
> 3. When the West Virginia Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project, and when, as a result of the project, a residue tract that is not needed by the State for public road purposes has been rendered landlocked, can the trial court require the Division of Highways to acquire the landlocked residue by condemnation?

We will address each of these three questions in turn.

A. "Uneconomic Remnant"

In its August 26, 2016 order, the circuit court found that the question of whether Property Owners' residue tract is an uneconomic remnant was a proper question to be decided by the jury. Thus, the first reformulated question asks:

> When the West Virginia Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project that is subject to the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4601 *et seq.*, and when, as a result of the project, a residue tract has been rendered landlocked, is the question of whether the residue has become an "uneconomic remnant" a question of fact to be determined by a jury?

The fact that the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4601 et seq. ("the Federal Property Acquisition Act") is applicable to projects such as Corridor H that have received federal funding is well established. For example, this Court previously has observed that

> [t]he Property Acquisition Act applies to federal and federally assisted road construction projects. As a condition of receiving federal assistance for a project resulting in the acquisition of real property, a State agency must agree to comply with the terms of the Act. *See* 42 U.S.C. § 4655; W. Va. Code §§ 54-3-1 to -5 (Repl. Vol. 2000) (implementing the federal Act). The general purpose of the federal Act is "to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in Federal land acquisition practices...." 42 U.S.C. § 4651.

***6** *W. Va. Dep't of Transp., Div. of Highways v. Dodson Mobile Homes Sales & Servs., Inc.*, 218 W. Va. 121, 124-25, 624 S.E.2d 468, 471-72 (2005).[9] Accordingly, we begin our analysis of this reformulated certified question by looking to the meaning of the term "uneconomic remnant" in the context of a federally funded project, such as the Corridor H project, that is subject to the Federal Property Acquisition Act.

Notably, the Federal Property Acquisition Act expressly defines the term "uneconomic remnant" as follows:

> If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire that remnant. *For the purposes of this chapter, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property and which the head of the Federal agency concerned has determined has little or no value or utility to the owner.*

42 U.S.C. § 4651(9) (2012) (emphasis added). *See also* 49 C.F.R. § 24.2(a)(27) (2018) ("The term *uneconomic remnant* means a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property, *and which the Agency has determined has little or no value or utility to the owner*." (second emphasis added)).

At the outset, we pause to clarify that, because 42 U.S.C. § 4651(9) is a federal statute, it understandably refers to a "federal agency." However, as noted above, W. Va. Code §§ 54-3-1 to -5 (LexisNexis 2016) make the Federal Property Acquisition Act applicable to state agencies, such as the DOH, who, among others, fall within the definition of "acquiring agencies" as set out therein.[10] Accordingly, for purposes of our discussion, we refer to an "acquiring agency" in place of a "federal agency."

***7** Turning now to our analysis of 42 U.S.C. § 4651(9), we have found no cases interpreting the relevant portion of 42 U.S.C. § 4651(9) that define the term "uneconomic remnant."[11] Property Owners note the circuit court's reliance on *Dodson* as support for its conclusion that the question of whether a residue tract is an "uneconomic remnant" may be decided by a jury. We find no support for this contention in the *Dodson* decision.

The issue addressed by this Court in *Dodson* was whether a corporate landowner was entitled to attorney's fees under the Federal Property Acquisition Act after asserting a counterclaim seeking inverse condemnation. In setting out the procedural facts, the *Dodson* Court acknowledged that, in its counterclaim, the landowner alleged that a .73 acre residue tract was an "uneconomic remnant" that the State should be required to purchase. The trial court in *Dodson* posed the query to the jury by special interrogatories that "*the State did not challenge*." *Dodson*, 218 W. Va. at 124, 624 S.E.2d at 471 (emphasis added). The *Dodson* Court quoted from 42 U.S.C. § 4651(9), and further acknowledged the State's argument that it had "no statutory obligation to acquire the severed .73 acre tract because the [Federal Property Acquisition Act] only imposes the requirement to purchase such tracts *when the head of the State agency makes the preliminary finding that a severed portion of property is an uneconomic remnant*." *Dodson*, 218 W. Va. at 124, 624 S.E.2d at 471 (emphasis added). However, the *Dodson* Court analyzed neither 42 U.S.C. § 4651(9) nor the State's argument related thereto in reaching its ultimate conclusion that the property owner was entitled to attorney's fees under 49 C.F.R. § 24.107. As a result, we find the *Dodson* Court's apparent endorsement of the circuit court's method of determining whether the tract at issue was an uneconomic remnant to be mere

obiter dicta that is not binding on this Court. [12] *See State ex rel. Frazier & Oxley, L.C. v. Cummings*, 214 W. Va. 802, 808 n.8, 591 S.E.2d 728, 734 n.8 (2003) ("We hasten to add that [an] implied conclusion must be necessary to a decision in the case or it is dicta, which neither creates precedent ... nor establishes law of the case." (internal quotations and citations omitted)); *Rogers v. Albert*, 208 W. Va. 473, 477 n.9, 541 S.E.2d 563, 567 n.9 (2000) (per curiam) (commenting that "dicta ... has no *stare decisis* or binding effect upon this Court"); *In re Kanawha Valley Bank*, 144 W. Va. 346, 382-83, 109 S.E.2d 649, 669 (1959) (observing that "[o]biter dicta or strong expressions in an opinion, where such language was not necessary to a decision of the case, will not establish a precedent").

***8** **[2]** Thus, finding no applicable precedent to aid our analysis, in applying meaning to 42 U.S.C. § 4651(9) we are guided by the familiar maxims of statutory construction. First, "[t]he primary object in construing a [federal] statute is to ascertain and give effect to the intent of the [Congress]." Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). *Accord* Syl. pt. 4, *Dodson*, 218 W. Va. 121, 624 S.E.2d 468. The intent of Congress with respect to the Federal Property Acquisition Act is expressly set forth therein as follows: "to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in ... land acquisition practices." 42 U.S.C. § 4651. *Accord Dodson*, 218 W. Va. at 126, 624 S.E.2d at 473.

[3] Guided by this Congressional intent, we next "look ... to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *Appalachian Power Co. v. State Tax Dep't*, 195 W. Va. 573, 587, 466 S.E.2d 424, 438 (1995). In other words, "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syl. pt. 5, *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959).

[4] In defining an "uneconomic remnant," the Federal Property Acquisition Act expressly provides that,

> [f]or the purposes of this chapter, an uneconomic remnant is a parcel of real property in which the owner is left with an interest after the partial acquisition of the owner's property *and which the head of the* [*acquiring*] *agency concerned has determined has little or no value or utility to the owner.*

42 U.S.C. § 4651(9) (emphasis added). We find no ambiguity in the operative provision of 42 U.S.C. § 4651(9) that places the duty of determining whether a parcel of real property is an uneconomic remnant, *i.e.*, it has little or no value or utility to the owner, exclusively upon the head of the acquiring agency. Thus, we are foreclosed from endeavoring to construe this language. *Appalachian Power Co.*, 195 W. Va. at 587, 466 S.E.2d at 438. Moreover, by obliging the head of the acquiring agency to determine whether a residue tract is an "uneconomic remnant," the Act furthers the expressed Congressional intent of avoiding litigation with respect to this preliminary determination. Finally, because the head of the acquiring agency, here the DOH, is exclusively tasked with determining whether the parcel remaining after a partial acquisition has "little or no value or utility to the owner," it is axiomatic that such question is not proper for determination by a trier of fact at trial. 42 U.S.C. § 4651(9). Accordingly, we now hold that, when the West Virginia Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project that is subject to the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act, 42 U.S.C. § 4601 *et seq.*, the question of whether the residue has become an "uneconomic remnant" is a question to be determined exclusively by the Commissioner of Highways. [13]

B. Mitigation of Damages

In this case the DOH has proposed to construct an access road to remedy the 120-plus acre landlocked northern tract of Property Owners' land, and thereby mitigate the

damages caused to this residue by the construction of Corridor H. The DOH estimates the cost of the access road to be approximately $100,000, though the DOH has not developed a specific plan for the proposed alternative access road. The Property owners object to the road, instead desiring to compel the DOH to purchase the entire northern tract, which they have estimated to be valued at $449,190. Thus, the second reformulated question addresses the right of the DOH to mitigate damages and asks:

> ***9** When the West Virginia Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project, and when, as a result of the project, the residue is rendered landlocked by the destruction of the preexisting public road access, may the Division of Highways, over the objection of the landowner, mitigate the damage to the residue by restoring reasonable public road access thereto?

The DOH contends that property owners have no right to reject its decisions concerning how public roads are to be designed, constructed, and maintained. This is so, the DOH asserts, because West Virginia law vests the DOH with broad and sweeping responsibility to determine the needs of the traveling public and to design, construct, and maintain a public road system to meet those needs. *See* W. Va. Code §§ 17-4-39 to -43 (LexisNexis 2017). In addition, citing *West Virginia Department of Transportation, Division of Highways v. Parkersburg Inn, Inc.*, 222 W. Va. 688, 694, 671 S.E.2d 693, 699 (2008), the DOH asserts that, although the law will not permit Property Owners to be cut off from public thoroughfares, they must content themselves with the access route deemed by the DOH as the most compatible with the public welfare. The DOH finally acknowledges that, if the change in public road access to the residue land at issue reduces its fair market value, then Property Owners are entitled to just compensation for such damages as determined by a jury.

Property Owners contend that they have found no West Virginia authority allowing the DOH to construct an access road to mitigate the landlocked nature of their real estate. Moreover, they assert that the DOH has no right to construct a replacement access road, and they may refuse it, insofar as they have a right to be compensated for their property exclusively in money.

[5] **[6]** Under Article III, Section 9 of the West Virginia Constitution, "[p]rivate property shall not be taken or damaged for public use, without just compensation ...." It is beyond dispute that " '[t]he right of access to and from a public highway is a property right of which the owner can not [sic] be deprived without just compensation.' *State ex rel. Ashworth v. The State Road Commission et al.*, Point 1 Syllabus, 147 W. Va. 430, [128 S.E.2d 471 (1962).]" Syl. pt. 2, *State ex rel. Woods v. State Rd. Comm'n*, 148 W. Va. 555, 136 S.E.2d 314 (1964). Furthermore, this Court has previously recognized, and we now expressly hold, that "one whose real estate is taken [for public use] is entitled to just compensation for the value of the land taken at the time of taking, and to damages to the residue." *W. Va. Dep't of Transp., Div. of Highways v. W. Pocahontas Props., L.P.*, 236 W. Va. 50, 61, 777 S.E.2d 619, 630 (2015) (internal quotations and footnote omitted). *See also Buckhannon & N.R. Co. v. Great Scott Coal & Coke Co.*, 75 W. Va. 423, 442, 83 S.E. 1031, 1038 (1914) (commenting that "[t]he owner is entitled to the value of the land taken at the time of taking, and to damages to the residue").

While our precedent refers to "damages to the residue," for clarification we note that this term is often referred to as "severance damages" in many jurisdictions. *See, e.g.*, *Sys. Components Corp. v. Fla. Dep't of Transp.*, 14 So.3d 967, 978 (Fla. 2009) ("*Severance damages* are part of the constitutional guarantee of 'full compensation' and reimburse the owner for the reduction in value the taking causes to any remaining land."); *Oakland Cty. Bd. of Cty. Rd. Comm'rs v. JBD Rochester, LLC*, 271 Mich. App. 113, 115, 718 N.W.2d 845, 846-47 (2006) ("Severance damages are damages to the remaining property that are attributable to the taking."); *State ex rel. Comm'r of Transp. v. Marlton Plaza Assocs., L.P.*, 426 N.J. Super. 337, 357, 44 A.3d 626, 638 (App. Div. 2012) ("Where only a portion of the private property is taken, the owner is not only entitled to just compensation for the fair-market value of the portion that has actually been

taken, but also for the diminution in the value, if any, of the remaining land, referred to as 'severance damages.' " (internal quotations and citation omitted)); *Cent. Puget Sound Reg'l Transit Auth. v. Heirs & Devisees of Eastey*, 135 Wash. App. 446, 456, 144 P.3d 322, 326 (2006) ("A loss of value to the land that is not taken is referred to as 'severance damages' ...." (internal quotations and citations omitted)). *See also* Black's Law Dictionary 396 (7th ed. 1999) (defining "severance damages" "[i]n a condemnation case, [as] damages awarded to a property owner for diminution in the fair market value of land as a result of severance from the land of the property actually condemned; compensation awarded to a landowner for the loss in value of the tract that remains after a partial taking of the land.").

***10** As Property Owners correctly observe, this Court has held that "[i]n an eminent domain proceeding, the landowner has a legal right to be paid exclusively in money the compensation to which he is entitled." Syl. pt. 3, *Bd. of Ed. of Kanawha Cty. v. Shafer*, 147 W. Va. 15, 124 S.E.2d 334 (1962). However, a property owner's right to be compensated in money does not, as Property Owners presume, extinguish the right of the DOH to mitigate damages to a residue for which it will be required to provide such compensation. In *Shafer*, this Court recognized a condemnor's right to mitigate severance damages, and acknowledged the public interest in such mitigation, when it commented that,

> [i]f there is a legal way in which the damage to the residue of the defendants' land may be minimized, certainly it will be in the public interest and to the interest of the landowners that such be done. If it should appear that the taking of the parcel of 1.445 acres deprives the landowners of all means of access to the residue of the tract of 56 acres and renders such residue virtually worthless, certainly the infliction of such damages upon the landowners and the consequent public burden of paying therefor should be avoided if there is a way in which such properly may be done.

Shafer, 147 W. Va. at 22, 124 S.E.2d at 338.[14] *See also* W. Va. Code § 54-2-9 (LexisNexis 2016) (directing that the commissioners shall ascertain, among other things, the amount of just compensation for "damage to the residue of the tract *beyond all benefits to be derived*, in respect to such residue, from the work to be constructed" (emphasis added)); W. Va. Code § 54-2-14 (LexisNexis 2016) (requiring condemnation applicant to pay into court, among other things, "the damages, if any, to the residue *beyond the benefits*, if any, to such residue, by reason of the taking" (emphasis added)); W. Va. Code § 54-2-14a (LexisNexis 2016) (same).

Importantly, though, compensation to landowners may not be mitigated by a mere offer to confer some privilege. In this respect, the *Shaffer* Court observed:

> In connection with an exhaustive annotation in [Annot.,] 7 A.L.R.2d 364, at page 392 [(1949)], certain principles here involved are summarized as follows: "The courts have frequently pointed out the difference in legal effect between mere promissory statements, stipulations, and declarations on the one hand, and (1) reservations of property rights in the landowner; (2) valid and contractual, hence binding stipulations; and (3) limited condemnation properly effected at the proper time. If a particular case involves one of these three matters rather than a promissory matter, the binding stipulation, or the reservation of rights, easements, etc., to the property owner, or the limited condemnation is properly to be considered in determining the landowner's damages or compensation."

147 W. Va. at 22, 124 S.E.2d at 338.

Other courts have reached similar conclusions and, in so doing, have acknowledged the need to balance the interest of landowners to just compensation with the interest of the state to fiscal responsibility and, in particular relation to landlocked property, to avoiding the creation of abnormal quantities of landlocked real estate. *See, e.g.*, *State ex rel. State Highway Comm'n v. Grenko*, 80 N.M. 691, 694, 460 P.2d 56, 59 (1969) ("Particularly where the State or one of its political subdivisions is the condemnor, the public

interest is involved as well as the interest of the owner of the property sought to be taken, and the owner ought not to be allowed a windfall where he is not entitled to it.").

***11** While *Shaffer* did not involve landlocked realty, a few courts have addressed this issue, albeit in a slightly different context, and provide some guidance for our resolution of this matter. For example, in the case of *Andrews v. State*, 248 Ind. 525, 229 N.E.2d 806 (1967), a landowners' property had been rendered landlocked as a result of the construction of a controlled access highway. In reaching its ultimate conclusion in the case, the *Andrews* court commented:

> In truth and in fact, we must conclude that a service road would alleviate a land-locked condition of the Baldwin property *and would certainly have the effect of reducing the amount of damages payable to the Baldwins. If the State of Indiana is not in a position to minimize the damages paid to land owners, then the cost of Interstate Highways would soar astronomically and Indiana would be dotted abnormally with land-locked real estate.*

Id. at 533, 229 N.E.2d at 810 (emphasis added).

New Mexico likewise has addressed a similar issue. In *State ex rel. State Highway Comm'n v. Grenko*, 80 N.M. 691, 460 P.2d 56, the highway commission condemned a portion of land belonging to Grenko, which divided the property into two parcels, for the construction of an interstate. During the condemnation trial, it was discovered that presumed access between the two Grenko tracts, and from the northern Grenko tract to the state highway system, did not exist. The highway commission sought and was granted, over Grenko's objection, permission from the trial court "to amend its map by showing the access roads extending to the Grenko boundaries, and agreed to construct the necessary connecting link so as to provide access between the two tracts and to the system of highways by way of the county road." *Id.* at 692, 460 P.2d at 57. [15]

[7] On appeal, the Supreme Court of New Mexico opined that the case "turns on whether the State could mitigate or diminish consequential damages by acquiring a right-of-way easement and agreeing to provide access from the northern tract over county roads to the main highway system, after filing its complaint and after entry of the order of possession." *Id.* The landowner, Grenko, relying on New Mexico law providing that the right to damages shall accrue as of the date the condemnation petition is filed, [16] contended that

> because the Highway Commission failed to provide access to the northern tract at the date of the notice in the eminent domain proceeding, even though because of an error, it became landlocked and consequential damages became fixed as of that date. It is argued that those damages cannot be mitigated by the State, nor can the petition be amended to agree to provide access to the tract.

Id. at 693, 460 P.2d at 58. The New Mexico Supreme Court rejected this argument, reasoning that

> [m]ost eminent domain statutes fix time as of which property taken or damaged is to be valued, the reason being that values of real estate are not constant and sometimes change greatly before the proceedings are completed. 3 Nichols on Eminent Domain (3d Ed.) § 815. Our statute is designed to avoid such problems of fluctuations in value. The amendment [of the Highway Commission's petition] does not violate this purpose of the statute because it does not change the date of valuation, only the extent of the condemnation on the valuation date.

***12** *Id.* The *Grenko* Court also rejected the landowners' argument that a promise to construct access to their property is no substitute for compensation in money. In this regard, the *Grenko* Court explained that

> the Grenkos are being compensated in money for all rights which they are losing. *State ex rel. Eastvold v. Superior Court [for Snohomish Cty.*, 48 Wash. 2d 417, 294 P.2d 418 (1956)]. The State is merely attempting to *limit the condemnation*, a matter that is properly to be considered in determining the landowners' damages. See 7 A.L.R.2d 364, 392-393. Moreover, the Grenkos are amply protected; if the State deviates from its construction plans in a manner to cause further loss to the landowners, *i.e.*, fails to provide the access, another taking or damaging results for which just compensation must again be assessed.

Grenko, 80 N.M. at 695, 460 P.2d at 60. *See also Mich. State Highway Comm'n v. Davis*, 38 Mich. App. 674, 679-80, 197 N.W.2d 71, 73-74 (1972) (finding it proper to admit evidence of highway commission's revised plans to restore access to parking lot impeded by roadway construction, which reduced severance damage appraisal from $79,600 to $25,650, and commenting "[s]ince we are dealing here not with the value of the property taken, but rather with the damage done to the residue as a result of the taking, we find no bar to the introduction of evidence bearing on those damages despite the fact that the evidence concerns facts occurring after the date of the taking. The trial court's ruling excluding such evidence was, therefore, in error."); *State Highway & Transp. Comm'r v. Linsly*, 223 Va. 437, 444, 290 S.E.2d 834, 838 (1982) (remarking that "[t]he Commissioner was entitled to show in mitigation of damages that he would construct a service road to provide reasonable substitute access to the highway"); *State ex rel. Eastvold*, 48 Wash. 2d at 423, 294 P.2d at 422 (finding no error in trial court's allowance of evidence that damages to landowers' property would be mitigated by construction of a cattle guard and observing that "if damages may be avoided by a waiver or stipulation definite and certain in its terms, which will fully protect the rights of all parties concerned, there is no reason why such a stipulation should not be received and acted upon." (quotations and citations omitted)).

[8] The foregoing authorities plainly establish that the DOH may mitigate severance damages by restoring public road access without the agreement of a landowner so long as the DOH is somehow obligated to construct the road. A mere promise to do so is insufficient. Furthermore, the authority to determine the proper location of the access road lies with the DOH:

> ***13** "The Constitution does not undertake to guarantee to a property owner the public maintenance of the most convenient route to his door. The law will not permit him to be cut off from the public thoroughfares, but he must content himself with such route for outlet as the regularly constituted public authority may deem most compatible with the public welfare. When he acquires [property], he does so in tacit recognition of these principles."

State ex rel. Woods v. State Rd. Comm'n, 148 W. Va. at 560-61, 136 S.E.2d at 318 (quoting *Richmond v. City of Hinton*, 117 W. Va. 223, 227, 185 S.E. 411, 412 (1936)). *See also Parkersburg Inn,* 222 W. Va. at 694, 671 S.E.2d at 699 (approving a jury instruction that stated, in relevant part, "[t]he law will not permit the Respondents to be cut off from public thoroughfares, but they must content themselves with such route for outlet as the West Virginia Division of Highways may deem most compatible with the public welfare as long as access is reasonable and adequate. When the Respondents acquired property in the State of West Virginia, they did so in tacit recognition of these principles.").

[9] Accordingly, we now hold that, when the West Virginia Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project, and when, as a result of the project, the residue is rendered landlocked by the destruction of the preexisting public road access, the Division of Highways may, without the landowner's consent, mitigate the damage to the residue by ensuring that the work performed by the Division of Highways is completed or revised in a manner that assures reasonable public road access thereto. The Division of Highways

must commit to ensure access by more than a mere promissory statement or declaration. Instead, the Division of Highways must protect the rights of the parties concerned by obligating itself to provide public road access by amending its condemnation petition, filing a new petition, or by some form of binding stipulation that is definite and certain in its terms.

C. Acquisition of Property Not Needed for State Road Purposes

Because the Property Owners seek to compel the DOH to purchase their northern tract, which was not needed by the DOH in relation to its construction of Corridor H, we briefly address the following reformulated question:

> When the West Virginia Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project, and when, as a result of the project, a residue tract that is not needed by the State for public road purposes has been rendered landlocked, can the trial court require the Division of Highways to acquire the landlocked residue by condemnation?

The authority of the Commissioner of Highways to acquire property that it does not need for state road purposes is addressed in the West Virginia Code as follows:

> In connection with the acquisition of real property, or any interest or right therein, for state road purposes, the commissioner may acquire, *by any lawful means other than by eminent domain or condemnation*, an entire lot, block, or tract of real property, or any portion thereof, even though it is not needed for present or presently foreseeable future state road purposes, if uneconomic remnants would be left the owner or if severance or consequential damages to the remainder make acquisition of the additional property more economical to the State.

***14** W. Va. Code § 17-2A-18 (LexisNexis 2017) (emphasis added). We find the foregoing provision is unambiguous in allowing the Commissioner to acquire certain property, "even though it is not needed for present or presently foreseeable future state road purposes," by "any lawful means *other than by eminent domain or condemnation*." *Id.* (emphasis added). Because it is unambiguous, we are constrained to apply its plain terms. *See* Syl. pt. 5, *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 ("When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute."). Insofar as W. Va. Code § 17-2A-18 expressly excludes eminent domain or condemnation as means for obtaining property that is not needed by the DOH for state road purposes, a court is without authority to impose such an obligation.

Moreover, this Court has previously recognized that

> " '[t]he sole discretion to determine what quantity of land is necessary for a public use is vested in the agency resorting to eminent domain, which discretion will not be interfered with by the courts unless it has been abused.' Syllabus Point 2, *State v. Bouchelle*, 137 W. Va. 572, 73 S.E.2d 432 (1952)." Syllabus point 1, *Mr. Klean Car Wash, Inc. v. Ritchie*, 161 W. Va. 615, 244 S.E.2d 553 (1978).

Syl. pt. 4, *Potomac Valley Soil Conservation Dist. v. Wilkins*, 188 W. Va. 275, 423 S.E.2d 884 (1992). *See also* Syl. pt. 3, *State ex rel. State Rd. Comm'n v. Prof'l Realty Co.*, 144 W. Va. 652, 110 S.E.2d 616 (1959) ("The necessity for taking land for a state highway improvement project, and the amount of land reasonably necessary for that purpose, are matters within the sound discretion of the state road commissioner; and such discretion will not be interfered with by the courts unless, in the exercise

of such discretion, he has acted capriciously, arbitrarily, fraudulently or in bad faith."). [17]

Although landowners may not compel the DOH to acquire by condemnation land that is not necessary for state road purposes, such landowners are entitled to recover just compensation for damages to their residue. *See* Syl. pt. 2 herein; *W. Pocahontas Props.*, 236 W. Va. at 61, 777 S.E.2d at 630 (observing that "one whose real estate is taken [for public use] is entitled to just compensation for the value of the land taken at the time of taking, and to damages to the residue" (internal quotations and footnote omitted)); *Great Scott Coal & Coke*, 75 W. Va. at 442, 83 S.E. at 1038 (commenting that "[t]he owner is entitled to the value of the land taken at the time of taking, and to damages to the residue").

[10] Accordingly, we now hold that, when the West Virginia Department of Transportation, Division of Highways, initiates a condemnation proceeding that involves a partial taking of land in connection with a highway construction project, and when, as a result of the project, a residue tract that is not needed by the State for public road purposes has been rendered landlocked, the trial court cannot require the Division of Highways to acquire the landlocked residue by condemnation.

IV.

CONCLUSION

***15** Having answered the reformulated certified questions, we remand this case to the Circuit Court of Grant County for further proceedings consistent with this opinion.

Reformulated Certified Questions Answered.

All Citations

--- S.E.2d ----, 2019 WL 1590693

Footnotes

1 Thomas J. Smith, in his capacity as the Secretary/Commissioner of the West Virginia Department of Transportation, Division of Highways ("the DOH"), was originally named as a defendant in this action. However, during the pendency of the instant proceeding, Byrd White was appointed as the Interim Secretary/Commissioner of the DOH. Accordingly, pursuant to Rule 41(c) of the West Virginia Rules of Appellate Procedure, Byrd White, in his official capacity as Interim Secretary/Commissioner of the DOH, has been substituted as a party in this appeal.

2 52.58 acres of this land was in permanent takes, 2.73 acres was for permanent drainage easements, and 3.39 acres was for temporary construction easements.

3 The parties dispute the exact acreage of the northern tract, but that dispute need not be resolved to answer the instant certified questions.

4 The term "landlocked" refers to the land being without any legally enforceable access to a public road. *See* Black's Law Dictionary 883 (7th ed. 1999) (defining landlocked as "[s]urrounded by land, often with the suggestion that there is little or no way to get in or out without crossing the land of another").

5 The DOH appraisal is based upon 124.33 acres. *See* note 3, *supra*.

6 Property Owners' appraisal is based upon 128.34 acres. *See supra* note 3.

7 According to the DOH, the details of the proposed alternative access were not developed in the circuit court. For example, the DOH avers that the proposal did not specify whether any additional land would need to be acquired from the Property Owners for construction purposes. Because it is unclear at this point whether DOH will seek to condemn any additional property in order to construct the access road, there is no issue pertaining to public use presently before this Court and our opinion should not be construed as implicitly addressing this issue.

8 The DOH proposed five reformulated questions to this Court as alternatives to the three questions certified by the circuit court. Because we have exercised our authority to reformulate the questions certified, we do not set out the questions proposed by the DOH.

9 Likewise, under 42 U.S.C. § 4655(a) (2012):

> [n]otwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, an acquiring agency under which Federal financial assistance will be available to pay

> all or part of the cost of any program or project which will result in the acquisition of real property on and after January 2, 1971, unless he receives satisfactory assurances from such acquiring agency that—
>
> (1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies *in section 4651* of this title and the provisions of section 4652 of this title, ...

(Emphasis added). *See also Huntington Urban Renewal Auth. v. Commercial Adjunct Co.*, 161 W. Va. 360, 367-68, 242 S.E.2d 562, 566 (1978) (acknowledging that "*W. Va. Code*, 54-3-3 [1972] ... makes the federal real property acquisition policies applicable to state agencies and gives state agencies 'plenary power and authority to adopt rules and regulations, which shall have the force and effect of law, to implement the provisions of ... [the] federal act ....' ").

10 "Acquiring agency" is defined as

> the State of West Virginia or any department, agency or instrumentality thereof, or any county, municipality or other political subdivision thereof or any department, agency or instrumentality of two or more states or of two or more political subdivisions of a state or states, and any person carrying out a program or project with federal financial assistance which causes a person to be a displaced person within the intent and meaning of the federal act.

W. Va. Code § 54-3-1(2) (LexisNexis 2016).

11 We note that, prior to 1987, 42 U.S.C. § 4651(9) did not expressly define the term "uneconomic remnant." Instead, the pre-1987 provision simply read: "If the acquisition of only part of a property would leave its owner with an uneconomic remnant, the head of the Federal agency concerned shall offer to acquire the entire property."

12 In this regard, the *Dodson* Court commented that,

> [i]f Appellant had not raised the counterclaim regarding purchase of the .73 acre tract as an uneconomic remnant, the only way Appellant could have sought to be relieved of the continuing tax burden of the unusable land was to petition the circuit court in a separate proceeding for a writ of mandamus to compel the State to take action. While the use of a counterclaim to reach the question of compensation for the .73 acre tract may be unusual, we see no defensible reason to require the initiation of a second suit by a landowner in light of the clear Congressional intent "to avoid litigation and relieve congestion in the courts, to assure consistent treatment for owners in the many Federal programs, and to promote public confidence in [ ] land acquisition practices." 42 U.S.C. § 4651. Additionally, the regulations governing award of attorneys' and other enumerated fees make no distinction with the method by which a party raises inverse condemnation.

W. Va. Dep't of Transp., Div. of Highways v. Dodson Mobile Homes Sales & Servs., Inc., 218 W. Va. 121, 126, 624 S.E.2d 468, 473 (2005) (footnote omitted).

13 We note that this holding has no application to a highway project that is not subject to the Federal Property Acquisition Act.

14 The *Shaffer* Court ultimately concluded that a condemnor

> has the legal right to take fee simple title to the land sought to be appropriated herein, subject to easements not previously existing, reserved or left to the landowners for the purpose of reducing or minimizing damages to the residue of the defendants' land; and that such taking by the petitioner, subject to the easements set forth and described in the amended petition, will not constitute payment of damages or compensation to the landowners in something other than money.

Bd. of Ed. of Kanawha Cty. v. Shafer, 147 W. Va. 15, 25, 124 S.E.2d 334, 340 (1962).

15 In order to correct the lack of access, "the Highway Commission obtained an easement for a right of way over federally owned lands." *State ex rel. State Highway Comm'n v. Grenko*, 80 N.M. 691, 692, 460 P.2d 56, 57 (1969).

16 Likewise, under West Virginia law "[t]he measure of just compensation to be awarded to one whose interest in real estate is taken for a public use in a condemnation proceeding is the fair market value of the property at the time of the taking." Syl. pt. 1, *W. Va. Dep't of Transp., Div. of Highways v. W. Pocahontas Props., L.P.*, 236 W. Va. 50, 777 S.E.2d 619 (2015). *See also* Syl. pt. 1, *W. Va. Dep't. of Highways v. Roda*, 177 W. Va. 383, 352 S.E.2d 134 (1986) ("In eminent domain proceedings, the date of take for the purpose of determining the fair market value of property for the fixing of compensation to be made to the condemnee is the date on which the property is lawfully taken by the commencement of appropriate legal proceedings pursuant to *W. Va. Code*, 54-2-14a, as amended.").

17 This Court has also made clear that,

> " '[i]f a highway construction or improvement project results in probable damage to private property without an actual taking thereof and the owners in good faith claim damages, the West Virginia Commissioner of Highways has a statutory duty to institute proceedings in eminent domain within a reasonable time after completion of the work to ascertain the amount of damages, if any, and, if he fails to do so, after reasonable time, *mandamus will lie to require the institution of such proceedings*.' Syllabus point 1, *State ex rel. Rhodes v. West Virginia Department of Highways*, 155 W. Va.

735, 187 S.E.2d 218 (1972)." Syl. Pt. 2, *Shaffer v. West Virginia Dep't of Transp., Div. of Highways*, 208 W. Va. 673, 542 S.E.2d 836 (2000).

Syl. pt. 4, *W. Va. Dep't of Transp., Div. of Highways v. Newton*, 238 W. Va. 615, 797 S.E.2d 592 (2017). Condemnation proceedings were initiated by the DOH in the case *sub judice*; therefore, Property Owners had no need to resort to mandamus.

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557 S.W.3d 569
Supreme Court of Texas.

Stephen MORALE d/b/a Action Collision Repair and Kimberly Morale, Petitioners,
v.
The STATE of Texas, Respondent

No. 17–0049
|
OPINION DELIVERED: June 22, 2018
|
Rehearing Denied October 19, 2018

Synopsis

Background: State initiated condemnation proceedings and property owners demanded jury trial. The Probate Court, Denton County, Bonnie J. Robison, J., entered judgment on jury's verdict. Appeal was taken, and the Fort Worth Court of Appeals, 2016 WL 7473933, reversed and remanded for new trial. Property owners petitioned for review.

Holdings: The Supreme Court held that:

[1] evidence that State had initially classified property owners as displaced due to partial taking of land that would result in owners no longer being able to operate collision repair shop was relevant to determination of property's highest and best use and corresponding market value;

[2] property owners' proffered evidence as to State's motive for revoking initial classification of property owners as displaced was relevant;

[3] testimony of owners' appraiser as to displacement value of land was not speculative, conjectural, and remote;

[4] testimony of city engineer and city attorney regarding town's prior grants of zoning variances on unrelated properties was not relevant; and

[5] any error in exclusion of testimony of city engineer and city attorney concerning town's grant of variances on unrelated properties was harmless.

Judgment of the Court of Appeals reversed; judgment of the Probate Court reinstated.

West Headnotes (9)

[1] Trial
Admission of evidence in general

Whether to admit or exclude evidence is within the trial court's sound discretion.

Cases that cite this headnote

[2] Eminent Domain
Taking Part of Tract or Property

The amount of just compensation due for a partial taking is the difference between the market value of the entire property before the taking and the market value of the remainder property after the taking, considering the effects of the condemnation.

1 Cases that cite this headnote

[3] Eminent Domain
Taking Part of Tract or Property

In determining the amount of just compensation due the property owner for a partial taking, the factfinder may consider the highest and best use of the condemned land, which is presumed to be the existing use of the land.

Cases that cite this headnote

[4] Eminent Domain
Value for special purposes

Evidence that State had initially classified property owners as displaced, in context of condemnation proceeding, due to partial taking of land that would result in owners no longer being able to operate collision repair shop, based on preliminary cure plan created by State's appraiser, was relevant to determination of property's highest and

best use, and corresponding market value, for purposes of calculating amount of just compensation due, even though classification was subsequently revoked due to alternative cure plan that would allow owners to continue to operate collision repair shop.

Cases that cite this headnote

[5] **Eminent Domain**
Damages

Property owners' proffered evidence as to State's motive for revoking initial classification of property owners as displaced due to partial taking, which classification had been based on appraiser's determination that owners would no longer be able to operate their collision repair shop after taking, after State's land planner presented alternative cure plan that would allow owners to continue operating shop, was relevant, in adversarial condemnation action, to determination of damages for taking, and as response to State's evidence on its motive for revoking displacement status.

Cases that cite this headnote

[6] **Evidence**
Necessity and sufficiency

An expert's opinion may assume facts established by legally sufficient evidence.

1 Cases that cite this headnote

[7] **Evidence**
Property remaining after condemnation; severance damages

Testimony of property owners' appraiser that displacement value of land following partial taking that would render owners no longer able to operate collision repair shop was $1.2 million was not speculative, conjectural, and remote, in condemnation action; valuation was based on State's initial classification of property owners as displaced and that improvements would need to be razed, appraiser assumed willing buyer would look at property and conclude that it was designed for auto collision repair shop and that it could no longer be used as such, and although displacement status was revoked based on subsequent cure plan that would allow owners to continue operating shop, implementation of cure plan was conditioned on town's grant of variance to continue to allow operation of repair shop as legal nonconforming use of land.

Cases that cite this headnote

[8] **Eminent Domain**
Value of Property

Testimony of city engineer and city attorney regarding town's prior grants of zoning variances on unrelated properties was not relevant to calculation of just compensation for partial taking of land on which property owners had operated collision repair shop as grandfathered, legal nonconforming use, after State revoked owners' displacement status based on cure plan that would allow them to continue to operate shop, where town had made no commitment to owners that it would approve cure plan and grant necessary variances that would allow them to continue to operate shop following taking.

Cases that cite this headnote

[9] **Eminent Domain**
Harmless error

Any error in exclusion of testimony of city engineer and city attorney concerning town's grant of variances on unrelated properties was harmless, in condemnation action to determine just compensation for partial taking of owners' property, following State's revocation of displacement status, based on alternative cure plan that would allow owners to continue to operate collision repair shop, which was grandfathered, legal nonconforming use, where it would have been duplicative of evidence already admitted regarding possibility that town would grant

owners variance to allow continued operation of business. Tex. R. App. P. 44.1(a)(1).

Cases that cite this headnote

*571 ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

Attorneys and Law Firms

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Opinion

PER CURIAM

The issues in this appeal of a condemnation judgment are whether the trial court erroneously admitted and excluded various evidence at trial, thereby probably resulting in rendition of an improper judgment. We hold that the trial court's evidentiary holdings were not an abuse of discretion. Because the court of appeals held otherwise, we reverse that court's judgment and reinstate the judgment of the trial court.

The State of Texas planned to condemn a portion of a 33,000 square-foot property owned by Stephen and Kimberly Morale in the Town of Little Elm, Texas (the Town), for purposes of improving FM 720 in Denton County. The property was improved with an 8,831 square-foot building used for the Morales' vehicle collision repair business. Specifically, the State planned to take a 3,200 square-foot strip of land, which included a metal canopy used by the business that would have to be demolished as part of the taking.

*572 The State's appraiser, Jennifer Ayers, initially determined that after the taking and the implementation of a "cure plan" involving removal of certain parts of the building, the Morales' property could still be used as a general auto repair shop but not as a collision repair shop. Based on Ayers's determination that the use of the property would change as a result of the taking, the State administratively classified the Morales as "displaced" in May 2012. *See* 43 TEX. ADMIN. CODE § 21.116 ("When a person is required to relocate as a result of the acquisition of right-of-way for a highway project, the [Texas Department of Transportation] will pay the reasonable expenses of relocating the displacee and his or her business and personal property ...."). According to department manuals, the classification denotes that the partial taking will render the condemnee "unable to conduct business in the same or similar manner as prior to the acquisition."

The State's land planner, Ronan O'Connor, subsequently developed a second cure plan for reconfiguring the property that would enable the Morales to continue operating their existing business on the site. O'Connor's plan relocated the metal canopy to another location on the property, added a door to the office building, and made adjustments to the parking curbs. In February 2013, Ayers revised her appraisal to incorporate O'Connor's cure plan, determining that the Morales' property could still be used as a collision repair shop. In May 2013, the special commissioners awarded the Morales $49,804 in damages for the taking. The Morales objected to the award and demanded a jury trial. The State formally revoked the Morales' displacee status on November 21, 2013.

The Morales hired their own appraiser, David Bolton, and land planner, Bill Carson. Bolton had developed an initial appraisal in May 2013 based on the assumption that the entire site would be demolished (following from the assumption of displacement). Carson developed two cure plans for reconfiguring the property to continue its use as a collision repair shop. Bolton used one of these plans to make an alternative appraisal based on nondisplacement.

The Morales' property is zoned light commercial, and a collision repair shop is not an authorized use in that zoning classification. The property also had other nonconforming uses, such as unpaved parking. However, these uses all existed before the current zoning restrictions were in place, and, as they were continuous, the uses would be grandfathered-in and considered legally

nonconforming. Once a nonconforming use ceases, the grandfathered status is lost. Thus, when Carson developed his cure plans allowing for continued use as a collision repair shop, he had to alter other previously grandfathered, nonconforming uses of the property (e.g., the use of the parking lot), which in turn required additional modifications to bring the new use "up to conformity" with applicable Town zoning ordinances.

Before trial, the State moved to exclude any evidence relating to the Morales' revoked displacee status. The trial court denied the motion. The State presented evidence at trial, through Ayers's testimony of her appraisal based on implementation of the O'Connor cure plan, that the compensation owed the Morales was $122,953. David Bolton, the Morales' appraiser, testified to two values. First, he testified to what he called his "displaced valuation" of $1,262,947, constituting the loss in fair market value of the property if all improvements were razed. He alternatively testified that if one of Carson's cure plans were implemented, such that the Morales could still use the property to operate a collision repair shop and thus would not be ***573** displaced, the Morales would be entitled to $1,064,335. Kimberly Morale testified that the Morales were requesting an award of $1,262,000 because, based on her knowledge of the property's highest and best use, they were being displaced.

The parties also disputed the admissibility of evidence regarding the Town's zoning regulations and the effect they would have on the property after condemnation. At trial, the State offered the testimony of city engineer Jason Laumer and city attorney Robert Brown. By referring to the Town's previous grants of zoning variances on unrelated properties, their testimony suggested that the Morales would also be given a zoning variance, allowing them to continue the collision repair business in a legally nonconforming way. Brown and Laumer conceded, however, that they could not testify as to what the Little Elm Town Council would or would not ultimately do. Dusty McAfee, who heads the Town's planning department, testified as a witness for the Morales. Like Brown and Laumer, McAfee could not speak to what the Town would do. But his testimony suggested that a prospective buyer would not believe it was reasonably probable that the Town would grant a zoning variance to make the O'Connor cure plan viable—or at least the buyer would not believe it was as probable as Brown and Laumer painted it. This was a key disagreement because the Morales' ability to continue using the property as a collision repair shop under the O'Connor cure plan (which was the basis for revoking the displacement classification) depended on obtaining a zoning variance.

The trial court admitted the testimony of Bolton and Kimberly Morale, including their discussion of displacement. It excluded Brown's and Laumer's testimony as irrelevant. The jury was asked to determine the difference between the market value of the whole property before the taking and the market value of the remaining property after the taking, considering the effects of the condemnation on the remainder. The jury awarded $1,064,335, Bolton's compensation figure associated with the Morales not being displaced, and the trial court essentially rendered judgment on the verdict. [1] The court of appeals reversed and remanded for a new trial. 553 S.W.3d 489, 509, 2016 WL 7473933 (Tex. App.—Fort Worth 2016) (mem. op.). It held that the admitted evidence of displacement was both irrelevant to the only issue at trial—"the compensation owed to the Morales for the part taken and for any damages to the Morales' remainder property"—and harmful. *Id.* at 496. The court also held Bolton's displacement appraisal was "based on a land use that was speculative and unsubstantiated," and that "the displacement market value testimony was irrelevant and therefore inadmissible." *Id.* at 504. Finally, the court of appeals held that the trial court erred in excluding Brown's and Laumer's testimony. *Id.* at 494. The Morales petitioned for our review.

[1] Whether to admit or exclude evidence is within the trial court's sound discretion. *See Owens–Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). Irrelevant evidence is not admissible. TEX. R. EVID. 402. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." TEX. R. EVID. 401.

[2] **[3]** The only issue the jury was asked to decide in this case was the ***574** amount of just compensation due to the Morales for the partial taking, calculated as the difference between the market value of the entire property before the taking and the market value of the remainder property after the taking, considering the effects of the condemnation. *State v. Petropoulos*, 346 S.W.3d 525, 530 (Tex. 2011). "The factfinder may consider the highest and best use of the condemned land," which is presumed to

be "the existing use of the land." *Enbridge Pipelines (E. Tex.) L.P. v. Avinger Timber, LLC*, 386 S.W.3d 256, 261 (Tex. 2012). A disagreement between experts as to the value of land after condemnation is part and parcel of trial. *See, e.g.*, *State v. Dawmar Partners, Ltd.*, 267 S.W.3d 875, 877 (Tex. 2008) ("[T]here was considerable conflicting evidence regarding the highest and best use of the property before and after the taking."); *State v. Windham*, 837 S.W.2d 73, 77 (Tex. 1992).

[4] Here, the collision repair shop was the existing use of the land at the time of the taking and thus was also the presumed highest and best use. The State's initial displacement classification, though later revoked, reflected the risk that the taking would cause the loss of that use. The court of appeals held that "the fact that the Morales were considered displaced ... does not make it more probable that the State at one time believed that the taking itself caused a change in the property's use" because the classification "was based on a combination of the effect of the taking and Ayers's proposed cure plan." 553 S.W.3d at 496. We disagree with this faulty premise. Ayers's cure plan merely reflected her conclusion that, at best, the property's highest and best use after the taking would still change. Certainly the State was entitled to, and did, present evidence explaining to the jury why the initial displacement classification was incorrect and why the taking ultimately did not prevent the Morales from continuing to use the property as a collision repair shop. But while the State may have changed its theory of the land's potential uses after the taking, we cannot say that the initial classification was wholly irrelevant to the property's highest and best use, and its corresponding market value, after the taking.

[5] The court of appeals further faulted the Morales for presenting the displacement evidence in a manner "that pointedly suggested that the State's revocation of displacement status was suspicious" and "to suggest that the State's valuation testimony and evidence was false." *Id.* at 498. It reasoned that the Morales' questioning of the State's witnesses on displacement "did not add any new information about the property's market value before or after the taking." *Id.* at 498. Even to the extent these colloquies were suggestive, they were not improper. If, as we have held, the State's classifying the Morales as displaced (and then revoking that classification) is relevant to the issues in the case, then the State's motivations for doing so are pertinent as well. *Cf. City of Austin v. Whittington*, 384 S.W.3d 766, 777 (Tex. 2012) (reiterating that a landowner may contest a condemnor's determinations of public use or necessity by establishing fraud, bad faith, or arbitrariness). Inquiries into the nature of the displacement revocation are probative in an adversarial trial in which the plaintiffs seek damages (at least in the alternative) based on their alleged displacement. And, as noted, the State presented its own evidence to the jury about its proper reasons for the revocation.

[6] **[7]** The court of appeals next held that Bolton's $1.2 million displacement valuation testimony was speculative and therefore inadmissible. We have held that expert testimony in condemnation cases is ***575** inadmissible if it relates to "remote, speculative, and conjectural uses" of the property that "are not reflected in the present market value of the property." *State v. Schmidt*, 867 S.W.2d 769, 773 (Tex. 1993) (quoting *State v. Carpenter*, 126 Tex. 604, 89 S.W.2d 194, 200 (1936)). The court of appeals faulted Bolton's displacement valuation because it "simply assumed that the Morales would have to relocate their business" and that "the improvements could not remain on the property." 553 S.W.3d at 502. However, an expert's opinion may assume facts established by legally sufficient evidence. *See Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 863 (Tex. 2017); *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499–500 (Tex. 1995).

In *Schmidt*, the "flaw" in the landowners' damages theory was that it did not assume a willing buyer; rather, it assumed "a buyer constrained to buy or abandon his plans for the use of his other property." 867 S.W.2d at 775. And in *State v. Little Elm Plaza, Ltd.*, an expert's valuation testimony "went too far" because the expert treated demolition of the "buildings as a certainty, rather than a market-affecting factor," even though there were several reasons that a complete razing was far from certain. No. 02-11-00037-CV, 2012 WL 5258695, at *12–14 (Tex. App.—Fort Worth Oct. 25, 2012, pet. dism'd) (mem. op.). That made the expert's testimony inadmissibly speculative. *See id.*

Unlike that testimony, Bolton's assumption that the Morales could not continue the property's existing use is grounded in evidence such as Kimberly Morale's testimony and the initial displacement classification. Building off his assumption of displacement (due to required cessation of the existing use), Bolton assumed

the improvements no longer fulfilled their function as an automobile repair facility and could not be utilized after the taking, such that the improvements would need to be razed. Bolton assumed a willing buyer of that property, *see Schmidt*, 867 S.W.2d at 775, who would look at the property and, in Bolton's words, conclude that "this was designed for an auto collision body shop and it's not going to work like that anymore ... those [improvements] are going to come down and I'm going to redevelop the site." Bolton appropriately *did not* assume a buyer who would derive some special benefit from a partially razed improvement once used as a collision repair shop but now unusable as such. *See State v. Moore Outdoor Props., L.P.*, 416 S.W.3d 237, 246 (Tex. App.—El Paso 2013, pet. denied) (explaining that the "willing seller-willing buyer test of market value entails considering factors that would reasonably be given weight in negotiations between a seller and a buyer," which "exclude[s] consideration of purely speculative uses to which the property might be adaptable but wholly unavailable" (citing *City of Austin v. Cannizzo*, 153 Tex. 324, 267 S.W.2d 808, 814 (1954))); *cf. Enbridge*, 386 S.W.3d at 262 ("The value-to-the-taker rule prohibits an owner from receiving an award based on a tract's special value to the taker, as distinguished from its value to others who may or may not possess the power to condemn.").

The excluded *Little Elm Plaza* testimony (on which the court of appeals relied) and Bolton's testimony are similar in the sense that both experts opine about the value of land with its improvements completely razed. But they are distinguishable in important respects. Unlike *Little Elm Plaza*, there is a legitimate question as to whether complete razing of the improvements could be avoided. For example, Ayers "did not suggest tearing down all of the improvements," but she did suggest "tearing down *part* of their building." 553 S.W.3d at 502. And although she testified ***576** that the business could still operate as a *general* auto repair business, she testified at first that the demolition would make the property unsuitable for the Morales' *existing* business. *Id.* Further, Ayers's revised analysis assumed the O'Connor plan could be implemented, allowing continued use of the property as a collision repair shop. However, she did not account for uncertainty about its implementation due to unknown factors such as the Town's approval of the cure plan. And unlike the excluded *Little Elm Plaza* expert, Bolton acknowledged the possibility that zoning variances would be granted and that displacement may not be necessary. But he did not improperly assume facts with an insufficient evidentiary basis. In sum, the State was free to cross-examine Bolton on his assumptions, but they did not render his testimony wholly speculative and therefore inadmissible.

[8] Finally, we disagree with the court of appeals' conclusion that the trial court erroneously excluded Brown's and Laumer's testimony about the Town's previous zoning-related actions. We hold the trial court did not abuse its discretion by excluding this testimony as irrelevant because it did not address the Morales' specific property.

In *Little Elm Plaza*, the court of appeals held that testimony that demolition would be required was inadmissibly speculative because it suggested demolition was certain and ignored the town's stated intention to accommodate the nonconforming property. *See* 2012 WL 5258695, at *13. Conversely, in their testimony, Brown and Laumer dismissed the fact that the Town had made no commitments to the Morales to specially accommodate their nonconforming property. Instead, Brown and Laumer relied exclusively on previous examples of the Town's granting zoning variances to other properties to suggest the pattern will repeat for the Morales. Their testimony was sufficiently speculative that it was within the trial court's discretion to exclude it.

[9] Even if Brown's and Laumer's testimony were admissible, its exclusion was not harmful. Erroneous exclusion of evidence is reversible only if it probably resulted in an improper judgment. *See* TEX. R. APP. P. 44.1(a)(1). We have explained that "exclusion is likely harmless if the evidence was cumulative, or if the rest of the evidence was so one-sided that the error likely made no difference." *Caffe Ribs, Inc. v. State*, 487 S.W.3d 137, 145 (Tex. 2016). The admitted evidence presented by both sides established the real possibility the Town would grant a zoning variance, allowing the collision repair business to continue. Thus, Brown's and Laumer's testimony about that possibility would have been duplicative. Indeed, the damages the jury awarded conformed exactly to Bolton's nondisplacement valuation, in which he assumed a zoning variance would be granted.

In sum, we hold the trial court did not abuse its discretion in admitting evidence about the Morales' alleged displacement, admitting Bolton's displacement

valuation testimony, and excluding Brown's and Laumer's testimony. We reverse the court of appeals' judgment and reinstate the trial court's judgment.

All Citations

557 S.W.3d 569, 61 Tex. Sup. Ct. J. 1601

Footnotes

1 An unexplained $20 discrepancy between the jury finding ($1,064,335) and the trial court's judgment ($1,064,355) has not been challenged on appeal.