IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CITY OF ALBUQUERQUE, a municipal corporation,

Petitioner-Appellee,

v.

No. 35,261
Bernalillo County
D-202-CV-2013-05649

SMP PROPERTIES, LLC AND R. MICHAEL PACK,

Respondents-Appellants,

and

MODERN WOODMEN OF AMERICA, ET AL.,

Respondents.

RESPONSE TO BRIEF IN CHIEF

Civil Appeal from the Second Judicial District Court
County of Bernalillo
The Honorable Nancy J. Franchini
District Court Cause No. D-202-CV-2013-05649

Christopher J. Tebo, Esq.
William W. Zarr, Esq.
Assistant City Attorneys
P.O. Box 2248
Albuquerque, New Mexico 87103
Telephone: (505) 768-4500
Facsimile: (505) 768-4525
For Petitioner-Appellee
City of Albuquerque

NOTE: Oral Argument Requested

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Statement of Page and Word Count Compliance:

This Statement of Proceedings contains 30 pages as permitted. Counsel used proportionally spaced Times New Roman typeface in 14 point font, in Microsoft Word Version 13. Counsel certified it also contains less then the minimum words permitted, the exact amount being 6,632.

STATEMENT OF PROCEEDINGS

NATURE OFTHE CASE

Appellee City of Albuquerque ("City") commenced a partial condemnation action on July 10, 2013 for the purpose of acquiring a 30-foot strip of land on property located at 3700 Hawkins Street N.E., Albuquerque ("Hawkins Property"). [Record Proper 11]. The property was owned by Appellants SMP Properties LLC and R. Michael Pack (collectively, "Appellants"). [RP 1]. The extent of the condemnation action was limited to acquiring the 30-foot strip in order to expand a pre-existing right of way on the northern boundary of Appellant's property. *Id.* This acquisition was necessary in order to connect Hawkins Street to a new road being constructed along the North Diversion Channel. *Id.*

The total amount of land actually taken from Appellants consists of an area of 15,588 square feet ±, or .3578 acres ±. After condemnation, the remaining amount of property on Appellants' parcel consists of an area of 413,873 square feet +/-, or 9.5012 acres ±. [RP 6]. Thus, the condemnation resulted in an acquisition by the City of approximately 4 percent of Appellants' property. *Id.* On August 6, 2013, the District Court issued a preliminary order of entry and a permanent order of entry was issued on

November 15, 2013. [RP 41; 84].

Appellants' appeal is predicated upon their argument in the District Court that a pre-condemnation visit by a City employee in December 2011 caused Appellants' tenant SAIA Motor Freight Line, LLC ("SAIA") to not renew a lease with Appellants. [RP 77; 138]. Beginning in 2003, SAIA leased a portion of the warehousing facilities at the Hawkins Property under an initial three-year term with two additional three-year options to follow. [RP 203]. In 2011, Appellant and SAIA were in the process of negotiating a new lease because the second option term expired on February 28, 2012. [RP 203-4].

Appellants allege that SAIA did not enter into a new lease agreement and vacated the property in 2012 because the City's taking may have required SAIA to relocate fuel tanks that it had installed on the property. [RP 386]. As a consequence, Appellants claimed a defense of inverse condemnation and asserted that the loss of the SAIA lease as it applied to the remaining ninety-six (96) percent of the property should be factored into the measure of damages due as just compensation for the City's taking. [RP 138].

On, July 24, 2015, the City moved for partial summary judgment on the issue of inverse condemnation. [RP 200]. In doing so, the City sought an order establishing that Appellant's alleged loss of the SAIA tenancy was not an element of damages for a partial taking under NMSA 1978 § 42A-1-26. *Id.*

In its order entered May 2, 2016 the District Court granted partial summary judgment for the City, finding that Appellants failed to meet the second part of the two-part inverse condemnation test enunciated in *Santa Fe Pacific Trust Inc. v. City of Albuquerque,* 2014-NMCA-093, 335 P.3d 232. [RP 595]. The District Court also held that under NMSA 1978 §42A-1-26, the measure of just compensation to which Appellants are entitled in a partial condemnation action is the difference in the value of the whole of the real property immediately before the taking and the remaining property immediately after thetaking. [RP 595].

As the condemnation suit progressed, the City also moved to exclude testimony at trial of Appellants' appraiser Bryan Godfrey. [RP 233]. The basis for the City's motion was to exclude under the standards enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S. Ct. 2786 (1993) the part of Mr. Godfrey's analysis which included a hypothetical conclusion that the SAIA tenancy was in fact in place as of the August 6, 2013, preliminary order of entry, but not subsequent. [RP 236-7]. The City claimed that Mr. Godfrey's hypothetical conclusion ignored the reality that SAIA actually ended its tenancy in February 2012. [RP 237]. On November 3, 2015, the District Court granted the City's *Daubert* motion and excluded testimony at trial. [RP 508].

On November 4, 2015, the District Court also issued an order granting the City's motion *in limine* to limit the testimony of Appellant R. Michael Pack to

only testifying about the value of the property before and after the partial taking. [RP 513]. On May 2, 2016 the parties entered into a Stipulated Final Judgment for Condemnation. [RP 598].

COURSE OF PROCEEDINGS

The City agrees that the proceedings listed in Appellants' Brief-in-Chief are those which are significant for this case. However, the City also notes that the following significant proceedings should also be included for completeness:

1. Order granting City's motion *in limine* to exclude the testimony of R. Michael Pack, filed November 4, 2015. [RP 513].

SUMMARY OF ARGUMENTS ON APPEAL

There are four (4) issues raised by this appeal:

1. Whether the City's pre-condemnation actions rose to the level of substantial interference with the use and enjoyment of the remaining property under the second part of the test for inverse condemnation set forth in *Santa Fe Pacific Trust, Inc. v. City of Albuquerque,* 2014-NMCA-093.

2. Whether the amount of compensation for a partial taking by condemnation includes damages for the alleged loss of a tenant.

3. Whether the District Court properly excluded testimony from Appellants' appraiser and also from Appellant R. Michael Pack concerning

the value of the Hawkins Property, to the extent that testimony on such valuation is derived in contravention of the method established by NMSA 1978 § 42A-1-26

4. Whether a party can appeal from a stipulated final judgment which also contains a reservation of rights to appeal certain decisions of the District Court.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT THE CITY'S PRE-CONDEMNATION ACTIONS DID NOT SUBSTANTIALLY INTERFERE WITH APPELLANTS' USE AND ENJOYMENT OF THE HAWKINS PROPERTY.

Santa Fe Pacific Trust, Inc. v. City of Albuquerque, 2014-NMCA-093, 336 P.3d 232 (hereinafter referred to as *"SFPT")* involved a claim for inverse condemnation that arose over plans by the City of Albuquerque to acquire downtown commercial rental property owned by the plaintiff. *Id.* The property was identified in a published Downtown Development Plan as within the site for an events center. *Id.* Two City mayors had very publically announced the intention of the City administration to acquire the property. *Id.* The City and plaintiff had also entered into a separate agreement involving an exchange of City property and property owned by the plaintiff adjoining the subject property. *Id.*

The City administration also undertook feasibility studies and began preliminary negotiations with the plaintiff to determine whether the property could be acquired via purchase agreement. *Id.* Ultimately, however, because the proposed funding of the larger project could not be acquired, the Albuquerque City Council did not approve the overall project or agree that the City could acquire the subject property.

Plaintiff brought suit alleging that various concrete steps taken by the City as well as public announcements related to the City's promotion of the overall project caused the Plaintiff to lose out on potential sales and leases of the subject property. *Id.* Based on those allegations, Plaintiff filed several claims for damages, including a claim for inverse condemnation under New Mexico law. *Id.* The district court granted the City's motion for summary judgment and dismissed the inverse condemnation claim. *Id.*

On appeal, this Court upheld the district court ruling, and adopted a two-part test (hereinafter *SFTP/Jackovich* test) first enunciated by the Alaska Supreme Court in *Joseph M. Jackovich Revocable Trust v. State Department of Transportation* 54 P.3d 294 (Alaska 2002). *Santa Fe Pacific Trust* at ¶37. This test was developed to analyze claims of inverse condemnation resulting from the pre- condemnation activities of a governmental entity when those activities are claimed to have allegedly reduced the value of a specific property. *Id.*

After determining that the City had likely manifested a "present concrete intention" to condemn the Plaintiffs property under the first part of the *SFTP/Jackovich* test, this Court evaluated under the second prong, whether the City's actions "substantially interfered" with the plaintiffs' use and enjoyment of the property. *Id.* ¶¶40-41. In assessing the City's actions, this Court held that a mere manifestation of intent to take, or a threat to condemn, does not warrant recovery for reduction in the value of property; there must also be some direct restriction on the use of the subject property. *Id.* ¶37 *(citing, 11 Eugene McQuillin, The Law of Municipal Corporations, §* 32.26 (2010)).

This Court noted that general knowledge of the project created by the City's "public airing and exploration of possible development plans" could not give rise to a valid inverse condemnation claim. *Id,* ¶40. In addition, under New Mexico law, inverse condemnation damages require intentional acts and therefore, "must be the result of the public entity's deliberate taking or damaging of the property in order to accomplish the public purpose." *Id,* ¶ 34; *Electro-Jet Tool and Manufacturing* Co. *v. City of Albuquerque,* 1992-NMSC-060, 19, 114 N.M. 676, 845 P.2d 770.

Further, this Court held that "[m]erely rendering private property less desirable for certain purposes ... will not constitute the damage ... but the

property itself must suffer some diminution in substance, or be rendered intrinsically less valuable, by reason of the public use." *Id* ¶41; *Public Service Co. of New Mexico v. Catron,* 1982-NMSC-050, 98 N.M.134, 646 P.2d 561. Accordingly, this Court ruled that regardless of any incidental economic consequence to the subject property, the City's pre-condemnation actions that do not directly restrict the use of a property or diminish the substance or intrinsic value of a property cannot create a compensable takings claim. *Id* ¶¶ 41-42.

A. PRESENT INTENTION TO ACQUIRE THE PROPERTY

The first part of the *SFPT/Jackovich* test is dependent upon analyzing whether a governmental entity publically announced a concrete intention to condemn the subject property. *Id.* ¶33 In the case at bar, it is undisputed that the extent of the condemnation was limited to a 30-foot strip of property on the northern boundary of Appellants' parcel amounting to approximately four percent of the total acreage. [RP 6]. Notwithstanding the visit by a City employee in 2011, at no time did the City express an interest in acquiring any other portion of Appellants' property. [RP 406; 409] Yet, while the City never announced an intention to condemn the remainder of the property, for purposes of its motion for partial summary judgment filed on July 24, 2015,

the City in fact conceded that its employee's actions appeared to have fulfilled that first part of the *SFPT/Jackovich* test. [RP 204]. The District Court noted this concession in its November 20, 2015 order. [RP 525-7]

B. NO SUBSTANTIAL INTERFERENCE

Not all consequential damage to property arguably caused by pre-condemnation activity is compensable in a claim for inverse condemnation. *Santa Fe Pacific Trust,* 2014-NMCA-093 ¶28. "[I]n order to be compensable, a taking of or damage to property must invade some substantive or intrinsic aspect of a landowner's right to the use and enjoyment of its property." *Id* ¶ 30. "An incidental economic loss is not sufficient." *Id.*

Having met the first prong of the *SFPT/Jackovich* test, it is then necessary to analyze under the second prong whether the City's pre-condemnation actions (i.e. the visit by its employee) substantially interfered with Appellants use and enjoyment of their property; in other words, that remaining ninety-six percent of the property against which the City expressed no interest and took no condemnation action.

In support of their argument for inverse condemnation of the remainder, Appellants rely on language from *SFPT* where this Court, in discussing the

planning activities engaged in by the City of Albuquerque relative to the event arena project, provided examples of certain kinds of actions that the City in fact did not do and thus by not doing so, placed no restrictions on the use of the plaintiffs property:

> "The City never physically appropriated the use of the Property. It never contacted existing or prospective tenants, it never denied SFPT any use permits related to the Property, and it never enacted any ordinances or regulations that changed the use of the subject property." (Id. ¶41, emphasis supplied).

Appellants attempt to extrapolate the proposition from this language that any contact with their tenants (in this case SAIA) - even where contact is required by statute - equates to substantial interference analogous to physical appropriation or other regulatory restrictions on the use of the property. To adopt Appellants' interpretation will be to ignore well-established New Mexico law and deifies a rational and common sense approach to evaluating when a governmental entity interferes with a private landowner's use of their property.

This is because here, the actions taken by the City upon which Appellants' base their claim for interference are the very actions required by the provisions of NMSA 1978 §42A-1-4. The statue is explicit in its requirement that the governmental entity *"make reasonable and diligent efforts to acquire property by negotiation"* whenever contemplating

acquisition of property via condemnation. Thus, in preparation for the statutorily required negotiations as part of the City's acquisition of the northerly 30-foot strip on Appellants' parcel, a City employee entered the Hawkins Property and discussed the potential land acquisition with a SAIA employee. [RP 405; 407; 526]. In doing so, the City thus provided Appellants and their tenant with a generalized knowledge of the City's plan. *Id.*

Yet, the discussion in 2011 was no more specific than a manifest intention; no direction was ever given by the City's employee to SAIA that it could not continue to utilize the 30-foot strip of land pending acquisition by the City. [RP 409]. Nor did the City place any restrictions on the use of the 30-foot strip by either Appellants or their tenant prior to the filing of the preliminary order of entry over 18 months later in August, 2013. More significantly given the holding in Santa Fe Pacific Trust, at no time did the City place restrictions on, or express interest in acquiring the remaining portion of SMP's property.

In granting the City's Motion for Partial Summary Judgment, the District Court correctly found that mere contact of a Appellant's tenant without some other accompanying action such as an order to vacate or a restriction on the use of the leased property by the tenant, will not constitute substantial interference with property that satisfies the second part of the

SFPT/Jackovich test. [RP 527].

Other State courts, when analyzing similar issues have found no taking occurred. In *Gardner v. City of Cape Girardeau,* 880 S.W.2d 652 (Mo. App. 1994), the Missouri Court of Appeals held that pre-condemnation survey work and marking at a property prior to condemnation that made it "unrentable" as claimed by plaintiff was not a taking. In *City of Colorado Springs v. Andersen Mahon Enterprises, LLP,* 260 P.3d 29 (Colo. App. 2010) the Colorado Court of Appeals held that pre-condemnation publicity that was claimed by the landowner to frustrate the rental of a property for several years prior to actual condemnation was not a taking.

Additionally, in *Chicago Housing Authority v. Lamar,* 21 Ill. 2d 362, 172N.E. 2d 790 (1961), the Illinois Supreme Court held that entering into negotiations and similar preliminary procedures, prior to acquisition of land for a public use was not as a matter of law "damage" to a property. In *City of Lewiston v. Lindsey* 123 Idaho 851, 853 P.2d 596 (Idaho App. 1993) the Court of Appeals of Idaho held that pre-condemnation notice and negotiations that resulted in loss of a tenant prior to condemnation was not a taking. Finally, in *City and County of Honolulu v. Chun,* 54 Haw. 287, 506 P. 2d 770 (1973) the Supreme Court of Hawaii held that a governmental authorization for the taking of property is not in of itself sufficient to constitute a taking; nor does a taking occur or a damage of property result by virtue

of the governmental entity engaging in negotiations to purchase the property.

II. APPELLANTS' EXPECTATION OF A LEASE RENEWAL IS NOT AN INTEREST IN LAND THAT CONSTITUTES A COMPENSABLE PROPERTY RIGHT UNDER NEW MEXICO LAW.

Under New Mexico law, a mere expectancy of a lease renewal is not an interest in land that constitutes a legal right to be separately valued and paid for in a condemnation action. *State ex rel. State Highway Commission v. Gray,* 1970-NMSC-059, ¶16,81 N.M.399, 467 P.2d 725; *see also State ex rel. Miller v. Gannett Outdoor Co. of Arizona Inc.,* 164 Ariz. 578, 795 P.2d 221 (1990); *see generally regarding expectations in the context of lease renewal, Environmental Control, Inc. v. City of Santa Fe,* 2002-NMCA-003, 131 N.M.450, 38P.3d 891.

In *Gray,* a business owner leased one tract of land and owned an adjacent tract of land, both of which were used to conduct the business. *Gray,* 1970-NMSC-059, ¶2. The business owner had held the leased tract for seventeen years, fourteen of which were as a month-to-month holdover tenant. *Id.* ¶¶11 & 15.The State condemned all of the fee land but instituted no condemnation action against the leased land. *Id.* ¶2. The business owner argued that the two properties should be considered as one tract and sought compensation for damages to the tracts as a whole. *Id.* ¶¶3-5.

In evaluating the business owner's claim, the New Mexico Supreme Court noted that:

> "[a] tenant from year to year with a covenant of renewal may have his damages assessed with reference to the covenant, but a mere expectation of renewal, based on evidence that the landlord and tenant were mutually satisfied and were likely to keep on together, cannot be considered by the courts."

Id. ¶*13 (citing, 2 Nichols, Eminent Domain, §* 5.23(4) (3d Ed. Rev. 1962) at 71-72).

Similarly, regarding takings and leases generally, the Court held that "a mere expectancy of renewal of [a] lease is not, in and of itself, an interest in land which constitutes a legal right to be separately valued and paid for." *Id.* ¶ 16. To support this conclusion, the Court cited the opinion in *Scully* v. *United States,* 409 F.2d 1061(10th Cir. 1969), where the Tenth Circuit includes the following quotation from Justice Holmes in *Emery* v. *Boston Terminal Co.* 178 Mass 172, 59 N.E. 763 (1901):

> "Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of petitioners' holding, they could not be taken into account . . . . They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the salable value of the lease, the addition would represent a speculation on a chance, not a legal right."

Yet, here Appellants are clearly claiming economic damages to the Hawkins Property in connection with their loss of SAIA as a tenant after the 2012 expiration of the second option period. [RP 204-5]. However, at the time it vacated the Hawkins Property, SAIA was in fact a month-to-month holdover tenant and given the failure to reach a new agreement

with Appellants for continued tenancy, was under no covenant or legal obligation to remain. [RP 204]. Therefore, Appellants claim is entirely based on the expectation that they could successfully negotiate additional leases with SAIA. However, under New Mexico law, a mere expectancy of renewal of a lease is not a compensable interest in land to be considered as damages due under a condemnation action. Thus, Appellants are not entitled to recover damages for the loss of SAIA as a potential tenant under an inverse condemnation claim.

III. THE DISTRICT COURT PROPERLY EXERCISED ITS GATE-KEEPING FUNCTIONS BY EXCLUDING TESTIMONY FROM APPELLANTS' APPRAISER AND ALSO FROM OWNER R. MICHAEL PACK CONCERNING THE VALUE OF THE HAWKINS PROPERTY TO THE EXTENT THAT SUCH VALUATION WAS DERIVED IN CONTRAVENTION OF THE METHOD ESTABLISHED BY NEW MEXICO LAW.

In *City of Albuquerque v. Westland Development Co., Inc.,* 1995-NMCA-136, 21 N.M. 144, 909 P.2d 25, this Court stated that NMSA 1978 42A-l-26 clearly establishes the temporal component of the calculation of before and after value in the context of condemnation actions. *Id.* ¶4. To get around this legal timing matrix Appellants' appraiser utilized a hypothetical condition that included the SAIA lease as in place immediately before the City's condemnation action. This condition was relied upon notwithstanding the

fact that SAIA vacated its tenancy 15 months earlier. [RP 235-7]. Appellants' appraiser also separated out the loss of a three-year lease renewal with SAIA as a distinct element of damages without taking into consideration whether SAIA intended to renew for the full three years. [RP 238]. The District Court correctly found that this methodology for valuation conflicted with the valuation method established by §42A-1-26, and as interpreted by this Court in *Westland.*

NMSA 1978, §42A-1-26 (1981) provides for the measure of just compensation in a condemnation action when part, but not all, of an owner's property is taken. Thus, under the statute, "[i]n any condemnation proceeding in which there is a partial taking of property, the measure of compensation and damages resulting from the taking shall be the difference in the fair market value of the entire property, immediately before the taking and the fair market value of the remaining property immediately after the taking." *Id.*

New Mexico Uniform Jury Instruction (UJI) 13-704, also tracks this statutory provision. The instruction states in relevant part that, "The money damages to be paid the owner for the property actually taken is the difference between the fair market value of the entire property immediately taken before the taking and the fair market value of the remaining property

immediately after the taking. *Id. See also, City of Albuquerque v. PCA-Albuquerque #19,* 1993-NMCA-043, 115 N.M. 739, 858 P.2d 406 (value of property is potential of highest and best use, not actual use). Given the plain language of the UJI, it follows that appraisal testimony inconsistent with the statutory provision for estimating just compensation based upon fair market value before and after the taking is improper, erroneous, will not assist the finder of fact, and if admitted is highly misleading to the finder of fact. UJI 13-704 (2016).

The hypothetical assumption of Appellants' appraiser was properly excluded by the District Court. This is because the hypothetical utilized to support his appraisal was contrary to known facts and, more importantly, failed to use the proper before portion of the before and after analysis required in New Mexico. Appellants' appraiser used an improper "before" valuation of the subject property when he hypothesized the SAIA still remained in a lease with Appellants up to and on August 6, 2013. Yet that is the very date on which the Preliminary Order of Entry was filed and the date mandated by New Mexico law to be used in the before and after valuation analysis. *Dona Ana ex rel. Board of Commissioners* v. *Bennett,* 1994-NMSC-005, ¶4, 116 N.M. 778, 867 P.2d 1160 (date of valuation held to be the effective date of preliminary order of entry). What was apparent to the District Court and is reflected in its Order, is that the Appellants' appraiser's

hypothetical condition was merely a tool relied upon to manipulate the before and after analysis. The goal was no doubt an attempt to capture speculative damages the Appellants claim resulted from the failure of SAIA to negotiate a new lease. To use this methodology, however, is contrary to New Mexico law. The only proper before and after analysis should be one that values the property in the actual "before" condition; i.e. without SAIA as a tenant and in the "after" condition subsequent to the City's condemnation action of the northernmost thirty feet of the parcel.

A. EXPERT TESTIMONY MUST ASSIST AND NOT CONFUSE A FACT-FINDER.

Rule 11-702 NMRA (2016) provides that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise." Rule 11-702 therefore predicates the admissibility of expert testimony on the satisfaction of three requirements: (1) that the expert is qualified; (2) that the testimony is of assistance to the trier of fact, and (3) that the expert's testimony is about scientific, technical, or other specialized knowledge with a reliable basis. *State v. Alberico,* 1993-NMSC-047, ¶41, 116 N.M. 156, 166 (1993). As stated in *Alberico,* "[e]ven if the expert testimony passes muster under Rule 702, it must still

be material to the particular case to be admissible". *Id.* ¶55. Ruling in a case specific for the issue of appraiser methodology in the condemnation context, this Court held in *Leigh v. Village of Los Lunas,* 2005-NMCA-025, ¶21, 137 N.M. 119, 108 P.3d 525, that the District Court abused its discretion when it admitted into evidence an appraisal report that failed to use the proper measure of appraisal; namely that the report failed to utilize the before and after rule as its valuation methodology.

B. AN OWNER'S TESTIMONY IS LIMITED IN SCOPE TO THE FAIR MARKET VALUE OF THE PROPERTY.

"A landowner may offer testimony as to the value of his property." *Leigh v. Village of Los Lunas,* 2005-NMCA-025 125, 139 N.M. 119. "However, the testimony must be directed to the fair market value." *Id.* at ¶25, *(citing* UJI 13-716 ("An owner may testify to the fair market value of his property, and that testimony may be considered by you the same as that of any other witness expressing an opinion as to the fair market value of the property.")). The fair market value is what a willing seller would take and a willing buyer would offer for the property if it were put on the open market. UJI 13-711." In the *Leigh* case, the owners' testimony was ruled inadmissible because it went beyond the scope of fair market value and instead consisted of testimony describing the value of the property to the owners personally. *See, Leigh,* 2005-NMCA-025, ¶¶25-27; *see*

also, Board of Com'rs of Dona Ana County v. Gardner, 1953-NMSC-047, 57 N.M. 478, 260 P.2d 938; *Transwestern Pipe Line Co. v. Yandell,* 1961-NMSC-173, 69 N.M. 448, 367 P.2d 938.

In the current case, Mr. Pack's proposed testimony involved his description of the loss to his business, and consequently to him personally, instead of the loss in the fair market value of the property caused by the City's condemnation. [RP 425]. The first component of his damages testimony - direct loss of rent from SAIA not entering into a new lease - was not related to fair market value. As a result the District Court properly excluded that testimony. [RP 514].

The District Court also excluded a second component of Mr. Pack's damages testimony. [RP 513]. This involved his calculation of the present value of the lost rental income from a particular tenant of the terminal building; i.e. SAIA. Again, this was clearly not testimony about either the fair market value of the property before or after the taking of the thirty feet by the City. It also fails to provide a measurement of what a willing seller would take and a willing buyer would offer for the remaining property (i.e. the remaining 94 percent of the parcel) if it was put on the open market. Again, the District Court ruled correctly.

C. APPELLANTS ARE NOT ENTITLED TO CONSEQUENTIAL DAMAGES ALLEGEDLY ARISING FROM THE CITY'S PRE-CONDEMNATION ACTIVITIES.

As described above, even for a partial taking as is the case here, NMSA 1978 §42A-1-26 provides that the measure of just compensation is the difference in the fair market value of the whole property immediately before the taking, and the value of the remaining property immediately after the taking:

> "In any condemnation proceeding in which there is a partial taking, the measure of compensation and damages resulting from the taking shall be the difference between the fair market value of the entire property immediately before the taking and the fair market value of the property remaining immediately after the taking...."

In *City of Albuquerque v. Westland Development Co., Inc.,* 1995-NMCA-136, 21 N.M. 144, 909 P.2d 25, this Court held that the use to which the condemned property was put could be considered to the extent that it affected the value of the remaining property. In *Westland,* the condemned property was improved by the City as a two lane access road leading to a landfill that was utilized by garbage trucks going back and forth from the landfill. This Court held that the diminution of value to the remaining property from the use to which the condemned strip of property was put is a proper consideration, relying upon the holding in *City of Santa Fe v. Komis,* 1992-NMSC-051, 114 N.M. 659, 845 P.2d 753.

In *Komis,* the New Mexico Supreme Court held that given the limited context of that case and similar cases, a property owner should be

compensated for diminution in value of that potion of the land remaining after a condemnation action. The context, which not present in the case at bar, involves remaining land where its value can be said to be reduced as a result of public fear or another detriment reasonably related to the taking. *Id.*

In *Komis,* the owner's property was taken only in part for the use of a highway to transport nuclear waste to a storage site in Carlsbad, New Mexico. Although the Supreme Court recognized that the public fear may not have been well-founded, or objectively reasonable, the diminution of value predicated upon that fear, such as that evidenced by potential tenants or prospective purchasers, was quantifiable and capable of being incorporated into a valuation methodology of before and after value.

In this case, Appellants offered no evidence to support a conclusion that the purpose of the taking (an infrastructure road project) or the use of the property taken adversely affected the market value of the remaining Hawkins Street Property. Instead, Appellants only claim that as a result of the City's contact with SAIA, the latter chose not to renew its lease. Appellants then claim only that the loss of SAIA as a future tenant resulted in damages to the Hawkins Property in excess of two-million dollars. Yet even if these allegations were true, it is clear under New Mexico law that the loss of SAIA as a future tenant cannot affect the intrinsic market value of either the portion of the Hawkins Property that

was condemned (4 percent), or the remaining 96 percent. Appellants' reliance on the holding of *Westland* to support their appraiser's hypothetical condition is misplaced because there is little doubt that this Court recognizes the strict applicability of the "before and after" valuation methodology.

IV. GIVEN THE STIPULATED JUDGMENT IN THIS CASE, NEITHER PARTY HAS, AS A MATTER OF LAW, THE RIGHT TO APPEAL ANY ANCILLARY ISSUE SUBSEQUENT TO THE ENTRY OF THE JUDGMENT.

In its Second Notice and Assignment to the General Calendar Order of June 15, 2016, this Court requested that in addition to any other issues the parties may wish to brief, that they also brief whether a party may appeal from a stipulated final judgment like the one in this case. In conjunction with this request, two cases were cited for consideration, *Gallup Trading Co. v. Michaels,* 1974-NMSC-048, 86 NM 304, 523 P.2d 548, and *Kysar v. BP Am. Prod. Co.,* 2012-NMCA-036, 237 P.3d 867. While each case analyzes the effect of a stipulation in the context of judgment and appeal, neither decision is sufficiently on point for determinative or authoritative value given the facts in the case at bar.

Gallup Trading involved multiple parties' consent to a judgment which the New Mexico Supreme Court held then eliminated their right to subsequently appeal that judgment. *Kysar* involved a stipulated directed verdict in favor of the defendant where the stipulation by the plaintiff was

found not to preclude a subsequent appeal. In both cases, however, the Court's rational in either denying the appeal *(Gallup Trading),* or permitting the appeal *(Kysar),* was predicated upon determining whether permitting the appeal would dispose of the underlying case, or was ancillary to the underlying case. Each decision further enunciated the need for the higher courts to promote judicial efficiency when possible.

In *Gallup Trading,* the determinative issue was whether nearly a year after consenting to a stipulated final judgment a party could then seek appeal of an issue that in effect, had already been addressed via the stipulated judgment. As the Court noted, it is the general rule that: "A judgment by consent is in effect an admission by the parties that the decree is a just determination of their rights on the real facts of the case had they been found. It is ordinarily absolutely conclusively between the parties, and cannot be appealed from or reviewed on a writ of error." *Shaw v. Spelke,* 110 Conn. 208, 215, 147 A. 675, 677 (1929). *See also, State v. Huebner,* 230 Ind. 461, 104 N.E.2d 385 (1952); 4 Am.Jur.2d Appeal and Error, ss 116, 243.

In effect by denying the appeal given the stipulated judgment and the fact that that the appeal would only rehash what the judgment had already determined; i.e. the rights of the parties, the Supreme Court established precedent which ordinarily prohibits a party from appealing from a judgment entered with that party's consent. *Gallup Trading,* 86 N.M. at 305, 523 P.2d at 549.

In *Kysar,* the issue before this Court was whether having agreed to stipulate to a conditional directed verdict, the appealing party would then be precluded from appealing, not the verdict (which *Gallup Trading* clearly precludes), but other procedural and evidentiary decisions that in of themselves prevented trial on the underlying case from taking place.

This Court concluded that an appeal will lie from a stipulated conditional directed verdict when the following conditions are satisfied: (1) rulings are made by the district court, which the parties agree are dispositive; (2) a reservation of the right to challenge those rulings on appeal is made; (3) a stipulation to entry of judgment; and (4) approval of the stipulation by the district court. In holding that under such limited conditions an appeal is permitted reflects this Court's recognition of an exception to the general rule that an appeal will not lie from a judgment entered by consent. Only when the *Kysar* conditions are satisfied can scarce judicial resources be conserved and the constitutional right of appeal appropriately protected. *Id.* at ¶13.

The case at bar is distinctive because the final judgment concluded the action entirely. The issues on appeal relate only to a defense raised by appellants in reponse to the condemnation action. It is undisputed that the parties stipulated to a final judgment as to the condemnation and thus concluded the case. There are no remaining counter or cross claims. [RP 598]. It is also undisputed that within the language of the final stipulated judgment,

Appellants clearly enunciated their desire to reserve a right of appeal of an issue, solely related to a now moot issue; namely the granting of partial summary judgment by the District Court in favor of the City. [RP 599]. The stipulated judgment in this case, however, is not analogous to the stipulated conditional directed verdict in *Kysar;* thus it is not a judicial determination like the directed verdict was.

Instead, like other stipulated agreements, the parties' stipulated final judgment in this case is a "contract between the parties". *State v. Clark,* 79 N.M. 29, 439 P.2d 547 (1968). Yet, underlying the stipulated judgment is also an incorrect assumption by SMP that the decision of the parties (admittedly mutual per the stipulation) to reserve one party's right to appeal within the language of the stipulated judgment, in fact creates a right of appeal. This is unsupported by either *Gallup Trading* or *Kysar.* But as noted above neither case clearly enunciates what the rule in New Mexico is given the issues now on appeal.

This is because if the stipulated judgment, notwithstanding the use of the term "final" is not a judicial determination, then it cannot be a final order for purposes of appeal. *See e.g. Khalsa v. Levinson* 1998-NMCA-110 ¶12, 125 NM 680, 684; Thus, notwithstanding the agreement of the parties that Appellants "reserved their right to appeal" [RP 599], there can be no appeal from the stipulated final judgment.

Contrary to Appellant's argument in the Brief-in-Chief, this specific question is not addressed by either *Gallup Trading* or *Kysar.* However, in conjunction with other cases which have analyzed the issue, both New Mexico decisions provide guidance suggesting that the ability of a party to appeal after entering into a stipulated agreement disposing of the case should be predicated upon a factor-based analysis. The two factors are: 1) whether the stipulation was voluntary, and 2) whether the appeal has any potential to effect a different resolution of the case given the dispositive action being appealed. In other words, given the stipulation and judgment that exists, does the appeal relate back in a manner that would permit the lower court to take action changing the outcome created by the stipulated judgment. If so, as in *Kysar,* the appeal may stand. If not, as in *Gallup Trading,* the appeal is waived and not permitted. This is a reasonable method of determining whether a right of appeal exists, and consistent with other jurisdictions that have addressed this issue. *See, e.g. Gaddy v. Brascho*, 141 So.3d 993 (Ala. 2013); *Stewart v. Lincoln-Douglas Hotel Corp.*, 208 F.2d 379 (7TH Cir. 1953).

There is no evidence in the record to suggest that the stipulation involved a lack of consent or involuntary agreement on the part of either party. Thus, the rational expressed in the holdings of *Rancho Del Villacito Condos, Inc. v.*

Weisfeld, 199-NMSC-076, 121 N.M. 52, 55, 908 P.2d 745 or *Hense v. G.D. Searle & Co.,* 452 N.W. 2d 440 (Iowa 1990) do not apply.

Instead, if the stipulation was voluntary, as here, then the second factor must be analyzed. In this case the appeal is not of the stipulated judgment but is ancillary in that it appeals the exclusion of testimony and evidence, none of which is necessary now that the stipulated judgment is in place. Further, the appeal, while raising an issue related to compensable damages in the context of inverse condemnation, again deals with an issue that has been rendered moot by the parties' decision to stipulate to a judgment on the underlying case; i.e. the condemnation and taking of the northerly 30-feet of the subject property.

In this case, it is undisputed that the voluntary nature of the stipulated final judgment precludes an appeal of that judgment by either party. *See, Dorse v. Armstrong World Industries, Inc.*, 798 F.2d 1372 (11TH Cir. 1986). This is highlighted by *Kysar* because unlike in that case, the stipulated judgment here was not agreed to by SMP in order to facilitate appellate review 9f the Court's dispositive grant of partial summary judgment. The opposite is true. The stipulated final order is the result of recognition that notwithstanding the grant of partial summary judgment in favor of the City, the parties agreed to resolve the underlying condemnation action.

All that now remains are the legal questions posed by Appellants as they relate to compensable damages and evidentiary standards. In effect, if the appeal

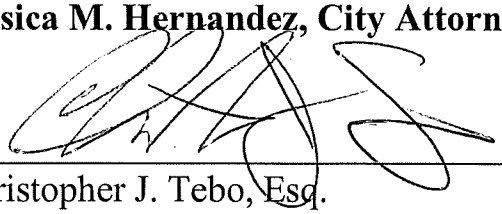
is permitted, this Court will not be able to issue a decision that changes the outcome of the underlying case because it has been stipulated to by the parties already. Thus, this Court may appropriately find that Appellants' appeal cannot lie.

ORAL ARGUMENT

The facts in this case, while not otherwise complicated, do raise complex issues of law and issues of first impression. Thus, the City agrees that oral argument may be helpful to clarify or further resolve the issues presented.

Respectfully submitted,

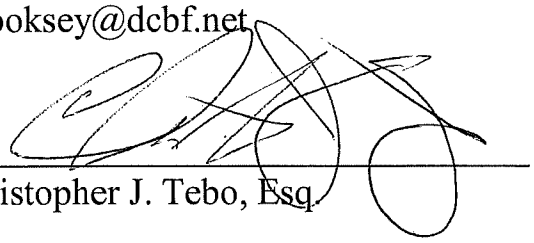
CITY OF ALBUQUERQUE
Jessica M. Hernandez, City Attorney



Christopher J. Tebo, Esq.
William W. Zarr, Esq.
Assistant City Attorneys
P.O. Box 2248
Albuquerque, New Mexico 87103
Telephone: (505) 768-4500
Facsimile: (505) 768-4525
ctebo@cabq.gov
wzarr@cabq.gov

I HEREBY CERTIFY that a true and correct copy of the foregoing sent via email to the following counsel of record on October 27, 2016:

William J. Cooksey, Esq.
Dubois, Cooksey & Bischoff, P.A.
2040 Fourth St. NW
Albuquerque, NM 87102
wcooksey@dcbf.net



Christopher J. Tebo, Esq.

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