IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

CITY OF ALBUQUERQUE,
A Municipal Corporation,
Petitioner-Appellee,

vs

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.

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

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NOTE: Oral Argument Requested

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TABLE OF AUTHORITIES

New Mexico Case Authority:

Case Law From Federal And Other States:

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Statement of Page & Word Count Compliance:

This Brief contains 35 pages as permitted. Counsel used a proportionally spaced Times New Roman typeface, in 14 point font, in Microsoft 3X Word Perfect. Counsel certifies is also contains less than the minimum words permitted, the exact amount being 8,622.

STATEMENT OF PROCEEDINGS

Nature Of The Case:

Petitioner-Appellee City of Albuquerque (the "City") filed its condemnation action on July 10, 2013, to obtain a 30 foot strip of land along the northern boundary line of Respondents-Appellants' SMP Properties, LLC and R. Michael Pack's (collectively "SMP Properties") property. Prior to filing its Complaint the City had entered upon and interfered with the use of the property by contacting the tenants of SMP Properties, causing one of the long standing and valuable tenants ("SAIA") to vacate the property. In answering the City's condemnation act, SMP Properties asserted inverse condemnation, consequential damages due to the City's conduct, and that the value of the partial taking should include lost rental income due to the commercial nature of the property and its valuation being determined by rental income. SMP Properties disputed the City's valuation of the subject property, asserting the provisions of N.M. Const. Article II, §20 and NMSA 1978, § 42A-1-26 (1981). The City filed its Motion for Partial Summary Judgment to preclude all inverse condemnation claims by SMP Properties, and the district court granted partial summary judgment, and also entered orders precluding SMP Properties' expert and owner R. Michael Pack) from testifying about loss of rental income and economic loss to the property as a result of losing rental income. This

appeal followed contesting the district court's rulings.

Course of Proceedings:

The significant proceedings in this case are as follows:

1. Complaint for condemnation filed 7/10/2013, for a partial taking and temporary construction easement, and August 6, 2013, Order of Entry. [1 RP1-4 and 1 RP 36]

2. Default judgment entered against all Defendants except SMP Properties, LLC and R. Michael Pack. [1RP 98-100]

3. Rule 1-016 Scheduling Order entered setting pretrial deadlines and a five (5) day jury trial to commence on November 16, 2015. [1 RP 130-132]

4. Stipulated Order granting SMP Properties' Motion to file First Amended Response. [1 RP 148-149]

5. City's Motion for Partial Summary Judgment Regarding Claims for Consequential Damages Relating to the Loss of Potential Tenant Leases, filed July 24, 2016. [1 RP 200-228]

6. City's Daubert Motion and Motion in Limine to Exclude Testimony of Bryan Godfrey (expert), filed August 12, 2015. [1 RP 233-258]

7. SMP Properties' Statement of Material Facts and Response to City's Motion for Partial Summary Judgment, filed September 11, 2015. [2 RP 354-399]

8. SMP Properties' designation of exhibits and deposition references, in support of their Statement of Material Facts, filed September 14, 2015. [2 RP 379]

9. City's Motion in Limine to Exclude Testimony of R. Michael Pack, filed September 17, 2015. [2 RP 423-434]

10. SMP Properties' Response to City's Motion to Exclude Testimony of R. Michael Pack, filed October 1, 2015. [2 RP 438]

11. SMP Properties' Response to City's Motion to Exclude Testimony of Byran Godfrey, filed October 7, 2015. [2 RP 469]

12. Order Granting City's Motion to Exclude Testimony of Byran Godfrey, entered November 3, 2015. [2 RP 508]

13. SMP Properties' correspondence dated November 11, 2015, to The Honorable Nancy J. Franchini, requesting stay of proceedings and grant of interlocutory appeal. [2 RP 516]

14. SMP Properties' Motion for Interlocutory Appeal and Stay of Proceedings. [2 RP 518-521].

15. District Court's (sua sponte) Order, reversing its Order Denying the City's Motion for Partial Summary Judgment (entered 11/20/2015), and granting partial summary judgment in favor of City (ruling that this is a "final, appealable order"). [2 RP 525,527]

16. District Court's Amended (sua sponte) Order, filed May 2, 2016 (confirming its Order of November 02, 2015 [2 SRP 25-527], but omitting language, this is a "final, appealable order" and adding SMP Properties' full reservation of rights to contest and appeal. [2 SRP 594,596]

17. Stipulated Final Judgment for Condemnation, filed May 2, 2016, with SMP Properties' reservation of rights to contest and appeal. [2 SRP 598-601]

SUMMARY OF ARGUMENTS AND RELEVANT FACTS:

SMP Properties respectfully submits the district court erred in granting the City's Motion for Partial Summary Judgment and precluding the testimony of their expert witness, Byran Godfrey, and R. Michael Pack, the "owner". Apparent in the adverse orders being challenged by SMP Properties is the district court's interpretation of the cases *Santa Fe Pacific Trust v. City of Albuquerque*, 2014-

NMCA-093, 336 P.3d 232 and *City of Albuquerque v. Westland Development Co., Inc.*, 1995-NMCA-136, 121 N.M. 144, coupled with a strict construction of 42A-1-26 (1981). It seems the district court also gave little or no consideration to the New Mexico Constitution mandating that private property shall not be taken or damaged for public use without just compensation. N.M. Const. Art. II §20. The adverse orders are found at 2 SR P594 (Amended Order on City's Motion for Partial Summary Judgment - granting same), 2 RP 508 (Order precluding testimony of Bryan Godfrey) and 2 RP 513 (Order Excluding Testimony of R. Michael Pack).

The district court also appears to have not considered the major difference in *SFTP* and this case, that there was never a "taking" in *SFTP*. In this case, there was. *See* Preliminary Order of Entry. [1 RP 36] These positions are argued hereafter in ISSUES 1 & 2.

ISSUE NO. 1: Did The District Court Commit Error in Granting Summary Judgment and Determining That The Loss of the SAIA Lease Was Not a Compensable Element of Damages

The district court entered its amended order granting summary Judgment in favor of the City on May 2, 2016 [2 SRP 594]. In its order it determined that the value of the SAIA lease was not a compensable element of damage for a partial taking under NMSA 1978, §42A-1-26 (1981). [2 SRP 594, 595, ¶4]. The district

court went on to conclude that the City's motion for partial summary judgment was well taken because the City's pre-condemnation activities did not constitute a taking. [2 SRP 595, ¶4]. The district court did recognize that the City, for purposes of summary judgment, had conceded it had publicly announced a present intention to condemn the property in question [2 SRP 595, 596, ¶4] The district court referenced the two-part test for determining when pre-condemnation activities constitute a taking as set forth *in Santa Fe Pacific Trust, Inc. v. City of Albuquerque, 2014-NMCA-093, ¶¶25-37, 336 P.3d 232.*

Standard of Review:

The review of a district court's grant of summary judgment is reviewed de novo by the Court. *Phoenix Funding, LLC v. Aurora Loan Services, LLC,* 2016-NMCA-010, ¶7, 365 P. 3d 8., cert. granted 2015-NMCERT-001. Also, the determination of the measure of damages, both constitutionally and statutorily, is a question of law reviewed de novo by this Court. *Primetime Hospitality, Inc. v. City of Albuquerque,* 2007-NMCA-129, ¶9, 168 P.3d 1087.

Preservation: SMP Properties preserved the matters raised in this Issue by filing their Response to the City's motion for partial summary judgment. [2 RP 379] and their extensive Statement of Material Facts, with supporting references to depositions and exhibits [2 RP 354-389, 2 RP 400-422]

Summary judgment is a drastic remedy to be used with great caution. The party opposing the motion for summary judgment is to be given the benefit of all reasonable doubts in determining whether a genuine issue of fact exists. *See, Richards v. Upjohn Co.*, 1980-NMCA-062, 95 N.M. 675, 678; *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶7, 8, 148 N.M. 713.

I. Santa Fe Pacific Trust and Westland:

The City's summary judgment argument was that SMP Properties did not meet the second of the two part "inverse condemnation" test under *Santa Fe Pacific Trust v. City of Albuquerque ("SFPT")*, which requires a landowner to show that (1) the government manifested a present intention to condemn property, and (2) the government substantially interfered with the landowner's use and enjoyment of the property. *SFPT*, 2014-NMCA-093, ¶¶25, 37, 335 P.3d 232, *writ quashed* 2015-NMCERT-004, 348 P.3d 695, *citing Joseph M. Jackovich Revocable Trust v. State, Dept. of Transp.*, 54 P.3d 294 (Alaska 2002). The City conceded the first requirement but argued the second, that it did not "substantially interfere" with SMP Properties' use and enjoyment of its property, resulting in no claim for inverse condemnation.

The City's argument fails. First, this case concerns a partial taking, in contrast to both *SFPT* and *Jackovich*, which were claims for inverse condemnation

only. *See* Complaint and Preliminary Order of Entry. [1 RP 1, 36] Therefore, damages are also at issue, rather than just, as in *SFPT* and *Jackovich*, whether there was actually a taking or not. The City asserted that this case involved "pre-condemnation" activity, which it says is non-compensable, and subsequent condemnation which does not allow consequential damages. Under New Mexico law, however, the evaluation of damages in a partial taking must consider *causation* as well as timing. *City of Albuquerque v. Westland Development Co., Inc.,* 1995-NMCA-136, ¶5, 121 N.M. 144. Therefore, implicit in *Westland*, "just compensation" in partial taking covers in scope pre-condemnation activity which directly causes a reduction in the value of the property. *See, Westland*, ¶¶ 4, 5, 42A-1-26, NMSA (1981).

a. SMP Properties' Claims Satisfy The Two-Part Test Set Forth in Santa Fe Pacific Trust.

SFPT concerned the City's plans to build an arena in an area which included the plaintiff's property. For several years newspapers publicized the proposed arena, the mayor held press conferences in which he indicated that the plaintiff's property was the potential location of the arena, and the City administration engaged in planning, including the issuance of a request for information to prospective developers, a memorandum of understanding regarding financing

commitment to one such developer, and a request for a proposal on the arena project. Nevertheless, the project never actually took place.

The plaintiff brought suit for, among other things, inverse condemnation. The district court ultimately granted summary judgment against the plaintiff on the inverse condemnation cause of action and this Court affirmed. *See, SFPT*, 2014-NMCA-093 ¶42.

This Court determined that the plaintiffs had met the first element of the two part *Jackovich* test, but failed to show the second: "substantial interference" *SFPT,* 2014-NMCA-093, ¶*41.* Therefore, plaintiff could not recover in inverse condemnation. In discussing the second requirement, this Court stated, "[w]hile the evidence demonstrated that some "potential" tenants of the building on the property were deterred by the possibility of imminent condemnation, this is not the kind of interference that rises to the level of unconstitutional damage to, or taking of property. *Id at* ¶*41.* Instead, the type of activities that did rise to substantial interference included: physically appropriating the use of the Property, ***contacting existing or prospective tenants***, or enacting ordinances or regulations that changed the use of the Property. (Emphasis added) *See, SFPT, 2014-NMCA-093,* ¶*41.*

In *SFPT* this Court adopted the inverse condemnation test set forth in the Alaska case *Jackovich Revocable Trust v. State, Dept. Of Transp.* 54 P.3d 294

(Alaska 2002). *Jackovich* concerned a projected road project which never materialized, much as the arena in *SFPT* never materialized. The contemplated project began in 1977, and the state published notices, plans and other information. In 1997, the property owners sued for inverse condemnation, alleging defacto taking and damage to their property. They argued that the information published about the road project deprived them of the full use and enjoyment of their properties and reduced their value, and submitted evidence that they were unable to sell their properties and it reduced their value. *Jackovich*, 54 P.3d at 298. The Alaska Superior Court dismissed the landowner's claims on summary judgment and the Alaska Supreme Court affirmed. The court reasoned that there was no inverse condemnation because the "state did not publicly announce a concrete intention to use or condemn specific parcels of the owners' properties or engage in activity that substantially interfered with the use and enjoyment of their properties." *Jackovich*, 54 P.3d at 295. The court noted that "objective manifestations of the government's intention to take the property are critical to the decision whether there was a taking", and that, the "adoption of a general plan is several leagues short of a firm declaration of an intention to condemn property." *Jackovich*, 54 P.3d, 294, 298, 299.

In addition to there being no concrete intention, the landowner's failed to

show that the state had substantially interfered with the property, because all it did was, "make announcements, prepare and publish plans, and provide publicity concerning the project." *Jackovich*, 54 P.3d, 294, 301-2. The court set forth a list of factors to be considered as "substantial interference", including: limiting the plaintiff's development, denying permits, or **notifying tenants they'd have to vacate**. (Emphasis Added). *See Id* 298.

This Court in *SFPT*, and the Alaska Supreme Court, without question, indicated that the "substantial interference" with property included entering the property and contacting existing tenants. *See*, *SFPT*, 2014-NMCA-093, ¶41 *Jackovich*, 54 P.3d 294, at 298. That is exactly what occurred in the instant case.

Statement of Facts:

On or about December 10, 2011, Jeffrey Willis, employed by the City as a "right-of-way coordinator, went to the SMP Property and talked with the "SAIA guy." [Dep. JW 8:13-20, 2 RP 403, 19: 9-25, 20: 9-14, 2 RP 404] Mr. Willis testified that, at the time he went to the property, the City had already made its decision to condemn a portion of it. *[Id,* 39:12-24, 2 RP 407, 41:1-14, 2 RP 408] He knew this because he had received the legal description of the property. [*Id.* 41:17-25, 42:1-2, 2 RP 408]

Mr. Willis spoke to the "SAIA guy" Kevin Russell, and showed him where

on the property the right-of-way taking would be [*Id.* 20:9-17, 2 RP 404, 21: 1-4, 2 RP 405] He didn't contact the owner, Michael Pack, but rather the tenants because Mr. Pack lived out of town, and he didn't have a phone number or email address for him. [*Id.* 21:8-20, 23:8-11, 2 RP 405] According to Mr. Willis, Mr. Russell was concerned that the taking would impact vehicle turning radii, as well as the fuel station-tanks on the property. [*Id.* 20:22-25, 2 RP 404, 21: 1-7, 2 RP 405]

According to Mr. Pack, Mr. Willis entered the property without his permission, and told Mr. Russell the City was taking 30 feet off the north end of the property. There were "no negotiations" as to the scope or location of taking. [Dep. MP 55:17-25, 2 RP 417] Mr. Tom Davis, SAIA's property manager, indicated that, prior to Mr. Willis' visit, SAIA had "every intention of staying" another nine years, which was evidenced by the fact that SAIA had spent two years and $180,000 installing the fuel tanks. [Dep. TD 34:11-25, 35:9-25, 2 RP 369, 45:5-25, 2 RP 372] Mr. Davis stated that SAIA company policy was that "[w]e would not put in a tank at a location where we had the ability or the intention of staying less than eight years" and "[t]he intention was we were negotiating nine more years to stay there after 2012, a lease with a three-year base term and two three-year options. And I know that because I was part of the decision-making process to install the tanks there." [*Id.*45:14-24, 46:1-7, 2 RP372,

61:20-24, 62:1-6, 2 RP 376].

After Mr. Willis' visit, SAIA considered whether it would be feasible to move the tanks, which would have cost $60,000. [*Id.* 46:13-25, 2 RP 372] Ultimately, SAIA determined that it could not renew the lease because of the loss of both the fuel tanks and the four doors, and the infeasibility of relocating the tanks. [*Id.* 49:19-22, 52:1-14, 2 RP 373] Mr. Davis confirmed that SAIA made the decision not to stay because of Mr. Willis' visit informing it of the decision to take the property. [*Id.* 53:14-18, 2 RP 374] Mr. Davis summed it up by confirming that had there not been a notification of the condemnation SAIA would have stayed. [*Id.* 61:9-23, 2 RP 376] See also Davis confirming letter of March 30, 2012. [SMP's Ex. I, 2 RP 361]

Argument:

Under *Jackovich*, "substantial interference" may be shown where the condemning authority notifies tenants they will have to vacate. *See, Jackovich*, 54 P.3d at 298. Although Mr. Willis did not specifically tell SAIA it would have to vacate, he showed Kevin Russell that the property to be taken would run right through the fuel tanks and impact four doors. Mr. Russell confirmed these facts in his deposition. [Dep. KR 8:9-19, 2 RP 412] This was in effect, a constructive eviction of SAIA, since they were essentially deprived of the full beneficial use of

the premises – the fuel tank doors and four doors, both of which they relied on to do business. *See, e.g. Honce v. Vigil,* 1 F.3d 1085, 1091 (10th Cir. 1993), *citing Dennison v. Marlowe*, 1987-NMSC-104 106 N.M. 433, 437 (constructive eviction occurs when the landlord substantially deprived the tenant of the beneficial use of the premises, and the tenant vacates). SAIA was unable to move the tanks, and had installed them intending to stay.

Therefore, Mr. Willis's entry on the property and discussion with Kevin Russell effectively notified SAIA it would have to vacate. This conduct established "substantial interference" under *Jackovich*, or at the least, made it a question of fact.

In addition, under *SFPT*, a condemning authority arguably does "substantially interfere" with the landowner's use and enjoyment of the property where it "contacts" existing or prospective tenants. *SFPT* at ¶41. Mr. Willis contacted SAIA and informed it of the boundaries of the condemnation, which had already been decided by December 10, 2011.

As a direct result of this tenant contact, SAIA decided not to renew its lease, despite its intention to stay for nine more years, as evidenced by its installation of the tanks. The City's intervention with the SAIA tenant amounted to "substantial interference" which deprived SMP Properties of the use and enjoyment of their

property, resulting in lost rental income. (*See* 2 RP 361, Ex. "I"]

Accordingly, under the facts of this case, SMP Properties demonstrated (1) the City's concrete intention to condemn (conceded by the City), and (2) a substantial interference with the property – Mr. Willis' visit to SMP's tenants.

b. This is a Partial Takings Case, and Therefore, Summary Judgment Was Inappropriate On the Issue of Damages, Including Damages For Lost Rental Income Caused by The Condemnation.

The City asserted in its motion for partial summary judgment that based on *SFPT, Jackovich* and several other inverse condemnation cases, SMP Properties could not recover for the loss of rental income.

The New Mexico Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation." N.M. Const. Art. II, §20, New Mexico's partial condemnation damage statute, NMSA 1978, §42A-1-26 (1981):

"The rule is a recognition that, in addition to compensation for property actually taken, the landowner should be compensated for ***any*** loss of value suffered by the remaining property because of the condemnation of a particular portion." (Emphasis added) *Yates Petroleum Corp. v. Kennedy*, 1989-NMSC-039, 108 N.M. 564, 567, 775 P.2d 1281, *citing State ex rel State Highway Dept. of NM v. Strosnider,* 1987-NMCA-136, 106 N.M. 608, 611, 747 P.2d 254.

Although the statutory language "immediately before" and "immediately after" the taking seems to require only a temporal assessment of damages, this is not the case. In *City of Albuquerque v. Westland*, 1995-NMCA-136, 121 N.M. 144, this Court held that a strictly temporal calculation of the statute would be insufficient, because just compensation requires payment for the diminution in the property value *caused* by the taking. This Court stated: "to compensate justly for the taking, the "before" value must be calculated *as if no taking were to take place* and 'after' value calculated as if the taking had already occurred. (Emphasis added) *Westland*, 1995-NMCA-136, ¶5. Thus:

> "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" is shorthand for "the difference between the fair market value of the entire property immediately before the taking ***(assuming that the prospective condemnation is not taken into consideration)*** and the fair market value of the property remaining immediately after the taking (taking the condemnation into consideration.)" (Emphasis added) *Westland*, ¶5.

In the instant case, *Westland's* causation analysis would require that just compensation value SMP Properties' property as if Mr. Willis had never entered the property, the act which directly caused SAIA to decide not to renew its lease. As this Court stated in *Westland*, a "purely temporal" calculation would likely result in "an award of little or no compensation for diminution of value of the

uncondemned portion of the property, because hypothetical purchasers would take into account that the condemnation would occur soon." *Westland*, ¶4. The analysis holds true here, where, prior to Mr. Willis' entry on the property and discussion with SAIA of the City's planned taking, SAIA had planned to stay and pay rent for eight or nine more years. Thus, valuation in this partial taking case requires that the "before" value be assessed as if SAIA were still a tenant, and the after value assessed, without that tenancy. It requires a consideration of the diminution in value caused by Mr. Willis' entry onto the property. This is especially relevant where the property in question is commercial property, and is valued according to income. The City's motion attempts to shut off a consideration of the pre-condemnation activity as a matter of law, which is inappropriate under *Westland*, and N.M. Const. Art. II §20, which requires consideration of causation. See also case law cited in Issue 2, opening paragraph.

Case law from other jurisdictions also support a finding of damages for lost rental prior to actual condemnation. For *example*, *Luber v. Milwaukee County*, 47 Wis.2d 271 (Wis. 1970). Although not binding authority, *Luber* is especially relevant for the instant case, because of the similarity in fact pattern, and the recognition of the landowner's interest in rental income.

c. *State ex rel State Highway Commission v. Gray* supports SMP Properties Position (1970-NMSC-059, 81 N.M. 399):

The City argued in its motion for summary judgment that the Gray case stands for the proposition that a "mere expectation" of renewal of a lease does not constitute a compensable property interest in the context of condemnation. The City asserted that SAIA lost rents are not compensable. Notwithstanding, *Gray* actually supports SMP Properties' position, because in this case there was far more than a "mere expectation" of a lease renewal between SMP and SAIA.

The jury in *Gray* returned a valuation based on partial taking. The State appealed, arguing in relevant part that the leased land should not have been considered part of the condemned parcel. The Supreme Court considered the three factors necessary to show a combined tract; contiguity, unity of use, and unity of ownership. *See, Gray*, 81 N.M. at 400. Although the Court found the first two factors satisfied, it examined Gray's rights and interest in the leased land, and determined that he could not show the third, unity of ownership. *See Gray*, 81 N.M. at 400. The Supreme Court, looking at valuation, recognized that "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." *Gray* 81 N.M. 399, 402. (Emphasis added)

The *Gray* court, however, specifically limited its holding to only the facts before it. Supportive of SMP Properties' position, the Supreme Court stated:

> "A tenant from year to year with a covenant of renewal may have his damage assessed with reference to the covenant. . . We do not decide the issue of whether some greater leasehold interest than that held by Gray at the time of taking could be combined with a fee interest, with a resulting partial taking of the combined tract, but only that his interest here, as a holder month-to-month. [Emphasis added]

The City argued that SAIA was a mere month-to-month tenant at the time it vacated the Hawkins Property, that there was no binding legal agreement between it and SMP Properties at the time it vacated the Hawkins Property, and that there was no binding legal agreement between it and SMP to renew the lease, but only a "mere expectancy" of renewal, which is not compensable. [1 RP 210] SMP Properties submits the City was wrong.

First, as set forth above, Mr. Willis entered the SMP Property and talked to Kevin Russell *before* SAIA'S lease had expired, and SAIA decided not to renew its lease as a direct result of Mr. Willis' visit. Second, the City ignored the fact the expectation that the SAIA lease would be renewed, which amounted to a binding "covenant of renewal", *Gray,* 81 N.M. 399, 402. The City also failed to appreciate the doctrine of promissory estoppel.

The essential elements of promissory estoppel are: (1) an actual promise

must have been made which in fact induced the promisee's action or forbearance; (2) the promisee's reliance on the promise must have been reasonable; (3) the promisee's action or forbearance must have amounted to a substantial change in position; (4) the promisee's action or forbearance must have been actually foreseen or reasonably foreseeable to the promisor when making the promise; and (5) enforcement of the promise is required to prevent injustice. *See, e.g. Strata Production Co. v. Mercury Exploration Co.,* 1996-NMSC-16, 121 N.M. 622, 628; 916 P.2d 822. SMP Properties clearly raised the elements of promissory estoppel as an inherent question of fact, in support of the argument that there existed a covenant of renewal with the SAIA lease. [2RP 394-397]

Mr. Davis testified that SAIA spent two years and $180,000 installing the fuel tanks. The process began in 2009 with negotiations and agreement with Mr. Pack about renewing the lease beyond 2012, and ended with the tanks finally installed. [Dep. TD 17: 18-25, 18:17-19, 17:18-25; 19:1-25; 20:1-22; 2RP365, 11:16-25, 2RP 364, 32:3-9, 2 RP 367, 35:12-16, 2 RP 369, 37:12-25, 38: 1-25, 39: 1-18]. In 2009, SAIA had already decided to stay at the Hawkins location beyond the 2012 lease expiration. *Id.* [49:5-25, 2 RP 373] It was SAIA company policy to only install tanks at locations where it would stay eight years or more, and to Mr. Davis' knowledge, SAIA never violated that policy. *Id.*35, 4-25, 2RP 368, 45:14-

24, 46:1-7, 2 RP 372] According to Mr. Davis, SAIA intended to stay nine more years at the Hawkins property after its lease expired in February, 2012 -- a three year base term with two three-year options. [*Id.* 45:14-24, 46:1-7, 2 RP 372].

Mr. Davis characterized the tank installation process as "painful" [*Id* . 19:11-25-20:11, 2 RP 365). The process wound up being more costly than planned, because, due to the location, SAIA had to use "Fireguard" tanks, which were a more expensive option. (*Id.* 25: 3-24, 2 RP 366). Mr. Pack agreed that tank installation was a "big deal", and that he and SAIA worked together for two years to get them done. [Dep. MP 41:9:25, 2 RP 415]. Once the tanks were installed, SAIA had to have them tested and registered regularly, and maintain them in good working order [TD Dep. 32:2-9, 2 RP 367, and generally, *Id.* pgs. 33-36, 2RP 368]. Removing tanks is costly, and you have to undertake new soil tests. [*Id,* 46:15-25, 2 RP 372].

The lease between SAIA and SMP, which terminated on Feb. 29, 2012, contained provisions that SMP would build SAIA new doors if they needed it. *[Id.* 17:3-10, 2 RP 365] Mr. Pack assured Mr. Davis that SMP would continue to lease the space to SAIA and the new lease was to have a similar provision for new doors if SAIA needed them. *[Id.* 38:1:15, 39:8-18, 2 RP 370, 45:14-24, 2 RP 372, 55:18-25, 2 RP 374, 375 (*Id,* 53:12-18, 2 RP 374] Mr. Davis, who handled SAIA's lease

process, began lease renewal negotiations a year before leases were set to expire [*Id*, 45:14-24, 47:1-25, 48:2-25, 2 RP 372] The renewal negotiations were ongoing at the time Mr. Willis came onto the property, on December 20, 2011, and prior to that time, according to Mr. Davis, "there was absolutely no reasons for us to leave. *[Id.* 62:2-6, 2 RP 376, and also generally 2 RP 372, pp. 45-48). Mr. Davis stated that the decision to move came after Mr. Willis's visit. [*Id.* 96:3-7, 2 RP 377]

The above facts demonstrate that, instead of a "mere expectancy" of lease renewal, there was (1) a promise –that SMP would allow SAIA to stay at least nine more years at the Hawkins location (and collect rent for those years), (2) SAIA's reliance on the promise was reasonable; it had already been at the location for nine years and had a good working relationship with Mr. Pack, who, in addition, was part of the fuel tank negotiations, (3) SAIA changed position by spending two years and $180,000 installing two fuel tanks, which, as a company policy, it only did if it intended to stay longer than eight years at a location, (4) SAIA's intention to stay and the installation of the tanks was foreseeable to Mr. Pack, he was part of the negotiations, and, in addition, was looking into door construction if SAIA needed new doors down the line. [*Id.* 47:4-22, 2 RP 416] Finally, if this were a situation wherein either party had suddenly backed out of the agreement in a

context other than condemnation, enforcement of the promise would have been required to prevent injustice. *See, e.g. Strata*, 121 N.M. at 628. In contrast to the tenancy in *Gray*, the agreement between SAIA and SMP Properties evidences a binding covenant to renew, based on promissory estoppel.

State ex rel State Highway Commission v. Chavez, 1969-NMSC-072, 80 N.M. 394, 486 P.2d 868, is also informative, because its fact pattern is more analogous to the instant situation. The *Chavez* Court held, essentially, that the expectation of a lease renewal ***could*** be taken into consideration in valuing property.

In *Chavez*, the tenants rented property on the highway on which they ran a store and gas station. They had a lease with the state, which they'd renewed previously, and which was set to expire several months after the state condemned the property. On or about the date of the condemnation proceeding, the state obtained an order restricting the tenants' access to the property. Nonetheless, the tenants stayed in possession until the end of their lease, and, upon motion by the state, the trial court dismissed the condemnation action as moot. The New Mexico Supreme Court determined that the tenants were entitled to compensation upon the filing of the proceeding, and remanded the case. *See, State ex rel. State Highway Commission v. Chavez*, 1966-NMSC 222, 77 N.M. 104, 419 P.2d 759.

On the remand, the issue of damages was submitted to a jury, which awarded the tenants $25,000. The state appealed, contending that the award was excessive. The tenants testified as to the value of the leasehold, and the state's expert rebutted, appraising the value of the improvements on the property, the access, and the remaining six months of the lease. The state's expert concluded that because he was only required to access the six month period before the lease expired, the improvements had no market value and, accordingly, the "before" value would be the reasonable rental value for six months, which he appraised at $1,476.00. *See Chavez,* 80 N.M. at 398 *(Chavez II).*

The Court disagreed, as follows:

> "We do not see where we held that damages were limited to the rental value to the lessees for the remainder of the term. From the testimony of appellant's appraiser, quoted above, it is clear that the lease, even though it had less than six months to run, ***and did not have a legally binding option to renew,*** was in his opinion a valuable asset worth $22,500.00 before the taking, which was reduced to $6,000.00 after the taking, or a net damage to the lessee of $16,500.00. ***We see nothing in our earlier holding that denied the right to have all elements of damage resulting from the condemnation considered when arriving at the award.*** Indeed, such a holding would be of questionable constitutionality as permitting the taking or damaging of property without the payment of just compensation." (Emphasis added). *Chavez II, 80 N.M. at 399.*

Here, likewise, SAIA made improvements on the Hawkins property, improvements it would not have made if it had planned to leave. SAIA and SMP

Properties had exercised all of the options for renewal on the prior lease, and were in the process of negotiating a new one with similar provisions, and, as the testimony of Mr. Davis and Mr. Pack makes clear, it was the unanticipated intervention of the condemnation that causes SAIA to vacate.

ISSUE 2: The District Court Erred in Precluding Testimony by SMP Properties' Expert And Owner as to Loss of Rental Income

In an inverse condemnation proceeding, lost profits may be recovered when they are the best measure of the value of the lost use and enjoyment of condemned land. *Primetime Hospitality v. City of Albuquerque*, 2009 NMSC 011, ¶2, 206 P.3d 112. N.M. Const. Art. 11§20 and NMSA 1978, Section 42A-1-29(A), provide that injured parties, through inverse condemnation proceedings, are entitled to the value of the property taken or damaged for public use. *Primetime Hospitality,* 2009-NMSC-011, ¶14. Lost rents can also be an appropriate measure of damages. *Primetime Hospitality v. City of Albuquerque,* 2007-NMCA 129, ¶37, 168 P.3d 1087, rev. in part. *Primetime,* 2009 NMSC-011. In accord, *El Paso Electric Co. v. Pinkerton,* 96 NM 473, 632 P.2d 350 (1981).

The SMP Defendants retained expert appraiser Byran Godfrey to evaluate the loss to the property. Mr. Godfrey issued a written report of his findings and was deposed.

Mr. Godfrey, following New Mexico's "before and after value" partial condemnation rule, used an income capitalization approach to appraise the before and after value of the property. This approach "considers real estate as an investment, and concentrates on the quantity and quality of income that the property can be expected to earn" [B.G. Dep., 3:1-25, 2 RP 315, 45: 1-20, 2 RP 421, 69:1-3, 2 RP 422]. In reaching his conclusion, Mr. Godfrey employed a hypothetical condition: that the property was 95% leased/occupied for the "before" valuation and about 55% occupied for the "after" valuation (55.38%). [Godfrey Appraisal Report, 2 RP 348-349, *Id.* 19: 6-14, 20:15-20, 2RP 312, 22:16-25, 23:1-25, 24: 21-25, 2 RP 313]

Using this hypothetical condition, and rental income amounts, by application of an income capitalization assessment, Mr. Godfrey calculated that the loss attributable to lost rents and costs associated with leasing the SAIA space amounted to not less than $400,000 in just compensation damages. [*Id.*45:1-19, 46:1-7, 2RP 421]. He concluded that the City owed a total compensation of not less than $554,650 ($400,000 lost rents and $154,650 lost land value). The City filed a Daubert Motion to exclude Mr. Godfrey's testimony, arguing that the methodology he used to calculate "Net Damages" was incorrect under New Mexico law, because it included SAIA's tenancy in the before valuation. The district court

agreed with the City and precluded Mr. Godfrey's testimony, specifically holding that *Westland (City of Albuquerque v. Westland Development Co., Inc.,* 1995-NMCA-136, 121 N.M. 144, "does not support the use of a hypothetical assumption to stretch back in time to capture a situation that did not exist immediately before the taking." [2 RP 508, 509] SMP Properties respectfully submit the district court misunderstood and misapplied *Westland.*

The City also filed a motion in limine to preclude the testimony of SMP Properties' owner, R. Michael Pack. In an Order dated November 4, 2015, the district court granted the motion, holding that Mr. Pack "shall not testify about loss of rental income or economic loss to the building, as a result of losing rental income. (Emphasis Added) [Order Granting Petitioner's Motion in Limine to Exclude Testimony of R. Michael Pack, 2 RP 513, 514].

Standard of Review:

Trial court rulings regarding expert testimony are reviewed for abuse of discretion. *State v. Albercio*, 1993-NMSC-047, 76 N.M. 156, 169. Trial court rulings regarding motions in limine are also reviewed for abuse of discretion. *See, generally, Draper v. Mowry*, 90 N.M. 710, 568 P.2d, 236 (N.M.C.A. 1977); *State ex rel Highway Comm. V. Chavez*, 80 N.M. 394, 456 P.2d 868 (1967).

Contention of SMP Properties: The preclusion of the testimony of Mr. Godfrey

and Mr. Pack was an abuse of discretion, which resulted from the misapplication of *Santa Fe Pacific Trust, Inc. v. City of Albuquerque,* 2014-NMCA-093, 336 P.3d 232, and *City of Albuquerque v. Westland Development Co., Inc.*, 1995-NMCA 136, 121 N.M. 144.

Preservation: SMP Properties preserved the matters raised in this Issue by filing Responses to both Motions of the City to exclude the testimony of Bryan Godfrey, at 2 RP 469. As to Michael Pack, see Response at 2 RP 438.

The district court abused its discretion by precluding the testimony of expert Bryan Godfrey and SMP owner Michael Pack. First, with respect to Mr. Godfrey, the district court misconstrued *Westland* in determining that he could not use a hypothetical condition that considered SAIA as a tenant in the "before" valuation, and the loss of SAIA in the "after" valuation.

In *Westland*, this Court interpreted the New Mexico partial taking statute, NMSA 1978 42A-1-26, which states, in relevant part, that the measure of compensation in a partial 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. This Court noted that the statutory language requires more than a "strictly temporal" calculation of the statute, because such a calculation is insufficient. *Westland*, 1995-NMCA-136,

Paragraph 5. This Court stated: "to compensate justly for the taking, the 'before' value must be calculated as if no taking were to take place and the "after" value calculated as if the taking had already occurred." *Id.* Thus, *Westland* requires consideration of the diminution in value caused by the taking. *Id.* Thus, *Westland* requires consideration of the diminution in value caused by the taking. *Id, see Leigh v. Village of Los Lunas,* 2005-NMCA-25, ¶13, 1998-NMSC-37, 137 NM 119. This is exactly what Mr. Godfrey's hypothetical accomplished and quite puzzling, what the district court objected to.

Second, in precluding the testimony of SMP owner Michael Pack, the district court ignored clear New Mexico legal precedent which allows an owner to testify as to the fair market value of her or his own property. For example, in *State ex rel State Highway Comm'n v. Chavez*, 1969-NMSC-072, 80 N.M. 394, 396-397, the New Mexico Supreme Court specifically followed the "prevailing rule" that an owner may testify as to the fair market value of his property, and so ruled within the context of a "takings" case. *See, Id.;* see also UJI 13-716 "(a)n 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 the opinion as to the [fair market value] of the property"; *cf. Leigh,* 2005-NMCA-25, 25. 1998NMSC-37 (landowners allowed to testify as to the fair market value of a lot,

however, not as to its value to them personally).

The *Chavez* court cited Nichols on Eminent Domain with respect to owners testifying about the value of their property, stating that the landowner "may be presumed to have sufficient knowledge of the price paid, **or the rents or other income received**, and the possibilities of the land for use, to have a reasonably good idea of what it is worth". (Emphasis Added) *Chavez*, 80 N.M. at 396, citing 5 Nichols, Eminent Domain, 18.4(2) (3rd Ed. 1962); see also; *El Paso Elec. Co. V. Pinkerton*, 1981-NMSC-039, 96 N.M. 473, 474 (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).

As shown in Mr. Pack's Affidavit [2 RP 465-468], [also SMP's Ex. 461-464] Mr. Pack is in the business of owning and operating truck terminals, and was to offer testimony on the fair market value of the SMP property and how the proposed taking impacted it. He has been in the real estate business for over thirty years, and owns five separate trucking terminals. Yet, the district court precluded him from offering testimony as to **economic loss** to the subject property as a result of lost rent. This completely goes against the well settled New Mexico precedent listed above which allows an owner to testify as to fair market value of his own property. This is especially true in this case, because truck terminals are valued according to

rent they bring in. [Pack's Affidavit, ¶6 2 RP 462]. Thus, the district court clearly abused its discretion in precluding Mr. Pack's testimony.

ISSUE 3: Can a Party Appeal from a Stipulated Final Judgment Containing Reservation of Rights to Challenge Pivotal Rulings of The District Court

On May 2, 2016, the district court entered a Stipulated Final Judgment for Condemnation ("Stipulated Judgment"). [2 SRP 598] Concurrently, as a preceding pleading, the district court entered its Amended Order on City's Motion for Partial Summary Judgment. [2SRP 594] This Court's Second Notice - Assignment to the General Calendar, filed June 15, 2016, requested that the parties brief, "whether a party may appeal from a stipulated final judgment like the one in this case." [CN2]

Standard of Review:

The ability to appeal the Stipulated Judgment is a question of law which invokes de novo review. *Baca v. Los Lunas CMTY. Programs*, 2011-NMCA-008,¶7, 149 N.M. 198. *Kysar v. BP American Prod. Co.,* 2012-NMCA-036, ¶11, 273 P.3d 867.

Contention of SMP Properties:

SMP Properties submit the answer to Issue 3 is yes. They contend, because of the earlier adverse rulings of the district court in granting summary judgment and the precluding of the testimony of their two primary damage witnesses, i.e., the

expert Bryan Godfrey and the owner R. Michael Pack, coupled with SMP Properties' express reservation of the right to challenge the district court's granting of summary judgment in favor of the City, they have adequately reserved a right to appeal. Contained in the Stipulated Judgment (first page), the district court recognized that this case was to proceed to final judgment based on the stipulation of the parties under a reservation of rights. [2 SRP 598] Further, at Page 2 ¶3, the district court stated "[r]ecognizing that Respondent SMP Properties, LLC has fully reserved its rights to appeal the Court's granting of Petitioner City's Motion for Partial Summary Judgment as set forth in the concurrently filed Amended Order on the City's Motion for Partial Summary Judgment, the parties have reached a settlement of the remaining disputes in this case." [2 SRP 599] Additionally, at the last paragraph [2 SRP 599] the district court orders "[t]he amount of this Judgment herein on behalf of Respondent SMP Properties, LLC is full, complete, and just compensation for the property described in Petitioner City's Complaint, subject to the reservation of rights to appeal set forth above." (Emphasis added) Furthermore, the district court's Amended Order on City's Motion for Partial Summary Judgment, concurrently entered with the Stipulated Judgment, expressly noted that "[i]t is further recognized that SMP's above-stated concession is done only for the purpose of obtaining a final judgment, under a full reservation of rights

to contest and appeal the Court's grant of summary judgment". [Emphasis added] [2SRP 596]

Argument and Authorities:

A. In requesting the briefing of this issue this Court cited to the cases, *Gallup Trading Co. v. Michael,* 1974-NMSC-048, ¶¶4-5, 86 NM 304, and *Kysar v. BPAM. Prod. Co.,* 2012-NMCA-036, ¶17, 273 P.3d 867. *Gallup Trading Co.*, 1974-NMSC-048, stands for the general rule that absent any reservation or contra manifestation, a consent to judgment against the consenting party ends the right of such party to appeal. *Kysar*, 2012-NMCA-036, on the other hand, permits an appeal in the event of a reservation of the right to appeal pursuant to specific conditions.

The required conditions, and their satisfaction by SMP Properties under *Kysar*, ¶17, are as follows:

1. That rulings are made by the district court which the parties agree are dispositive. This condition is satisfied due to the district court's (a) grant of summary judgment dismissing SMP's properties inverse condemnation case, (b) ruling that the loss of the SAIA lease is not a compensable element of damages, and (c) ruling that the City's pre-condemnation activities did not constitute a taking, and (d) there being no opposition by either party (other than the reservation

of rights) found in the record, implying an agreement by acquiescence). [2SRP 595] Succinctly, the entirety of SMP Properties case as to adequate compensation was dismissed and the testimony as to heart of their damages, *i.e.*, the loss of the SAIA lease revenues, was precluded from presentation to the jury.

2. That there must be a reservation of the right to challenge those rulings on appeal. Unquestionably, a reservation of rights to challenge the district court's ruling is express in both the Stipulated Judgment and the district court's Amended Order on City's Motion for Partial Summary Judgment. In the first page of the Stipulated Judgement [2 SRP 598] the district court states ". . . and the parties having stipulated that this case may proceed to a final judgment, under the reservation of rights set forth below . . . ." At Page 2, ¶3 of the Stipulated Judgment, the district court further states "[r]ecognizing that Respondent SMP Properties, LLC has fully reserved its rights to appeal the court's granting of Petitioner City's Motion for Partial Summary Judgment as set forth in the concurrently filed Amended Order on the City's Motion for Partial Summary Judgment, the parties have reached a settlement of the remaining disputes in this case." [2 SRP 599] Going further, in the Stipulated Judgment the district court ordered as follows: "the amount of this Judgment herein on behalf of Respondent, SMP Properties, LLC is full, complete and just compensation for the property

described in Petitioner City's Complaint, subject to the reservation of rights to appeal set forth above." [2SRP 599, last¶] Also, as contained in the concurrently entered Amended Order on City's Motion for Partial Summary Judgment. [SRP596, last¶] a reservation is again seen where it states "[i]t is further recognized that SMP's above stated concession is done only for the purpose of obtaining a final judgment under a full reservation of rights to contest and appeal the Court's grant of summary judgment."

3. That there is a stipulation to entry of judgment. SMP Properties submits the satisfaction of this requirement is evident by the words contained in the Stipulated Judgment. [2SRP 598] First, there is the title of the instrument "Stipulated Final Judgment for Condemnation". [2SRP 598] Second, the Stipulated Judgment recites ". . . and the parties having stipulated that this case may proceed to a final judgment . . . ." [2SRP 598¶1] Additionally, the Stipulated Judgment is signed by the Court and approved by counsel for the parties. [2SRP 600, 601]

4. There is approval of the stipulation by the district court. The satisfaction of this condition is met because (a) the district court's Amended Order, in its last paragraph (directly above the Judge's signature) recites the recognition of a "full" reservation of rights to contest and appeal, and (b) the Stipulated Judgment makes three separate references to the reservation of rights, which includes a

"finding" by the district court that SMP Properties have "fully" reserved the right to appeal. [2 SRP 596, 598, , 599 ¶3]. Both pleadings are also signed by the district court judge.

B. The New Mexico Supreme Court in the case of *Rancho Del Villacito Condos, Inc. v. Weisfeld,* 121 N.M. 52, 55, 908 P.2d 745, 748 (1995), arguably approved an exception to the general rule (precluding appeal due to stipulation), when circumstances demonstrate a "lack of consent". (Cited in *Kysar,* 2012, NMCA-036, ¶15). Further, a review of the well reasoned case of *Hense v. G.D. Searle & Co.,* 452 N.W.2d 440 (Iowa 1990) (cited as "instructive" by the N.M. Supreme Court in *Rancho Del Villacito Condos,* 908 P.2d 745, 748), is supportive. The Supreme Court of Iowa in *Hense* recognized that the application of considerations of judicial economy and lack of consent out weigh the strict general appellate waiver rule. *See also, Taylor v. Baker*, 566 P.2d 884, 887 (Or. 1978) and *Allen v. Atlanta & Charlotte Air Line Ry,* 57 S.E. 2d 249, 250 (S.C. 1950).

Based on the facts and authorities set forth above, SMP Properties respectfully submits that they have met the requirements of reserving their right to an appeal of the grant of summary judgment and the preclusion of their witnesses.

Oral Argument: The facts in this case are extensive and the case law is complex. SMP Properties believes oral argument may help clarify, or further resolve, the

issues raised in their Brief in Chief. Due to page limitation and the addition by the Court of Issue No. 3, it has required SMP Properties to abridge their arguments and the recital of facts.

DUBOIS, COOKSEY & BISCHOFF, P.A.

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I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to opposing counsel of record on this 22nd day of August, 2016.

_____
William J. Cooksey