Opinion issued May 22, 2018

[SEAL]

In The Court of Appeals
For The First District of Texas

NO. 01-16-00765-CV

BERNARD J. MORELLO AND
WHITE LION HOLDINGS, L.L.C.,
Appellants

V.

SEAWAY CRUDE PIPELINE COMPANY, LLC,
Appellee

On Appeal from the County Court at Law No. 3
Fort Bend County, Texas
Trial Court Case No. 13-CCV-050231

OPINION

This is a statutory condemnation case. Seaway Crude Pipeline Company, LLC sought to construct a common-carrier crude-oil pipeline that would travel the length of the State of Texas, from the Gulf Coast to Oklahoma, and would include in its path a 115-acre tract of land owned by Bernard Morello and a contiguous 82-acre tract owned by Morello's holding company, White Lion Holdings, L.L.C. (collectively, Morello), near the City of Rosenberg, Texas. After Seaway and

Morello failed to agree on terms for the pipeline installation, Seaway began condemnation proceedings. Special Commissioners were appointed, and an appraisal of damages was determined. Morello filed objections in the trial court.

Seaway moved for partial summary judgment, and Morello filed a plea to the jurisdiction. Both motions addressed whether Seaway effectively declared a necessity for the taking and, if it did, whether Morello presented any summary-judgment evidence in support of his affirmative defenses that Seaway acted arbitrarily or in bad faith, which, if found, would remove the conclusiveness of Seaway's necessity determination.[1] The trial court ruled in Seaway's favor on both motions.

Seaway also moved to strike various experts retained by Morello to opine on future uses of his property, damages for the taking of the easement, and damages to the remainder of the property because of the taking. The trial court granted Seaway's motions to exclude, leaving Morello without damages evidence on lost market value of the remainder.

The trial court entered a final judgment in Seaway's favor, holding that Seaway could condemn easements across the land and ordering an award of approximately $88,000 to Morello for the taking, which was

---

[1] Both parties agree that the necessity determination, as applied to the facts of this condemnation challenge, is a jurisdictional requirement. *See Whittington v. City of Austin*, 174 S.W.3d 889, 903 n.11 (Tex. App.—Austin 2005, pet. denied) ("*Whittington I*").

the amount Morello's expert had opined was the market value of the property actually taken, without any compensation for loss of market value of the remainder of the land.[2] *See City of Austin v. Cannizzo*, 153 Tex. 324, 267 S.W.2d 808, 812 (1954) (noting that, when government takes only part of property, three controlling issues are (1) "market value of the land taken, considered as severed land," (2) "market value of the remainder of the tract immediately before the taking," and (3) "market value of the remainder of the tract immediately after the taking").

Morello challenges the trial court's judgment in four issues. In his first two issues, he contends that the trial court erred in ruling for Seaway and against him on Seaway's summary-judgment motion and his plea to the jurisdiction. He argues that Seaway failed to demonstrate that it determined a necessity for the taking and that he proved, or at a minimum presented more than a scintilla of summary-judgment evidence in support of, his affirmative defenses. In his last two issues, Morello contends that the trial court erred in denying his motion for costs and in excluding and limiting his experts' testimony.

We affirm.

---

[2] Seaway was authorized to immediately construct the pipeline within the court-authorized easement, even though Morello appeals the judgment. The pipeline was completed and went into service in late 2014.

Background

There are currently three Seaway pipelines that cross Morello's two tracts of land (the Property). The first pipeline was laid in 1975, before Morello purchased the Property. The second pipeline was laid in 2014 and is the subject of this suit. A third pipeline was laid afterward and is not a part of this litigation.

First Seaway pipeline

In 1975, a previous owner of the Property entered into a Permanent Easement Agreement with Seaway that established a 60-foot pipeline easement running north-south across the Property. According to Morello, the terms of the 1975 agreement were favorable to the landowner and his future development of the land because Seaway agreed that it would move the pipeline at its own expense to allow future development. Since the 1970s, Seaway has operated a common-carrier pipeline that crosses the Property under the terms of the 1975 agreement as the pipeline travels from the Texas Gulf Coast to Oklahoma.

Morello purchases land with existing pipeline and other burdens

Morello purchased the Property in 2004. The land, combined, is approximately 200 acres. When purchased, the Property already had the 1975 easement and pipeline in place. It also was subject to a 1988 Texas Commission on Environmental Quality compliance plan that addresses groundwater contamination

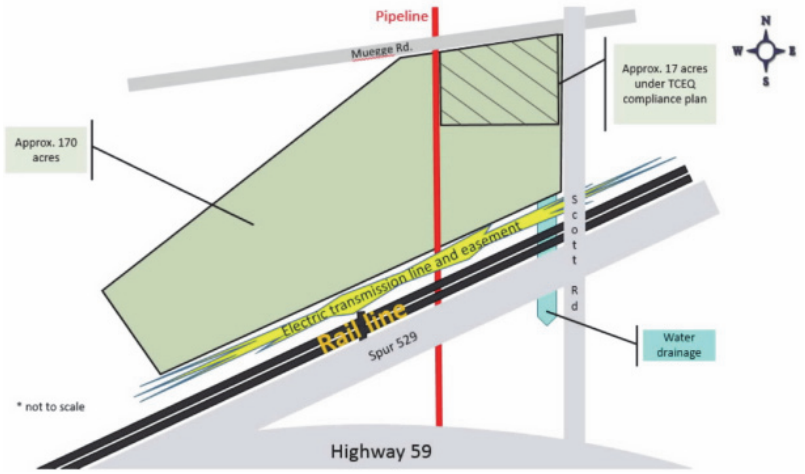
in the northeastern corner of the Property that resulted from earlier use of the site for industrial pipe manufacturing. Three vacant metal buildings remain in that corner of the Property. The TCEQ plan limits the use of the 17 acres surrounding those buildings. Litigation between the TCEQ and Morello regarding plan compliance and related penalties remained pending when the trial court heard the dispositive motions in this litigation.[3]

Of particular interest to Morello, the Property has rail lines along its southern border. The lines are used by Union Pacific Railroad and Kansas City Southern Railroad. The Property has 3,500 feet of rail line frontage but has no railroad spurs to connect it to the rail lines. There is a high-voltage electricity transmission line, with its own easement, that runs between the Property and the rail lines.

There are roadways along two sides of the Property to the east of the 1975 pipeline. Scott Road is on its eastern boundary and can support industrial and heavy traffic. Muegge Road is on its northern boundary and can support only lighter traffic. There is no road frontage or improvements to the west of the pipeline. Below is a rough schematic of the Property.

---

[3] In 2006, the State sued Morello and White Lion for violating the 1998 TCEQ compliance plan. *See State v. Morello*, No. 16-0457, ___ S.W.3d ___, ___, 2018 WL 1025685, at *1 (Tex. Feb. 23, 2018); *White Lion Holdings, L.L.C. v. State*, No. 01-14-00104-CV, 2015 WL 5626564, at *2 (Tex. App.—Houston [1st Dist.] Sept. 24, 2015, pet. denied) (mem. op.).



In Morello's view, the Property's proximity to the rail lines made it ideal for a "rail-served, heavy truck served, industrial warehouse development." In 2009, five years after he purchased the Property, Morello wrote a letter to Kansas City Southern Railroad (but not the other rail line, Union Pacific) about obtaining rail service to the Property. He enclosed a summary site plan and aerial photograph of his land but did not specifically state his plans or provide any drawings or schematics for a rail-served industrial distribution center.[4]

---

[4] In March 2015, almost two years after the taking, Morello again contacted Kansas City Southern Railroad about obtaining rail service to the Property. The railroad responded in writing, stating that before it could hold any productive conversations with Morello, it would need projections on rail use, "including but not limited to rail traffic volumes, origins and destinations of rail traffic, frequency of loading and offloading, commodities and products shipped, and type of rail cars used," along with a diagram and conceptual plan for the development. There is no evidence that Morello provided the requested information.

In this lawsuit, Morello has stated an intent to develop the Property for heavy industrial use and to connect the land to the rail lines, but the record does not contain any evidence that he has taken any concrete steps toward that development. The land has remained relatively unchanged since its purchase, with no industrial development. It continues to be in a raw, undeveloped state, except for the three older metal buildings that sit vacant.

Morello enters into development agreement with City of Rosenberg

In 2012, Morello executed a Development Agreement with the City of Rosenberg that kept the Property in the City's extraterritorial jurisdiction and immune from city taxes but also required Morello to obtain the city's prior written consent to use the Property for anything other than agricultural use. The Development Agreement remains in effect until 2027.

Seaway plans second pipeline parallel to first

That same year, Seaway decided to add a second pipeline to its common-carrier pipeline system. The $2 billion upgrade would allow it to move crude oil in both directions simultaneously. The new pipeline would cross 2,820 separate tracts of land and travel in "mostly a straight line" parallel to Seaway's existing pipeline from the Texas Gulf Coast to Oklahoma. Because the first pipeline transverses Morello's land, the second pipeline would as well.

In June 2012, Seaway adopted a unanimous written Consent of its management committee, which states that the committee "hereby determines that there is a public need and necessity" to have crude petroleum transported by a second pipeline through various listed Texas counties as part of its common-carrier system. *Cf.* TEX. NAT. RES. CODE § 111.019(a)-(b) (providing that common carriers may condemn rights-of-way and easements "necessary for the construction, maintenance, or operation of the common carrier pipeline").

Seaway undertook to acquire the easements necessary to construct the second pipeline parallel to its older pipeline. It selected the amount of land needed, according to its project management, with the goal of making the project "as safe as possible, as timely as possible, and as cost effective as possible." Seaway sought a 50-foot easement across the Property, adjacent to its existing 60-foot easement.

Seaway contacts Morello about acquiring the second easement

As part of the state-long project, Seaway approached Morello regarding a 50-foot-wide pipeline easement across the Property adjacent to the 1975 easement and pipeline. The total land covered by the second easement, which courts treat as severed land, is 2.766 acres. *Cannizzo*, 267 S.W.2d at 812 (stating that in partial takings, land taken is "considered as

severed land"). Combined, the two adjacent easements would span 110 feet as they transverse the Property.

Morello was not opposed to a second pipeline on the Property, but he did resist having a second pipeline easement. He requested, as an alternative plan, that the second pipeline be laid within the original 60-foot easement. He wanted the second pipeline within the original, 60-feet easement because he believed doing so would cause the second pipeline to be subject to the favorable terms of the 1975 easement. If the second pipeline had its own easement, he would, in his view, effectively lose access to the 1975 easement's favorable terms, and that would negatively impact his development plans. But there is no evidence Morello ever communicated his reasoning to Seaway during the negotiations. Neither his affidavit nor Seaway's communication notes indicate that Morello explained to Seaway before the taking why he wanted the second pipeline to be laid within the original easement. Likewise, there is no evidence that Morello ever told Seaway that he was contemplating developing the Property by building railroad tracks and roads across the Property for a rail-served warehouse distribution center.

Seaway rejected Morello's request to use a single easement for both pipelines, with two right-of-way agents telling Morello that the existing easement could not be used for the second pipeline for "safety reasons" and that a second, 50-foot easement was needed. One of the agents, Blake Box, told Morello that he nonetheless would convey Morello's request to his supervisor.

Morello never received a response. Morello states that he felt "pushed" to make a monetary counter-offer instead of negotiating the placement of the pipeline.

Around the same time, Seaway attempted to arrange a lunch between Morello and a Seaway engineer, but Morello refused to attend. Morello explains his refusal, saying that Seaway "had already made up their mind that they were going to create a new easement," and lunch would not change their "foregone conclusion."

Seaway contends that negotiations for an agreed easement faltered because Morello failed to engage in the process. Seaway then sent Morello its "final offer to acquire easements," which Morello did not accept.

Condemnation proceedings and post-condemnation litigation

After making its final offer, Seaway began condemnation proceedings. The trial court appointed Special Commissioners to determine appropriate compensation. Morello did not appear for the hearing. As a result, at the hearing, the commissioners had before them only Seaway's appraisal, which included damages for the severed land but did not include any damages for loss of market value of the remainder. The resulting commissioners' award compensated for the actual taking but not for losses to the remainder. Seaway deposited the amounts awarded in the court's registry and took possession of its easements in August 2013, establishing the date of the taking. *City of*

Harlingen v. Estate of Sharboneau, 48 S.W.3d 177, 186 (Tex. 2001) (Baker, J., concurring).

Morello filed objections to the Special Commissioners' findings with the trial court. *See* TEX. PROP. CODE § 21.018(a). He argued that Seaway and its agents had acted arbitrarily and in bad faith, among other assertions. Morello also filed motions for injunctive relief and motions to dismiss, which were denied.

Morello then filed a plea to the jurisdiction, arguing that Seaway acted arbitrarily and in bad faith and that the award did not adequately compensate him for the taking. Seaway filed a motion for partial summary judgment, seeking an order decreeing that it has the right to condemn the easements and dismissing Morello's affirmative defenses. Morello asserted in his response that Seaway's Consent impermissibly authorized the taking out of "convenience," instead of the statutorily required necessity. *Cf.* TEX. NAT. RES. CODE § 111.019(a)-(b) (providing that common carriers may condemn easements "necessary for the construction, maintenance, or operation of the common carrier pipeline").

Morello also argued that Seaway demonstrated bad faith while negotiating for the easement. According to Morello, Seaway used the condemnation process as a pretext to avoid its potentially costly contractual obligations to him under the 1975 easement agreement. Morello reads the 1975 pipeline easement as giving him an unfettered right to have Seaway move the pre-existing pipeline if his development plans

require route adjustments. He contends that a second easement for a parallel pipeline that does not have as favorable of terms would, in effect, negate the advantages of the first easement: there would never be a scenario in which Morello could legitimately demand that the 1975 pipeline be rerouted if he did not have a contractual right to also have the parallel 2014 pipeline similarly rerouted.[5] Morello has not identified any Seaway documents that evidence this alleged pretext motivation nor any pre-taking documents that discuss the cost of compliance with the 1975 easement agreement.[6]

Seaway subsequently moved to exclude Morello's experts on the grounds that they were not timely designated and their opinions were irrelevant, speculative, and unreliable. Morello filed a response, seeking leave to late-designate experts for good cause. Thereafter, the trial court struck some of Morello's designated experts and limited the testimony of others.

Seaway filed an amended motion for partial summary judgment, seeking a ruling that it properly declared a necessity for the taking, that Morello's

---

[5] The 1975 contract is silent regarding future pipelines placed in separate easements. So, if a second pipeline were installed that did not have similar contractual rights favoring Morello, and Morello began to develop the Property, he would retain the contractual ability to have input into adjusting the location of the first pipeline (under the 1975 agreement) but would have no ability to have input into adjusting the location of the second pipeline.

[6] The parties conducted extensive discovery, including fifteen depositions and the production of over 200,000 documents.

affirmative defenses to the condemnation fail as a matter of law, and that Seaway has the power of eminent domain to condemn the specified portion of the Property. Seaway's motion argued, in the alternative, that Morello has no evidence that Seaway's condemnation is in bad faith or arbitrary. Morello filed a response and also filed an amended plea to the jurisdiction.

The trial court granted Seaway's motion for partial summary judgment and motion for no-evidence partial summary judgment and denied Morello's amended plea to the jurisdiction. Seaway moved for final judgment, arguing that the only remaining issue was the value of the portion of the Property taken and stating its consent to entry of judgment in the amount of $88,227 for that taking.

Final judgment was entered awarding that amount, and Morello appealed.

Relevant Condemnation Law

The Texas Constitution provides that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by consent of such person." TEX. CONST. art. I, § 17. Thus, private land may be condemned only for "public use" with payment of "adequate compensation." *Whittington v. City of Austin*, 174 S.W.3d 889, 896 (Tex. App.—Austin 2005, pet. denied) ("*Whittington I*"). The power of eminent domain must be conferred by the Legislature, either expressly or by necessary implication. *Anderson v. Teco Pipeline Co.*,

985 S.W.2d 559, 564 (Tex. App.—San Antonio 1998, pet. denied). Statutes granting the power of eminent domain are strictly construed in favor of the landowner and against the condemnor. *Id.*

The statute that grants the power of eminent domain to common carriers is Section 111.019 of the Natural Resources Code, which provides, in pertinent part,

> (a) Common carriers have the right and power of eminent domain.
>
> (b) In the exercise of the power of eminent domain granted under the provisions of Subsection (a) of this section, a common carrier may enter on and condemn the land, rights-of-way, easements, and property of any person or corporation *necessary* for the construction, maintenance, or operation of the common carrier pipeline.

TEX. NAT. RES. CODE § 111.019(a)-(b) (emphasis added).

"The condemnor's discretion to determine what and how much land to condemn for its purposes—that is, to determine public necessity—is nearly absolute." *Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257, 268 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). And a condemnor's determination that a pipeline or other large-scale project is globally necessary and serves a public purpose suffices without the condemnor having to make granular determinations of necessity as to each tract of affected land. *Anderson*, 985 S.W.2d at 566 ("Teco was not required to produce a resolution

finding that the Andersons' particular tract of land was necessary for the project."); *Houston Lighting & Power Co. v. Fisher*, 559 S.W.2d 682, 685-86 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.) (holding that board's approval of project for "Cedar Bayou to Webster right-of-way" was sufficient to demonstrate that specific tract of land along route also was necessary); *cf.* TEX. GOV'T CODE § 2206.053(b) (providing that single "resolution . . . may be adopted for all units of property to be condemned").

One rationale for the high degree of discretion afforded condemnors in their necessity determinations is that, if less deference were given and each piece of a project were scrutinized for necessity, a finding that one small piece of a larger-scale project was not necessary could derail an entire project. *Wagoner v. City of Arlington*, 345 S.W.2d 759, 763 (Tex. Civ. App.—Fort Worth 1961, writ ref'd n.r.e.). In other words, one fact-finder might conclude that the land in question was not necessary for the project, resulting in the destruction "of an entire project . . . because of the inability to obtain the small part of land which [was] made the subject of the particular condemnation suit." *Id.*; *see City of Austin v. Whittington*, 384 S.W.3d 766, 778 n.7 (Tex. 2012) ("*Whittington III*") (stating that courts should not second guess advisability of takings because tract-specific challenges to large-scale projects might result in takings being upheld in one county and invalidated in another, making straight-line courses difficult to secure); *see also Newsom*, 171 S.W.3d at 269

(discussing *Wagoner* and rationale for deference to necessity determination).

The condemnor's determination of necessity is presumptively correct and treated as conclusive, unless the landowner establishes an affirmative defense such as arbitrariness or bad faith. *See FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619, 629 (Tex. 2008); *Hous. Auth. of City of Dallas v. Higginbotham*, 135 Tex. 158, 143 S.W.2d 79, 88 (1940); *Anderson*, 985 S.W.2d at 565. The landowner has the burden of proof for its affirmative defense. *Clear Lake City Water Auth. v. Clear Lake Country Club*, 340 S.W.3d 27, 35 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *Newsom*, 171 S.W.3d at 269.

The landowner establishes its affirmative defense "by negating 'any reasonable basis' for determining what and how much land to condemn." *Clear Lake City Water*, 340 S.W.3d at 35 (quoting *Newsom*, 171 S.W.3d at 269); *compare Newsom*, 171 S.W.3d at 270 (stating that landowner could negate any reasonable basis by showing that condemnor "had completely abdicated its responsibilities in determining whether, what, or how much land to condemn" when it turned that decision over to interested party) *with Ludewig v. Houston Pipeline Co.*, 773 S.W.2d 610, 614-15 (Tex. App.—Corpus Christi 1989, writ denied) (holding that landowners' evidence that condemnor could have adopted different plans and taken less of their land was no evidence of arbitrary behavior if condemnor reached reasoned decision to do otherwise).

Whether the condemnor's determination of necessity was arbitrary or in bad faith generally is a question of law for the court. *Whittington III*, 384 S.W.3d at 778 & n.7. "The trial court should only submit the issue to a jury if the underlying facts are in dispute." *Id.* at 778. Thus, summary judgment against a landowner on the landowner's affirmative defense that the condemnor acted arbitrarily or in bad faith with regard to its necessity determination may not be granted if the landowner proffers evidence creating a factual dispute regarding the necessity determination. *See id.*

The parties have analyzed the issue of Morello's affirmative defenses, both at the trial court and on appeal, under the assumption that bad faith with regard to single-tract negotiations impacts necessity only as to that single tract of land. But, because a necessity determination for a large-scale project provides the necessity determination for all constituent tracts, it is not clear what the effect would be if there were a finding of tract-specific bad faith within a large-scale project.[7]

---

[7] We note that a condemnor's statewide necessity determination logically may be treated as a necessity determination for each constituent tract, making an examination of a particular tract for the landowner's affirmative defense not inconsistent with a rule that project-wide necessity determinations suffice. But, if a tract-specific necessity determination is not required as part of a condemnor's affirmative proof and is not to be set aside unless it is arbitrary or in bad faith, the effect of tract-specific bad faith is unclear. We have located no case law holding that tract-specific bad faith sets aside necessity only as to the specific tract or that it sets aside an entire project, but we are mindful that both parties take the position that necessity was a jurisdictional requirement for Seaway to condemn any of the lands used to construct

We need not determine whether a landowner's arbitrariness defense should be examined in the context of a specific tract's necessity or project-wide necessity given our conclusion, discussed below, that there is no evidence to support Morello's affirmative defenses.

Necessity Determination

Seaway's motion for partial summary judgment and Morello's plea to the jurisdiction both raised the issue of Seaway's necessity determination and the conclusiveness of that determination. Morello seeks a reversal of the trial court's ruling on both motions and argues that the proper resolution is to sustain his plea to the jurisdiction, with the result that Seaway did not have the power of eminent domain to take its easement or to install, and now operate, the second pipeline.[8] We address the trial court's ruling on those two motions together.

---

this second pipeline. *See* note 1 *supra*; *see also Whittington I*, 174 S.W.3d at 903 n.11; *Anderson v. Teco Pipeline Co.*, 985 S.W.2d 559, 566 n.5 (Tex. App.—San Antonio 1998, writ denied).

[8] Morello argued in his response to Seaway's amended motion to exclude designated experts Sikes and Carter that Seaway acted arbitrarily and "such conduct negates" Seaway's "right to take at all," meaning that the pipeline could be forced to shut down until Seaway properly condemns an easement. At oral argument, Morello asserted that he would not seek to shut down the pipeline but instead to have the second pipeline moved into the area covered by the 1975 agreement and subject to that agreement's terms. He concedes, however, that he believes he would have the legal right to require the state-long pipeline to be shut down while awaiting a compliant necessity determination and pipeline installation.

A. Standard of review

Morello's plea to the jurisdiction and Seaway's summary-judgment motion were effectively cross-dispositive motions and are reviewable under the de novo standard that applies to cross-motions for summary judgment; therefore, we will review both motions de novo and render the judgment that the trial court should have rendered. *See Harris Cty. Hosp. Dist. v. Textac Partners I*, 257 S.W.3d 303, 311-15 & n.11 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

B. The Management Consent included a necessity determination

Morello's first argument is that the June 2012 Management Consent did not effectively declare a public necessity to invoke the right of eminent domain. Seaway relies exclusively on its Consent to establish that it made a necessity determination.

Morello focuses on a particular Consent resolution that authorizes Seaway "to file or cause to be filed . . . proceedings in eminent domain for the acquisition of such rights and interests in the land that may be *necessary, convenient, or required* for the purpose of . . . constructing, installing, . . . [or] operating . . . the common carrier Pipeline. . . ." (Emphasis added.) Morello argues that the Consent is fatally flawed in that it permits condemnation of property for the impermissible reason of mere convenience.

The Consent is a six-page document. Morello focuses on a single phrase within that larger document. Yet we are not permitted to read excerpts of legal documents in isolation to determine the drafter's intent; instead, we are to read them in their entirety, allowing each portion to provide context and guidance for the whole. *See Hysaw v. Dawkins*, 483 S.W.3d 1, 13 (Tex. 2016). The remainder of the Consent contains repeated declarations that Seaway determined a necessity existed and does not support a conclusion that Seaway relied on mere convenience as a basis for condemnation.

1. Recital paragraph

The Consent's recital paragraph refers to public necessity three times. First, the recital states that Seaway "hereby determines that there is a *public need and necessity* to have oil . . . transported by pipelines through [various listed] Counties in the State of Texas . . . as a part of its common carrier System." It continues by stating that Seaway "finds and hereby affirms that the *public convenience and necessity* require the location, construction, operation and maintenance of said common carrier Pipeline . . . for the receipt, transportation . . . and processing of oil . . . through [various listed] Counties in the State of Texas." Finally, it states that the location will be "as *public necessity and engineering feasibility* may require," thus adding a limitation to the location of the pipeline to that which is both necessary and feasible. (Emphasis added.)

Morello argues that recital paragraphs cannot be considered to determine a legal document's meaning. But that rule has exceptions. While recitals are generally not considered part of a legal document, they may be considered if the drafter intended them to be. *All Metals Fabricating, Inc. v. Ramer Concrete, Inc.*, 338 S.W.3d 557, 561 (Tex. App.—El Paso 2009, no pet.). The Consent directly resolves that "all findings . . . as hereinabove recited be and the same are hereby approved, adopted, and affirmed." We therefore will consider the recital paragraph, which include three statements that Seaway determined a public necessity, in determining the meaning of the agreement as a whole.[9]

2. Resolution paragraphs

In addition to the recital, the Consent's first two resolution paragraphs state that Seaway "hereby determines that in order to provide efficient common carrier service to the public . . . public convenience and

---

[9] Morello argues alternatively that the use of the conjunctive "and" in the recital—providing that Seaway found that "public convenience and necessity" required the pipeline—adds ambiguity that should be interpreted against the document's drafter. We disagree. To the extent Seaway determined that the pipeline is both necessary and convenient, the secondary finding is superfluous. *See Ex parte Williams*, 866 S.W.2d 751, 754 (Tex. App.—Houston [1st Dist.] 1993, no writ) (explaining that use of conjunctive "and" when listing two items means both have occurred and cannot be read to mean only one occurred); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116 (2012) (discussing conjunctive/disjunctive canon of interpretation). The conjunction "and" does not inject ambiguity into the Consent.

necessity requires the location, construction, operation and maintenance of the common carrier Pipeline and appurtenant facilities generally along" the statewide route and that Seaway's agents are authorized to negotiate with "all persons or parties having or claiming an interest in the lands *necessary* for the location, construction, operation and maintenance of the common carrier Pipeline. . . ." (Emphasis added.)

The resolution paragraphs further authorize Seaway to exercise "the power of eminent domain for the acquisition of the *necessary* easement or easements . . . for the construction of the common carrier Pipeline" and to use discretion in "routing of all parts of said common carrier Pipeline . . . and in causing said eminent domain proceedings to be filed." (Emphasis added.)

3. Consent, when read as a whole, contains necessity determination

Reading the Consent as a whole, and giving consideration to all of its terms, we conclude that Seaway expressed a determination of necessity and did not purport to authorize condemnation out of mere convenience. *See Circle X Land & Cattle Co., Ltd. v. Mumford Indep. Sch. Dist.*, 325 S.W.3d 859, 865-67 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (concluding, on review of all evidence, that condemnor made necessity determination even if minutes did not expressly state finding); *cf. Whittington I*, 174 S.W.3d at 904-05 (holding that "magic words" of necessity are not needed and

that determination of necessity can be established through evidence of affirmative acts manifesting determination). We overrule Morello's first issue.

Arbitrariness or Bad Faith

Morello next contends that the trial court erred in ruling against him on his arbitrariness and bad faith affirmative defenses. First, he argues that he presented evidence that Seaway arbitrarily delegated its condemnation authority and, in doing so, abused its discretion. Second, he argues that he established that Seaway failed to supervise land-choice decisions and, thus, acted arbitrarily. Third, he argues that documentary and testimonial evidence established disparate treatment of landowners by Seaway and, with it, bad faith, because Seaway willingly negotiated with other landowners while ignoring his tract-specific requests. He argues that he established his affirmative defenses as a matter of law or, alternatively, that his summary-judgment evidence raised a fact issue to preclude summary judgment in Seaway's favor.

A. Applicable law and standard of review

A condemnor's determination of necessity is treated as conclusive unless the landowner establishes an affirmative defense such as bad faith or arbitrariness. *See FKM P'ship*, 255 S.W.3d at 629 & n.9. The landowner establishes its affirmative defenses "by negating 'any reasonable basis' for determining what and how much land to condemn." *Clear Lake City Water*,

340 S.W.3d at 35 (quoting *Newsom*, 171 S.W.3d at 269); *see Circle X Land & Cattle Co.*, 325 S.W.3d at 864. Whether the necessity determination was in bad faith or arbitrary is a question of law for the court, unless there is a factual dispute regarding the necessity determination. *See Whittington III*, 384 S.W.3d at 777-78. Such a factual dispute will preclude summary-judgment against a landowner on his affirmative defenses. *See Newsom*, 171 S.W.3d at 273-76.

B. No evidence of arbitrariness through delegation of eminent domain power in violation of *Newsom*

Morello relies on *Newsom* to argue that Seaway's delegation of decision-making authority abused its discretion, amounted to arbitrary action, and, as a result, negated the conclusiveness of Seaway's necessity determination. *Newsom* is distinguishable on its facts.

In *Newsom*, two separate subdivisions were being developed near Frank Newsom's land. *Id.* at 261. The Harris County Flood Control District required each development to include drainage management features. One developer was required to expand an existing drainage ditch. The other developer, led by John Santasiero, was required to build a retention pond. Both developers attempted to purchase portions of Newsom's neighboring land to build the necessary drainage management features, but Newsom rejected their offers. *Id.* Both developers asked the District to use its eminent domain power to condemn separate portions

of Newsom's property for the developers' benefit. The District did so, the land was condemned, and Newsom sued to set aside the takings.

Newsom presented evidence that the District had not undertaken any effort to determine an appropriate location for the required drainage improvements. Instead of analyzing the issue itself, the District relied on Santasiero's representations on the matter. *See id.* at 272-73. There was no evidence that the District did anything to confirm Santasiero's statement that Newson's land was the appropriate location for the improvements or to address the conflict between Santasiero's and Newsom's positions related to the dispute. *See id.* at 272.

Newsom attempted to establish his arbitrariness affirmative defense by showing that the condemnor had "completely abdicated its responsibilities in determining whether, what, or how much land to condemn." *Id.* at 270. We concluded that Newsom raised a fact issue on the defense by presenting evidence that the District allowed Santasiero to identify Newsom's land as the appropriate target for condemnation—a decision that directly advanced Santasiero's financial interests at Newsom's expense—without taking steps to verify that Newsom's land was the appropriate location for the needed drainage features. *See id.* at 275-76.

The *Newsom* facts are wholly distinguishable from those surrounding Seaway's pipeline. In *Newsom*, there were several landowners that owned properties closely situated to where drainage was needed, yet the

condemnor made no effort to determine if one property was better suited than the others for constructing the necessary drainage pond. *See id.* at 272-73. Instead, the condemnor followed one landowner's wishes and, in doing so, directly and negatively affected an adjacent landowner's interests. *See id.* The delegation of the condemnation decision-making authority to a party with a pecuniary interest in selecting his neighbor's land as the target of condemnation was the controlling aspect of the *Newsom* decision; it is not present here.

There is no evidence that Seaway turned routing decisions over to individuals with competing interests. Morello does not point to evidence that Seaway let those with a conflict of interest decide which property to condemn. Thus, *Newsom* is factually distinguishable.[10] *See Whittington III*, 384 S.W.3d at 783-84 (similarly distinguishing *Newsom*). Morello presented no evidence of arbitrariness through an impermissible delegation of its power of eminent domain.

---

[10] *Newsom* is further distinguishable based on the type of feature being constructed under the power of eminent domain and the logistical realities of planning for such a project. The *Newsom* developers were constructing discrete land features that would fit within a single tract of land. *See Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257, 261 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). Seaway was endeavoring to build a continuous pipeline that would span the length of the state and cross thousands of properties. Seaway's Consent contained an attachment that illustrated the pathway Seaway had determined was necessary, which generally tracked the path of Seaway's existing pipeline. The constraints inherent in planning a route for hundreds of miles of connected pipes are not analogous to *Newsom*'s standalone pond on a single property.

C. No evidence of arbitrariness through failure to supervise agents' land-choice decisions

Morello's next arbitrariness argument is that Seaway failed to adequately supervise its contractors' land choices. Morello argues that allowing contractors to make unsupervised land choices is evidence that Seaway did not find particular lands to be necessary for its project. He points to statements by Seaway's Chairman that the Management Committee "never made a determination of what land was necessary" and that the Committee merely "gave [its contractors] a general route" and left it to them "to go out there and do the job."

But this argument presumes Seaway had an obligation to make a necessity determination as to each parcel versus an overarching determination that the general route was necessary. Granular necessity determinations are not required. *See Anderson*, 985 S.W.2d at 566 (holding that resolution determining necessity for whole pipeline is sufficient and that resolution determining necessity of individual tracts is not required); *Fisher*, 559 S.W.2d at 686 (holding that board's approval of entire project as necessary was sufficient to demonstrate that specific tract of land along route also was necessary). Evidence that a condemnor failed to determine that each constituent parcel of a state-long pipeline project was necessary is no evidence of arbitrariness. *See Anderson*, 985 S.W.2d at 566. Thus, we conclude that Morello presented no evidence of arbitrariness through lack of supervision of land choices.

D. No evidence of arbitrariness through disparate negotiations

Morello's final arbitrariness argument goes to the heart of his dispute with Seaway, which, according to Morello, "centers on Seaway's refusal to consider repeated requests to make adjustments that would preserve the integrity and future development of the Property." He argues that Seaway failed to consider the specific facts of his land in deciding how large of an easement was necessary and whether to approve his requested concessions, such as installing the pipeline at a greater depth to avoid interference with future rail access and placing the second pipeline within the first easement. Morello contrasts his treatment with evidence that Seaway negotiated with other landowners and made concessions to their easement-placement requests. He argues that this disparate treatment is evidence of Seaway's arbitrariness.

Whether Seaway acted arbitrarily depends on whether it had a reasoned basis for its decision of what and how much land to condemn. *Clear Lake City Water*, 340 S.W.3d at 35; *see Newsom*, 171 S.W.3d at 269; *Circle X Land & Cattle Co.*, 325 S.W.3d at 864; *see also FKM P'ship*, 255 S.W.3d at 629. Therefore, we begin our analysis of Morello's disparate-treatment argument by considering the reasoned basis asserted by Seaway for its condemnation decisions.

1. Seaway cites safety as its reasoned basis

Seaway management testified that, when Seaway offered to purchase Morello's land—which is the relevant time for determining whether Seaway acted arbitrarily[11]—there were safety concerns inherent in locating operational pipelines less than 50 feet from one another. John Macon, a mechanical engineer with management responsibility over the Seaway project and discretion to determine the pipeline route, testified that a 50-foot easement is the "standard" that Seaway "always starts with" when determining the amount of land to condemn.[12] He further testified that "part of" Seaway's reasoning is to avoid "work anywhere near the existing live line just for pure safety-related issues. We don't want these big tractors on top of it, so we slid the easement over to the side and we do all of our work off the easement and existing line."

In response to Morello's contention that the second pipeline could have been laid within the original

---

[11] *Cf. Ludewig v. Houston Pipeline Co.*, 773 S.W.2d 610, 614-15 (Tex. App.—Corpus Christi 1989, writ denied) (holding that condemnor did not act arbitrarily by considering future possible pipeline-related needs when determining necessity, even those properly characterized as "remote" at time of condemnation).

[12] This 50-foot standard has historical precedent. *See* TEX. NAT. RES. CODE § 111.0194 (a), (d) (providing that pipeline "is presumed to create an easement . . . that extends only a width of 50 feet as to each pipeline laid under the grant or judgment in eminent domain prior to January 1, 1994" and that this presumption "shall apply separately as to each pipeline under a grant or judgment which allows more than one pipeline on the subservient estate"). In his brief, Morello concedes that "a fifty-foot easement is standard."

easement, Macon testified, "It's not as good of an idea as doing it this way [with separate easements]. It is more difficult to lay it in the same easement. It does have inherent risk with it. The closer you are to that pipeline the less safe it is; that's just the facts of the situation. It will be slower and it will be more expensive." Seaway argues that this safety concern provided a reasoned basis for its decision and disproved arbitrariness as a matter of law, entitling Seaway to summary judgment on Morello's affirmative defenses.

2. Morello argues other evidence negates safety as a deciding factor for rejecting his specific requests

Morello identifies other summary-judgment evidence that he contends raises a fact issue, at a minimum, on whether the safety issue actually influenced Seaway's decision-making. He points to testimony from Macon suggesting that Seaway did not consider whether an exception could be safely granted for the Property. And he notes that an internal Seaway standard establishes that, while a 50-foot easement is standard for safe pipeline installation, a lesser distance—as small as 10 feet—may be appropriate for a second line within the same easement.[13] According to Morello, this is some evidence that Seaway had discretion to

[13] The standard appears to address a second pipeline built simultaneously with the first pipeline and as part of one easement. It does not expressly discuss a second pipeline built at a later time.

establish a narrower easement and that it could have done so safely.

Morello also points to testimony from Seaway project managers indicating that they never considered Morello's specific requests, which means that they could not have made a reasoned decision to reject them. Morello points further to testimony from Jan Paradis, Seaway's right-of-way supervisor. Paradis testified that she told management of Morello's request that the second pipeline be placed within the first pipeline's easement and that management told her to simply buy off the surveyor's plat, suggesting that Morello's specific concerns and requests were not considered.

Morello contrasts his treatment by Seaway with evidence that Seaway agreed to at least nine other landowners' requests that it lay its second pipeline in a narrower easement or, in some cases, within the original easement and that Seaway did not rely on safety concerns to reject those landowners' requests. With one landowner, Seaway agreed to an easement only 25 feet wide. With another landowner, Seaway agreed to lower the existing 1975 pipeline from 36 inches to 60 inches and to lay the new pipeline at a 60-inch depth to accommodate future use of the property. With two other landowners, Seaway agreed to a five-foot nonexclusive easement. There is evidence that Seaway made similar concessions with three other landowners along the pipeline's path.

Morello also points to an internal Seaway memo from Tim Dyk to Rick Blake—one of Dyk's supervisors—regarding the size of easement to be obtained on yet another landowner's property. The memo acknowledged that from "the beginning of the project we have agreed to a 5' permanent" right of way across that particular landowner's property. The memo then stated that Seaway needed to alter its position and insist on a wider, 50-foot right of way on that land because "we were recently at a hearing in the same courts for the Morello tract testifying that we require a 50 [foot] wide" right of way.

But Morello does not attempt to show that the conditions surrounding any of these other tracts were reasonably similar to those for his land. He does not present any details concerning the safety concerns and issues involved in the other properties, their existing and proposed future use or development, the extent to which those landowners had taken steps already to develop their properties, or whether the concessions occurred under reasonably similar circumstances. We do not know if Morello's requested concessions are comparable to the other landowners' requested concessions.[14]

---

[14] For example, Morello has directed us to evidence that Seaway agreed to place its second pipeline within the original easement for Foster Farms Corridor, LLC, which is a concession Morello sought but was denied. But Morello fails to address how that concession fit within the larger negotiated deal between Seaway and Foster Farms. Perhaps the negotiated price was reduced in exchange for the concession. Perhaps it was in exchange for a different concession by Foster Farms. To that possibility, we note

3. No evidence that Seaway acted arbitrarily or with bad faith

Without proof that concessions granted other landowners were comparable to those denied Morello or that the conditions and safety issues for the other properties were reasonably similar to those for the Property, Seaway's agreements with other landowners is no evidence that it acted arbitrarily in rejecting Morello's requests.

Moreover, Morello's argument fails to take into account that there is no evidence he ever told Seaway why he wanted the second pipeline laid within the first easement. By not explaining the reason he wanted a routing path that would take longer and cost more, Morello lost an opportunity to demonstrate at the time that his request was a financially advisable, fact-based routing choice comparable to other landowners' circumstances and requests.

Morello next contends that, regardless of how the properties or requests compared, Seaway pre-determined that it would reject his request because its true intent was to insulate itself from contractual obligations arising out of the 1975 easement. According to Morello, if a new easement were created for a second pipeline, the terms of that easement would have

---

that the agreement includes a provision that allows Seaway to install a third pipeline without paying additional easement fees. Without a broader understanding of the Foster Farms negotiations, or those for other landowners, the comparability of their requests and Seaway's concessions are unknown.

effectively eliminated Morello's ability to enforce his pipeline placement preferences under the 1975 easement agreement. Morello's bad-motive argument is that Seaway was insulating itself from costly future pipeline-related expenses by placing another pipeline along the same route that did not have contractual relocation rights. Morello contends that Seaway's refusal to negotiate the easement width and pipeline placement with regard to the second pipeline, in this context, provides its own evidence of Seaway's bad faith.

But Morello did not present any direct evidence of such a motive. Instead, Morello argues that he established, or at least presented a fact issue, regarding this bad motive through circumstantial evidence and expert testimony.[15]

We reject Morello's ill-motives argument for two factual reasons and three legal reasons. First, had Seaway placed the second pipeline in the first easement, as Morello wanted, the 1975 agreement still only would have applied to the first pipeline. The 1975 agreement did not obligate Seaway to extend its terms to a second pipeline built on the Property. Second, Morello had a right to seek damages for the remainder. Thus, if he could have demonstrated that a rail-served industrial distribution center was a non-speculative

---

[15] In his fourth issue, Morello challenges the trial court's exclusion of his expert, Dale Morris, designated to testify that Seaway's motive was to avoid the costs that would be incurred to comply with the terms of the 1975 easement. We discuss his exclusion below and conclude that the trial court did not abuse its discretion.

use and was the highest and best use for the Property, he could have recovered mitigation costs and required Seaway to incur the costs that he claims Seaway was trying to save.

There are significant legal grounds for rejecting Morello's bad-faith argument as well. First, even if Seaway was motivated by a desire to save money, that does not dictate that Seaway had the ill motives Morello assigns to it. *See Ludewig*, 773 S.W.2d at 614 (condemnor's decision is not arbitrary when condemnor chooses "least expensive option" or "most economically feasible path for its pipeline"). Based on this record, Morello's improper motive assertion is pure speculation.

Second, Seaway's negotiation obligations are set forth in Section 21.0113 of the Property Code, which requires condemnors to make bona fide offers to voluntarily purchase land that may be subject to condemnation. *See* TEX. PROP. CODE § 21.0113. Section 21.0113 requires compliance with a statutorily-mandated checklist for a bona fide offer; it does not also require good-faith negotiations.[16] *Cf. Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 185-87 (Tex.

[16] Morello also argues a non-statutory source for a good-faith requirement. He asserts that Seaway's internal Pipeline Design for Onshore Pipeline Standards required it to negotiate with landowners "to select a path that will minimize the potential for future land use conflict and potential damage to the line, and at the same time keep construction costs to a minimum." But failure to adhere to an internal policy manual, to the extent Morello's evidence suggests Seaway failed in this regard, does not show that Seaway violated a legal obligation to Morello.

2004) (in case decided before Section 21.0113's "bona fide offer" provision was enacted, holding that statutory requirement that condemnor demonstrate it was "unable to agree" with landowner on damages for voluntary sale of property did not include requirement of "good faith" negotiations). Morello does not dispute that Seaway complied with the Section 21.0113 checklist.

Third, the relevance of Morello's summary-judgment evidence addressing whether Seaway was more willing to consider other landowners' deviation requests than his own depends on whether Seaway had a reasoned basis for its decision on what and how much land to condemn. *See Whittington III*, 384 S.W.3d at 783; *Newsom*, 171 S.W.3d at 269; *Ludewig*, 773 S.W.2d at 614-15. Seaway's decision need not be the only feasible option or the option most advantageous to the landowner. *See Ludewig*, 773 S.W.2d at 614. Condemnors are permitted to reject viable alternative routing choices. *See id.* Evidence that there was a different pipeline route on the Property that was feasible and would have benefitted Morello does not establish arbitrariness in Seaway's routing decisions. *See id.* "Where there is room for two opinions, an action cannot be deemed arbitrary when it is exercised honestly and upon due consideration, regardless of how strongly one believes an erroneous conclusion was reached." *Id.*

Our focus must be on whether Seaway considered safety in determining that the state-long pipeline should generally not be built within 50 feet of an existing pipeline. It is not whether it was actually safer, in

the eyes of Morello or his experts,[17] or whether an exception could have been granted for Morello.[18]

Seaway presented a reasoned basis for its pipeline-placement decision: it is generally safer to place pipelines 50 feet apart. Because it is safer and more economical, Seaway adopted a default approach of using separate, 50-foot easements for its parallel pipelines. That Seaway negotiated other terms with some landowners and agreed to commit itself to constructing the pipeline within a smaller easement on a few tracts of land—an agreement that might well reflect a lower

---

[17] In his fourth issue, Morello challenges the trial court's exclusion of the opinion of his expert, Richard Kuprewics, that the Seaway pipeline could have been placed within the 1975 easement safely. We conclude below that the trial court did not abuse its discretion with regard to that exclusion.

[18] *Cf. Whittington III*, 384 S.W.3d at 781 (stating that "question is whether the condemnor actually considered the taking necessary for the public use—not whether the court believes the taking was actually necessary"); *id.* at 783 (decision on scope of condemnation "does not require the chosen course to be more feasible or better than the alternative," but rather, "forbids decisions not made according to reason or judgment"); *Ludewig*, 773 S.W.2d at 614 (condemnor's decision is not arbitrary when condemnor chooses "least expensive option" or "most economically feasible path for its pipeline"); *id.* (existence of feasible alternatives to condemnor's plan "does not constitute proof of an arbitrary and capricious action"); *id.* at 615 (condemnation of larger easement to address "remote" possibility of additional need constitutes legitimate, reasoned basis for decision); *Krenek v. S. Tex. Elec. Coop., Inc.*, 502 S.W.2d 605, 607-08 (Tex. Civ. App.—Corpus Christi 1973, no writ) (arbitrariness is not shown merely because alternative plan might be better, more convenient, or less expensive than condemnor's plan or because other experts "would have selected a different route or would have arrived at a different conclusion").

price as part of the negotiation give-and-take or differences between the properties or their safety issues—does not negate the reasoned basis for Seaway's decision. *See Ludewig*, 773 S.W.2d at 614-15 (concluding no arbitrariness given that condemnor stated reasoned basis for size of easement—future maintenance needs—even though there was only "remote" possibility that need would arise in future).

While Morello has presented evidence that placing the second pipeline within the 1975 easement was a feasible alternative, he has not presented evidence that Seaway's general safety standard was arbitrary or adopted in bad faith. Morello presented evidence that Seaway would potentially save future relocation costs by not subjecting the second pipeline to the terms of the 1975 easement, but selecting "the most economically feasible path for its pipeline is not evidence of arbitrary or capricious action." *Id.* at 614. It is not sufficient for Morello to demonstrate that Seaway *could* have placed the second pipeline in the 1975 easement; Morello must raise a fact issue that it is arbitrary not to do so. *Id.*

Seaway's decision not to further engage Morello after providing him with a bona fide offer also is no evidence of bad faith, even if Seaway did negotiate with other landowners. Because Morello did not raise a fact issue on arbitrariness or bad faith, we overrule his second issue.

The absence of evidence of arbitrariness or bad faith does not insulate Seaway from having to pay

appropriate compensation to Morello. We address the question of appropriate compensation in Morello's fourth issue, which challenges the exclusion of experts on which he was relying to establish remainder damages.

Motion for Costs

In his third issue, Morello contends that the trial court erred by denying his motion for costs after Seaway amended its condemnation petition to include an agreement to pay future costs of pipe relocation under certain conditions. In his motion, Morello argued, on the one hand, that if Seaway had made a similar concession before it filed its condemnation lawsuit, "it is doubtful there would have been any need for this condemnation proceeding at all," and, on the other hand, that Seaway's purported concessions in the amended petition "may not be feasible."

A. Statutory provision and standard of review

Section 21.019(b) of the Property Code provides a mechanism for a landowner to recoup fees and expenses incurred defending against a condemnation suit that is later dismissed by the condemnor:

> A court that hears and grants a motion to dismiss a condemnation proceeding . . . shall make an allowance to the property owner for reasonable and necessary fees for attorneys, appraisers, and photographers and for the

> other expenses incurred by the property owner to the date of the hearing.

TEX. PROP. CODE § 21.019(b). This provision is designed "to discourage the commencement and subsequent abandonment of condemnation proceedings" and "to compensate the landowner for expenses incurred" during a condemnation proceeding that is later abandoned. *City of Wharton v. Stavena*, 771 S.W.2d 594, 595-96 (Tex. App.—Corpus Christi 1989, writ denied) (emphasis removed). Statutory construction is a question of law that we review de novo. *Colorado Cty. v. Staff*, 510 S.W.3d 435, 444 (Tex. 2017).

B. Case law

The Texas Supreme Court has held that Section 21.019(b) does not require a formal motion to dismiss or an order granting a motion to dismiss for a landowner to be entitled to fees and expenses related to an abandoned condemnation proceeding. *FKM P'ship*, 255 S.W.3d at 637. If an amended petition "functionally abandons the original condemnation claim and asserts a different claim," the amendment may invoke the fee provision without a formal motion to dismiss. *Id.* at 636. We have located two cases in which an amendment was held to be a functional abandonment of a condemnation claim to invoke this fee provision.

In *FKM Partnership*, a university sought to acquire 47,008 square feet of land from a landowner, who refused to sell. *Id.* at 624. The condemnor filed a condemnation petition and obtained possession of the

land. It later revised its plans, amended its petition to reduce the size of the condemnation to only 1,260 square feet, and returned the remaining land to the landowner. *Id.* at 624-25. The Court held that the amended petition functionally abandoned the original condemnation claim and entitled the landowner to recover fees and costs. *See id.* at 637.

The Court noted that there is "no bright line that can be drawn" regarding when an amendment reducing the size of a condemnation functionally abandons the original condemnation claim. *Id.* It identified three relevant factors though: (1) how much the condemnation claim has been reduced; (2) "whether the planned use of the smaller tract sought by amendment differs significantly from the tract originally sought"; and (3) "whether the potential future uses of the different tracts are similar." *Id.* Even though the university's identified uses for the different-sized tracts were similar, the Court held that the reduction of the taking by 97% was, as a matter of law, a functional abandonment of the original claim, which entitled the landowner to recover Section 21.019(b) fees and expenses. *Id.*

In the second case, a functional abandonment of the original claim occurred when a condemnor filed three suits against a landowner to condemn three separate tracts of land, the three suits were consolidated, and the condemnor amended its petition to delete one of the three tracts from its suit. *State v. Tamminga*, 928 S.W.2d 737, 739-40 (Tex. App.—Waco 1996, no writ). Because the amendment "was not designed to reduce the amount of land to be taken at a single location or

to clarify the interest to be taken," but, instead, to abandon a right to condemn a distinct tract of land while continuing to seek condemnation of the other two, the amendment was held to be equivalent to a dismissal of a condemnation suit. *Id.* at 740.

By contrast, fees and expenses were not recoverable in a case in which a condemnor amended its pleadings to alter the "configuration" of the taking and, with it, property "access," without changing the size of the tract to be condemned. *State v. Brown*, 262 S.W.3d 365, 366-70 (Tex. 2008). The Court held that the amendment was not a functional abandonment equivalent to a dismissal. *Id.* at 370.

C. Trial court did not err in concluding Seaway's amendment was not a functional abandonment equivalent to a condemnation-claim dismissal

Morello argues that the changes in Seaway's second amended petition amounted to a "material reduction in property rights taken" and qualified as a "functional dismissal of the original proceeding. . . ." Morello describes the amendment as causing a "sea change in the core compensation facts," but does not explain how the pleading changes were equivalent to a functional abandonment of Seaway's initial condemnation claim.

1. The concession in Seaway's second amended petition

Seaway's second amended petition granted Morello the right to cross the pipelines for construction of various structures but prohibited him from endangering, obstructing, injuring, or interfering with access to the easement. It further provided—for the first time—that Seaway would, at its "sole cost and expense," lower or encase its second pipeline in the future as it deemed "necessary to permit Morello to construct" roads and railroad tracks across the easement.

Seaway's offer to pay these costs was contingent on Morello first providing it with (1) an agreement from a railroad company to provide rail service to the Property, (2) engineering design plans, (3) government permits and approvals for the planned construction, and (4) proof of funding for a rail-served industrial distribution center. The second amended petition stated that Seaway would complete the modification within 180 days after Morello or his successors provided proof of the four conditions. Seaway describes this as an effort to "accommodate" Morello's concerns about the depth of the pipeline placement, not an abandonment of its claim to condemn a 50-foot easement for its pipeline.

2. Morello's experts on impact of Seaway's concession

Morello designated three experts to testify concerning the significance of the changes to the amended petition in support of his motion for costs.

a) Mark Sikes

One of Morello's designated experts, Mark Sikes, is a real estate appraiser. Before Seaway amended its petition, Sikes opined that the Property's highest and best use ("best use"), both before and after the second pipeline, was a rail-served industrial distribution center. The best use could be "restored" after the second pipeline by incurring $2.16 million to lower the pipeline, more than $600,000 in other modification costs, and more than $300,000 in other development costs.[19] Thus, Sikes opined that the total cost to restore to best use is $3,112,500.

Sikes opined that Seaway's concession that it would pay these expenses "effectively prevent[s] industrial development of the land" west of the second pipeline. According to Sikes, the amended petition changed the best use for the remainder of the Property west of the pipelines to agricultural use because modifications could no longer restore the Property to its pre-existing best use. In other words, Sikes did not assert that

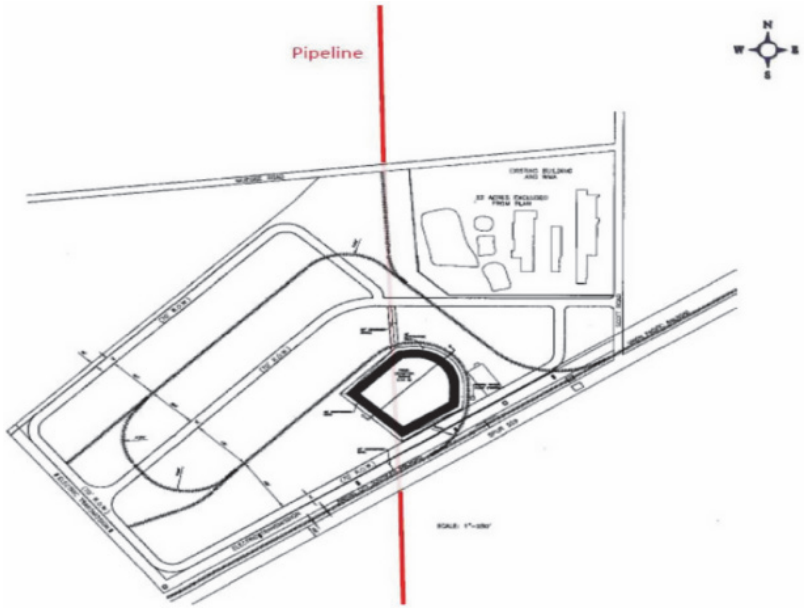
[19] Sikes stated that the second pipeline would require Morello to "incur additional development costs to cross the easement that did not exist before the taking." He utilized the development costs prepared by experts, Jack Carter and Dale Morris.

Seaway's concession was worthless because the conditions were unrealistic or onerous and therefore Morello would still have to pay the same costs to modify his land, leaving his damages unchanged. Instead, he asserted, without explanation, that the amended petition somehow affirmatively bars or precludes Morello from building a rail-served industrial distribution center and therefore a different measure of damages now applied.

As a result, Sikes no longer included in his second report the modification costs. Sikes, instead, conducted a study of four comparable tracts sold for agricultural use and concluded that the western remainder—the largest portion of the Property—had decreased in market value from $30,000 an acre as an industrial site to only $5,000 an acre as an agricultural site. The eastern remainder of just 64 acres "remains relatively unchanged and retains most of the same characteristics after the taking," so it did not suffer any change in damages valuation. Thus, even though the second amended petition declared that Seaway would pay the costs to lower or encase the second pipeline, Sikes's damage model for the remainder increased from $3.1 million to almost $3.3 million. So, the amended petition, according to Sikes, did not decrease Morello's damages; it actually increased them. Under that interpretation, the amended petition did not reduce or dismiss Seaway's condemnation.

b) Jack Carter

Before the second amended petition, another of Morello's designated experts, Jack Carter, who is an engineer and site planner, prepared a plan for the tract to be developed as a rail-served industrial distribution center. His plan included new roads and rail spur lines that would connect future buildings on the Property to existing rail lines. The new rail spurs, in Carter's plan, involved multiple loops and crossed over two existing pipeline easements and an existing high voltage easement in three different places. In his plan, the three existing metal buildings in the TCEQ compliance area would "likely be removed," but that area would not be part of the development. His plan drawing is below.



Before the amendment, Carter opined on the cost to modify the remainder tract (apart from the TCEQ

compliance area) so it could still be used for a rail-accessed industrial warehouse. The cost included constructing "expensive pipeline adjustments for road and rail crossing" as well as additional, necessary drainage costs for a detention basin and a connection culvert. In his initial report, Carter stated that construction costs of $2.8 million would need to be expended "to offset the impacts of the new pipeline" on the Property development, of which $2.16 million was the cost to lower the pipeline.

Carter's second report opined that, as a result of Seaway's concession in its second amended petition that it would pay the cost to lower or encase the pipeline upon receipt of actual development plans, the $2.16 million cost would no longer need to be spent by Morello; Carter therefore removed that cost from his analysis. After adding one more cost that was not included in his first report, Carter stated that the development costs would be almost $2 million less than he had stated in his first report.[20] He offered no criticism of Seaway's concession nor any suggestion that it would prevent the implementation of his plan. Carter's second report does not suggest that Seaway was changing the easement it was taking; it instead reduced the current damages based on Seaway's concession that it would pay some rerouting costs, if necessary, in the future.

---

[20] Carter's second report removed $2.16 million for the cost to lower the pipeline but added $160,000 in new costs.

Carter's amended report does not support a characterization of Seaway's second amended petition as a dismissal of its condemnation suit, which continued to seek the same land while, in Carter's opinion, causing less damages because Seaway would pay some costs itself.

c) Chris Farrar

Morello's third designated expert, Chris Farrar, a commercial real estate financial expert with expertise in capitalizing commercial real estate projects, was designated after Seaway filed its second amended petition. Farrar, as explained by Morello, would testify that the conditions in Seaway's second amended petition were "extremely onerous." More specifically, he would testify that the fourth condition—that Seaway would pay for the costs to lower the second pipeline only if Morello provided "proof that sufficient funding for construction" had been obtained—would "make it highly unlikely, if not impossible" for Morello "to obtain funding through investment or economic financing from any source." Farrar opined that Seaway's concession was, in effect, worthless for this reason. His opinion could have supported an analysis that neither the land to be condemned nor Morello's damages changed with the amendment.

d) Experts opinions do not support conclusion of functional abandonment equivalent to a dismissal

If the second amended petition increased damages, as Sikes opined when he essentially adopted the first model that was part of his initial report, it did not dismiss Seaway's condemnation. If the amendment decreased damages, as Carter opined, it did not harm Morello because Seaway would pay the mitigation costs directly rather than indirectly through an award of damages and Morello was pursuing a litigation-based resolution either way. Finally, if the second amended petition created an impossible condition for development and therefore was essentially worthless, as Farrar indicates, it changed nothing and in no event works as a dismissal. Regardless, the parties' damages dispute does not change what Seaway has always sought in the litigation—to construct and operate a pipeline and to pay Morello the compensation required by the Texas Constitution for the taking. The second amended petition at most changed how a portion of the costs associated with putting the land to its best use, post-taking, would be divided.

None of these experts' opinions support the conclusion that the amendment to Seaway's condemnation claim was a functional abandonment equivalent to a dismissal of its claim.

3. Amendment not a functional dismissal

The only two cases in which courts have concluded that an amendment to a condemnation petition was equivalent to a functional dismissal are readily distinguishable and do not support the conclusion that Seaway's amendment functionally abandoned its condemnation claim similar to a dismissal. The amount of land subject to condemnation did not change when Seaway amended its condemnation petition. A distinct tract was not removed from the claim. The use of the property did not change. And Seaway's explanation of how that use qualified as a public necessity did not change. Instead, the added provisions stated that Seaway would pay the costs to re-configure the pipeline in the future to accommodate a rail-accessed industrial distribution center, should Morello actually undertake such a project. Further, none of the *FKM Partnership* factors apply: Seaway's planned easement use remained the same, which was to allow for the installation and operation of a common-carrier pipeline. *See* 255 S.W.3d at 637.

We are not persuaded that Seaway's conditional offer to pay a portion of the expenses that Morello sought to recover constitutes a dismissal of its original condemnation proceeding.

We overrule Morello's third issue.

Striking of Experts

In his fourth and final issue, Morello contends that the trial court erred in striking some of his experts and limiting the testimony of others. Morello intended to rely on several of these experts to establish (1) that the Property's best use is as a rail-served industrial distribution center, (2) the appropriate compensation for the taking based on this best use, and (3) the amount of compensable damages for the remainder's lost market value.

A. Applicable law and standard of review

To evaluate whether the trial court erred by restricting expert evidence on these issues, we first address the appropriate standard for evaluating market value damages, for designating the best use of property, and for the exclusion of expert witnesses.

1. Market value damages

Landowners must be compensated for property taken. U.S. CONST. amend. V; TEX. CONST. art. I, § 17(a). Landowners are entitled to the fair market value of the taken land. *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 627 (Tex. 2002). Market value is "the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying." *Estate of Sharboneau*, 48 S.W.3d at 182 (quoting *State v. Carpenter*, 126 Tex. 604, 89 S.W.2d 979, 980 (1936)).

The market value of property in a condemnation proceeding is determined as of the date of the taking. *Sw. Bell Tel. Co. v. Radler Pavilion Ltd. P'ship*, 77 S.W.3d 482, 485 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). A property's current market value, though, includes consideration of "the market for its possible future use." *Enbridge Pipelines (E. Tex.) L.P. v. Avinger Timber, LLC*, 386 S.W.3d 256, 264 (Tex. 2012) (quoting *Estate of Sharboneau*, 48 S.W.3d at 185)); *see Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 611 (Tex. 2016) (factfinder may "consider all of the uses to which the property is reasonably adaptable and for which it is, or in all reasonable probability will become, available within the foreseeable future" (quoting *State v. Windham*, 837 S.W.2d 73, 77 (Tex. 1992)). Current market value may take into account the option to hold property as an investment for future development. *Crosstex*, 505 S.W.3d at 611; *In re State*, 355 S.W.3d 611, 617 (Tex. 2011) (orig. proceeding).

When a governmental entity condemns only part of a tract, as occurred here, it must pay adequate compensation for the part taken and for any resulting damage to the remainder.[21] *See* TEX. CONST. art. 1,

[21] In addition to damages to the property's fair market value, damages due to "required modifications to the remainder as a result of the condemnation" may be compensable in some circumstances. *State v. Centennial Mortg. Corp.*, 867 S.W.2d at 783, 784 (Tex. 1993) (per curiam); *see Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001) (stating "modifications to the remainder or loss of improvements on the remainder due to condemnation are . . . compensable"). There are limitations though, and not all damages to remainder property are compensable. *Id.* at 459. "Whether damages can be recovered depends on

§ 17(a); *see* TEX. PROP. CODE § 21.042(c) (providing that "damage to the property owner" includes "the effect of the condemnation on the value of the property owner's remaining property."). "Damages to remainder property are generally calculated by the difference between the market value of the remainder property immediately before and after the condemnation, considering the nature of any improvements and the use of the land taken." *Cty. of Bexar v. Santikos*, 144 S.W.3d 455, 459 (Tex. 2004); *see Coble v. City of Mansfield*, 134 S.W.3d 449, 454 (Tex. App.—Fort Worth 2004, no pet.).

Courts should admit as remainder-market-value evidence such matters as suitability, adaptability, surroundings, conditions before and after, and all circumstances that tend to increase or diminish the remainder's market value. *Coble*, 134 S.W.3d at 454. The goal is to determine how the market actually would value the property, without enhancement. *City of Fort Worth v. Corbin*, 504 S.W.2d 828, 830-31 (Tex. 1974) ("The objective of the judicial process . . . is to make the landowner whole and to award him only what he could have obtained for his land in a free market.").

---

what kind of damage is involved." *Id.* For example, costs for modifications necessary for future uses of the remainder are not recoverable if the identified future uses are remote, speculative, and conjectural. *Coble*, 134 S.W.3d at 455. These "purely speculative uses" are not relevant or admissible. *Id.* at 456 (quoting *City of Austin v. Cannizzo*, 153 Tex. 324, 267 S.W.2d 808, 814 (1954)).

2. Highest and best use

In determining a property's fair market value, the factfinder is not limited by the current use of the property; "the factfinder may consider the highest and best use to which the land taken can be adapted." *Zwahr*, 88 S.W.3d at 628; *see Enbridge Pipelines*, 386 S.W.3d at 261 (same). "Highest and best use" is "the reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible and that results in the highest value." *Enbridge G & P (E. Tex.) L.P. v. Samford*, 470 S.W.3d 848, 857 (Tex. App.—Tyler 2015, no pet.) ("*Enbridge II*") (quoting *City of Sugar Land v. Home & Hearth Sugarland, L.P.*, 215 S.W.3d 503, 511 (Tex. App.—Eastland 2007, pet. denied)).

A tract's existing use "is its presumed" best use, "but the landowner can rebut this presumption." *Zwahr*, 88 S.W.3d at 628. To rebut the presumption and to base damages on a property use "other than that to which it is being put at the time," a landowner has to show that the property was (1) "adaptable" to the hypothetical future use at the time of the taking, (2) such use was "reasonably probable within the immediate future, or a reasonable time," and (3) "the market value of the land has been enhanced thereby." *Radler Pavilion*, 77 S.W.3d at 486; *see Cannizzo*, 267 S.W.2d at 815 (stating that market value takes "into consideration all of the uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future"). If the landowner does not rebut the presumption that the

current use is the best use by meeting these three *Radler Pavilion* factors, it would be speculative to base damages on the landowner's identified future use, and evidence regarding this future use is inadmissible. 77 S.W.3d at 486.

In condemnation cases involving raw acreage—similar to the Property at the time of the taking[22]—evidence of hypothetical future uses is generally inadmissible. *See Boswell v. Brazos Elec. Power Coop., Inc.*, 910 S.W.2d 593, 601 (Tex. App.—Fort Worth 1995, writ denied). The rationale for this rule is that evidence of a hypothetical but speculative use tends to cause juries to overstate a property's value without a solid evidentiary basis. *See id.*

"Compensability is a question of law for the court, and subject to de novo review." *Santikos*, 144 S.W.3d at 459. Numerous courts have concluded that a landowner's intended future use for property is inadmissible as too speculative and uncertain for purposes of determining fair market value. For example, in *State v. Harrison*, the landowner stated an intent to build a commercial development on raw property but had never taken "any steps" to do so. *See* 97 S.W.3d 810, 814 (Tex. App.—Texarkana 2003, no pet.), The court stated that "evidence of a landowner's subjective intent concerning the future use of the property is inadmissible because it is too speculative and uncertain." *Id.* In the

---

[22] The only structures on the land at the time were vacant, and the land was dedicated to agricultural use under Morello's agreement with Rosenberg.

absence of any evidence that the owner took any action to implement his intentions, his testimony about commercial development was inadmissible. *Id.* Other courts have reached similar results. *See Estate of Sharboneau*, 48 S.W.3d at 184-85 (holding that expert testimony on future development was speculative because it was based on "best possible outcome" after making numerous "assumptions and estimates" without addressing "basic marketplace realities" or development risks); *Coble*, 134 S.W.3d at 456-57 (stating that appraiser's remainder damages opinion—which included cost to comply, post-taking, with city ordinance applicable to residentially platted land—was speculative in that it was based on assumption that land would be developed as residential subdivision even though it was unimproved, no such development had been proposed, and ordinance would not apply if more likely commercial development occurred); *Radler Pavilion*, 77 S.W.3d at 486-87 (holding that expert opinion that property's best use was as high-density multi-use development was speculative because opinion was based on layered assumptions, ignored problems with plan, and assumed best possible outcome).

3. Exclusion of expert damage valuation as conclusory or speculative

An expert's opinion is conclusory when it is without a reliable predicate. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006); *Burrow v. Arce*, 997 S.W.2d 229, 236 (Tex. 1999). "And testimony is speculative if it is based on guesswork or conjecture." *Nat.*

Gas Pipeline Co. of Am. v. Justiss, 397 S.W.3d 150, 156 (Tex. 2012). "Opinion testimony that is conclusory or speculative is not relevant evidence, because it does not tend to make the existence of a material fact 'more probable or less probable.'" *Coastal Transp. Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004). Likewise, expert testimony that would not help the trier of fact to understand the evidence or to determine a fact in issue is not relevant. *See* TEX. R. EVID. 702.

The admission or exclusion of expert witnesses is reviewed for an abuse of discretion. *Mack Trucks*, 206 S.W.3d at 578.

B. The trial court did not err in excluding Morello's damage experts

Morello challenges the trial court's orders striking all or parts of the opinions of six of his experts. The stricken experts were to opine on the Property's best use and post-taking adaptability costs for the remainder. We consider each expert separately.

1. Jack Carter

Morello's first stricken expert is Jack Carter. Eighteen months after the Seaway taking, Carter prepared, at Morello's request, a plan for building a rail-served industrial development center on the Property. Carter's plan was prepared for this litigation and based on Morello's statement that he intends to

develop the Property, either by himself or with investor partners, as a rail-served industrial development center within the next fifteen years.[23]

Carter's report did not state that his plan was the Property's best use but did state that he was told by the two railroad companies that "this line is one of their busiest lines and connects to Mexico" and that a "large, rail served, distribution center" was feasible. Carter further stated that Seaway's pipeline "effectively severs the site into two tracts," a western and eastern tract, and that modifications in his plan would be necessary to "mitigate the impacts to the development" of the Property so that it still could be put to Morello's identified future use.

Carter conceded in his deposition that he does not know the cost to develop the plan or whether there is any market demand for his plan. Nor could he identify entities that would use the rail lines or products that would be transported by them.

The trial court granted Seaway's motion to strike Carter's opinion on the Property's future use as a rail-served industrial center as speculative and held that his opinion on necessary modification costs was not relevant because it was based on a speculative future use. We agree that Carter's opinion was properly stricken.

---

[23] Morello had no firm intentions to develop the Property as a rail-served industrial center at the time of the taking; he testified, "I may develop it within 15 years."

To rebut the presumption that the Property's current use at the time of the taking was its best use and to show that a different use should be considered in calculating damages, Morello had to show that the Property was (1) "adaptable" to the hypothetical future use—here, a rail-served industrial distribution center—at the time of the taking, (2) such use was "reasonably probable within the immediate future, or a reasonable time," and (3) "the market value of the land has been enhanced thereby." *Radler Pavilion*, 77 S.W.3d at 486; *see Cannizzo*, 267 S.W.2d at 815 (stating that market value takes "into consideration all of the uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future").

Seaway argues that Carter failed to satisfy any of the *Radler Pavilion* requirements, and therefore the trial court did not abuse its discretion in excluding his testimony or the other expert testimony regarding damage to the remainder that was predicated on the Property's use as a rail-served industrial distribution center.

It is unnecessary for us to determine whether Morello satisfied the first *Radler Pavilion* prong—adaptability—through Carter's development plans because we conclude that Morello has not satisfied the second prong of that test. Regarding the second prong—whether Morello presented evidence that the Property could, in reasonable probability, be adapted to such use within the immediate future or a reasonable time—Morello did not offer any evidence that the Property

was adaptable for such use in the immediate or reasonable future. There was no evidence of how long it might take to adapt the Property. And there was no evidence that Morello has taken any concrete steps to implement Carter's plans. Morello has not built any new facilities on the Property or worked with the railroads to build rail spur lines to connect to existing rail lines. Morello and his experts did not identify any potential developers, investors, or buyers for the Property who would pursue the future use identified by Carter. Nor did Morello's experts address or even acknowledge obstacles that might limit the feasibility of the plan.[24]

---

[24] The evidence suggests that there were numerous obstacles that could delay implementation of Carter's plan. The first is whether the necessary approval could be obtained from the railway owners to connect warehouses on the Property to existing rail lines and any delay that would result waiting for such approvals. One of Morello's experts testified that these approvals are "very hard to get."

The second potential obstacle is whether the necessary approval could be obtained from the owners of the electric distribution lines and associated easement to build in that area and any delay that would result waiting for such approval. The easement prohibits the construction of any structure except fences within its area. Morello conceded that he has not sought consent for any construction from these owners. Carter acknowledged that it is very likely that the electrical easement owner would not approve his plan without modifications. Additionally, Morello has not identified any evidence concerning the delay this approval process would cause.

The third obstacle is whether approval could be obtained from the City of Rosenberg and any delay that would result waiting for the approval described in the Development Agreement. Morello contends that there would be no delay, but he cites no evidence to support this contention. Instead, he relies on a

Morello concedes that he had not sought any approvals at the time of the taking. When asked whether he had taken any action "to move the construction or development forward" for a rail-accessed industrial site on the Property, Morello testified he had not because of "market. You have to have a market. People just don't go out and develop things. You have to have—the marketplace has to be there. It's market driven." Another of Morello's experts, Sikes, conceded in his deposition that it could take years before Carter's plan could be developed because of the need to obtain financing, approvals, and permits. Absent evidence that it was reasonably probable that such approvals could be obtained within a reasonable time, Carter's plan was speculative and not relevant.[25] *See Estate of Sharboneau*, 48 S.W.3d at 186.

In conclusion, there was no evidence that the identified future use as a rail-served industrial distribution

---

provision in the Development Agreement that provides that, if Morello develops the Property without the City's consent, the City may construe such development as "a petition for voluntary annexation." But the Development Agreement also states that the City Council retains discretion to deny an annexation request and that the City's right to annex the Property is "in addition to the City's other remedies."

The fourth obstacle is whether the necessary approval could be obtained from TCEQ and any delay that would result waiting for such approval. In oral argument, Morello conceded that such approval would be necessary for his intended development. Morello has not sought TCEQ's consent.

[25] Given our resolution of this issue, it is unnecessary to address the trial court's conclusion that Carter's opinion should be struck as untimely.

center was reasonably probable within a reasonable time. Morello argues that "reasonable time" presents a fact issue, but evidence of hypothetical uses is inadmissible unless a landowner presents some evidence that this *Radler Pavilion* factor is satisfied. 77 S.W.3d at 486. In the absence of such evidence, the trial court did not abuse its discretion in concluding that a factfinder cannot be left to speculate regarding how long it would take to develop a rail-accessed industrial distribution center. Without any evidence on the second *Radler Pavilion* factor, the identified future use was speculative and inadmissible, and the trial court did not abuse its discretion by excluding Carter's testimony.

2. Mike Sikes

a) Sikes's opinion on best use before the taking

Morello's second stricken expert, Mike Sikes, is a certified real estate appraiser. He concluded that the Property's best use before the taking was "industrial development utilizing the rail access." Seaway argued that this use was impermissibly speculative as of the date of the taking.

In his initial report written before Seaway's concession, Sikes stated that the installation of Seaway's second pipeline changed the best use for the Property's western portion from industrial development to agricultural/rural/residential use but that the best use could be restored to industrial development by making certain modifications to the Property. Sikes presented

two damages models and adopted the least costly of the two.[26] In his second report written after Seaway's concession, Sikes abandoned the earlier damages model and presented a third model.[27] Thus, Sikes has offered three different approaches for calculating the damage to the remainder.

Following the same reasoning it used for striking Carter's testimony, the trial court struck Sikes's expert damages opinions as speculative. Regardless of which of the three damages models he used, Sikes's opinions were based on the same underlying premise: the Property's best use was as a rail-served industrial distribution center.

---

[26] In the first model, Sikes opined that the 130 acres on the west side of the pipeline had a value of $30,000 per acre if used for rail-accessed industrial development. In contrast, it was worth only $5,000 per acre if used for agricultural and residential. The damages therefore were roughly $3.2 million. In the second model, Sikes opined that the damages to the remainder were $3.1 million based on mitigation costs to restore the 130 acres to their best use. This would require the expenditures identified by Carter and Morris ($2.8 million), plus an entrepreneurial incentive of almost $300,000, resulting in a total of $3.1 million in mitigation costs. Because his $3.1 million model was less, Sikes adopted the second model.

[27] In his second report, after Seaway's second amended petition, Sikes discarded the mitigation costs model. Instead, he relied on his comparative sales analysis model. Morello argues that Sikes did so because "development was no longer financially feasible," the conditions imposed by Seaway's second amended petition were "cumbersome and impractical," and, therefore, the second pipeline "could not be crossed." Sikes's report does not, however, include these explanations for discarding his second model.

For the same reasons that such a development was speculative for Carter, we hold that the trial court did not abuse its discretion in concluding that it is likewise speculative for Sikes based on this record. Morello owned the Property for over 13 years and yet has not taken any concrete steps to implement his plan. Even if he were to begin today, Sikes conceded that it "could take years" before the permits, financing, and construction could be completed and the Property could be operational as a rail-served industrial distribution center, even if all obstacles to the plan were adequately identified and addressed timely—an issue without any expert evidence.

Sikes's best-use opinion also fails *Radler Pavilion*'s third admissibility prong by failing to present reliable expert testimony that the land's market value would be "enhanced" by building a rail-served industrial distribution center. 77 S.W.3d at 486. To show enhancement, Sikes had to address how the market value would be impacted by the costs and benefits of such a project. He also had to address the four obstacles to development—each requiring consent of a third party and a risk that consent would be delayed, if not withheld—and how those obstacles would impact the Property's value.[28]

---

[28] *See* n.24 *supra.* First, the market would have to consider the risk that a prospective buyer would not obtain approval from the two railway owners to build new rail lines on the Property to connect warehouses to the existing rail line, and if the buyer could, the market would have taken into account the cost and time delay caused by obtaining such approvals as well as the cost

Neither Morello nor Sikes identified any evidence concerning the likelihood, cost, or time delays to overcome these obstacles or how the market would account for them. But a willing buyer of the Property who wanted to develop it as a rail-served industrial distribution center would have to assess the risk that the necessary approvals might not be obtained, and this risk would impact the Property's market value. Sikes assumes, without evidence, that all such approvals could be readily obtained. Because Sikes has not provided a reliable basis for concluding that the market would "enhance" the value of the Property based on its proposed use as a rail-served industrial distribution center, the trial court, for this additional reason, did not abuse its discretion in determining that his opinion was inadmissible.

---

of the rail spurs themselves. The market would consider the impact of these issues in accessing the Property's market value.

Second, the market would have to consider the risk that a prospective buyer would not obtain consent from the electric distribution line owners to develop in their easement, as well as the cost and time delay caused by obtaining consent.

Third, the market would have to consider the risk that a prospective buyer would not obtain development approval from the City of Rosenberg and the cost and time delay caused by obtaining approval. Morello does not identify any evidence regarding how the market would view the impact of the Development Agreement on the remainder's value.

Finally, the market would have to consider the risk that a prospective buyer would not obtain development approval from TCEQ and the cost and time delay caused by obtaining approval of development, as well as any lingering regulatory obligations or liabilities.

Finally, evidence of an alternative best use different from the current use requires consideration of the alternative's economic feasibility. *Enbridge II*, 470 S.W.3d at 857. But Morello did not present any evidence that he or his experts conducted a marketability, financial feasibility, or economic feasibility study. Indeed, his experts conceded that no such studies had been conducted, though Sikes's expert report conclusorily states that "financially feasible, and maximally productive uses" were considered to "estimate" the Property's best use.

b) Sikes's opinion on best use after Seaway's concession

Sikes opined in his second report that the best use of the western remainder of the Property changed to agricultural as a result of Seaway's second amended petition. Seaway argued that this opinion was unreliable and without any support (i.e., conclusory). Sikes offered no explanation for his opinion. Therefore it was conclusory and inadmissible. *See Elizondo v. Krist*, 415 S.W.3d 259, 264-66 (Tex. 2013); *Burrow*, 997 S.W.2d at 236; *see also City of San Antonio v. Pollock*, 284 S.W.3d 809, 816, 819-20 (Tex. 2009); HARVEY BROWN & MELISSA DAVIS, EIGHT GATES FOR EXPERT WITNESSES: FIFTEEN YEARS LATER, 52 Hous. L. Rev. 1, 67 (2014) (stating that expert testimony is conclusory or speculative when "the expert fails to provide any explanation or predicate for her opinion").

The trial court did not err by excluding this expert.

3. Chris Farrar

On July 15, 2016, the last day of the discovery period,[29] Morello designated Chris Farrar, a financial expert, to testify that the conditions in Seaway's second amended petition made it highly unlikely or impossible for Morello to obtain financing for a rail-served industrial distribution center. The trial court struck his testimony as untimely and irrelevant. Morello's brief contains only three sentences discussing Farrar, only one of which discusses in summary manner the purported relevance of his opinion. Morello's brief does not address any of the specific issues regarding the timing of Farrar's designation.

Rule 38.1 of the Texas Rules of Appellate Procedure requires an appellant's brief to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). A brief that fails to comply with these requirements waives the complained-of error on appeal. *See Izen v. Comm'n for Lawyer Discipline*, 322 S.W.3d 308, 322 (Tex. App.—Houston [1st Dist.] 2010,

---

[29] The trial court, with the agreement of the parties, had extended the discovery deadline to July 15, 2016. Two months before the deadline, Seaway filed its Second Amended Petition offering for the first time to move the second pipeline in the future if Morello actually undertook development of the Property in line with his litigation theory and expert development plans. On the discovery deadline, which was one year after the July 2015 expert-designation deadline, Morello produced two revised expert reports and designated for the first time Farrar as a real-estate-finance expert.

pet. denied). We conclude Morello waived error on this expert's exclusion.

Even if we were not to find waiver, we would still reject Morello's contention that the trial court erred in striking Farrar. When Morello designated Farrar, he failed to provide an expert report as required by the trial court's April 2015 agreed docket control order, an issue that Morello does not address in his brief. Moreover, Morello offered no explanation for taking two months after the second amended petition was filed before designating Farrar.[30] Under these circumstances, we cannot conclude that the trial court abused its discretion in striking Farrar and concluding that Morello had not demonstrated good cause for the delay in designating Farrar and for failing to provide an expert report.[31]

4. Dale Morris

Morello designated R. Dale Morris to testify regarding the cost to lower the second pipeline as part of

---

[30] Two months may have been reasonable, but Morello offered no evidence on this issue.

[31] That Farrar's expert designation did not occur until after the July 2015 expert-designation deadline (as set forth in the April 2015 agreed docket control order) did not make his designation untimely. Good cause existed for the late designation because Morello did not need any expert testimony regarding the conditions set forth in Seaway's second amended petition until after Seaway filed that pleading. Instead, Farrar's designation was untimely because he was not designated for two additional months, and there was no explanation for the length of the delay, particularly in the absence of an expert report.

a modification to the Property to enable it to retain its best use as an industrial distribution center.[32] For the same reasons that Carter's cost opinion was speculative and inadmissible, Morris's restorative damages opinion is as well.

Morris also opined regarding the cost Seaway would incur to reroute the first pipeline under the 1975 agreement. Morello argues, that Morris's opinion "is relevant to the motivation of Seaway in refusing to consider Morello's request" that the second pipeline be placed in the area of the 1975 easement. The trial court held that Seaway's cost to relocate the first pipeline under the 1975 easement was not relevant because the jury charge would not include it as an element of Morello's claims.

The absence of such costs from the jury charge does not necessarily mean the costs are not relevant to Seaway's motives. But before the 1975 agreement could be relevant to Seaway's motives, Seaway's decision-makers at the time of the taking had to know its terms. Morello has not identified any evidence that Seaway's decision-makers knew its terms.

Even assuming Morris's opinion would be admissible on the issue of Seaway's motives, Morello offers no explanation for how Morris's opinion, if it had not been struck, would have created a fact issue on Morello's arbitrariness affirmative defense. Indeed,

---

[32] As Morello's brief states, Carter "is not a pipeline constructability expert" and therefore he relied on Morris for the cost to lower the pipeline.

Morris's opinion could not have raised a fact issue because it was not attached to Morello's pleadings concerning the arbitrariness issue—either through an affidavit or deposition.

5. David Heslep

David Heslep, an environmental engineer, opined regarding the pre-existing environmental problems on roughly 17 acres of the Property and the cost to monitor the Property's remediation efforts, possible future changes to remediation procedures should TCEQ agree to them, and future plans for the Property in light of those possibilities. Morello argues, without citation to the record, that Heslep's testimony is relevant "to the issue of post-condemnation market value (damage to the remainder) of the property." But Morello's appraiser, Sikes, does not purport to rely on Heslep for this damage calculation in either of his reports. Therefore, the trial court's exclusion of his opinion was in any event harmless.

6. Richard Kuprewics

Morello also challenges the trial court's exclusion of Richard Kuprewics, who was designated to testify that the Seaway pipeline could have been placed within the 1975 easement safely. But Seaway did not dispute that it could be done safely; the relevant issue is whether it made a reasoned determination that 50-foot easements were a safe approach.

Even if the court erred in striking Kuprewics's opinion as irrelevant, any error was harmless because we have already concluded that Morello did not present any evidence that Seaway's safety determination was arbitrary. Other feasible alternatives do not prove that Seaway acted arbitrarily. *See Whittington III*, 384 S.W.3d at 783 (decision on scope of condemnation "does not require the chosen course to be more feasible or better than the alternative," but rather "forbids decisions not made according to reason or judgment"); *Ludewig*, 773 S.W.2d at 614 (condemnor's decision is not arbitrary when condemnor chooses "least expensive option" or "most economically feasible path for its pipeline"). Indeed, Kuprewics's opinion could not have raised a fact issue because it was never attached to Morello's pleadings on the arbitrariness issue—either through an affidavit or deposition.

Finally, Morello globally asserts that his experts' opinions remained relevant, even if the stated future uses were considered speculative, because they addressed appropriate "compensation for the cost of curing or mitigating damage" resulting from the partial condemnation. But his experts did not offer opinions on the "cost to cure" the impact of the taking so that the land could continue with its current agricultural use, or even a reasonably likely different use within a reasonable time from the taking. Instead, they opined on the cost to cure the Property so that it could be used in the future as a rail-served industrial site—a use that was remote and speculative. *See State v. Schmidt*, 867 S.W.2d 769, 773 (Tex. 1993) (holding that

speculative uses not reflected in land's current market value should be excluded); *Coble*, 134 S.W.3d at 455-56.

We overrule Morello's last issue.

Conclusion

We affirm.

Harvey Brown,
Justice

Panel consists of Justices Keyes, Brown, and Lloyd.

CAUSE NO. 13-CCV-050231

SEAWAY CRUDE PIPELINE COMPANY LLC,	§	EMINENT DOMAIN
	§	PROCEEDING
	§	
Plaintiff,	§	THE COUNTY COURT
	§	AT LAW NUMBER 3
	§	
v.	§	FORT BEND
	§	COUNTY, TEXAS
BERNARD J. MORELLO, ET AL.,	§	
	§	
	§	
Defendants.	§	

FINAL JUDGMENT

(Filed Sep. 21, 2016)

BE IT REMEMBERED that on this date. there came on to be considered Seaway Crude Pipeline Company LLC's ("Seaway") Motion for Entry of Final Judgment. Without admitting or Judgment for Seaway's acquisition by condemnation of the easements described and depicted in the Exhibits A and B and A1 and B1 attached hereto and to Seaway's Second Amended Statement and Petition in Condemnation (the "Second Amended Petition"), filed with the Court on May 17, 2016.

It appears to the Court, and it is so found that Defendants, Bernard J. Morello ("Morello') and White Lion Holdings, LLC ("White Lion") (collectively "Defendants") are the legal owners of that certain real property located in Fort Bend County, Texas (the "Subject Property") across which the easements are sought

by Seaway as more particularly set forth in Seaway's Second Amended Petition, which Subject Property is more particularly described as:

Legal Descriptions

Morello Tract. Being a tract of land containing 115.22 acres, more or less, more particularly described by metes and bounds in that certain Special Warranty Deed dated April 5, 2004 White Lion Holdings, L.L.C. to Bernard J. Morello, recorded as Document Number 2004042732 of the Official Public Records of Fort Bend County, Texas; less and except any conveyances heretofore made.

White Lion Tract. Being a tract of land containing 25.322 acres, more or less, being 23.167 acres out of the C.P. Osborne Survey, (A-691) and Moses Merritt Survey (A-87), 2.155 acres out of the Lester E. Cross Survey (A-408). 25.322 certain Special Warranty Deed from Vision Metals, Inc., a Delaware corporation to White Lion Holdings, L.L.C., a Texas limited liability company dated April 5, 2004, effective as of and from April 6. 2004 recorded under Document Number 2004042731 of the Official Public Records of Fort Bend County, Texas; less and except any conveyances heretofore made.

Being a tract of land containing 20 acres, more or less, out of the Charles N. Simpson Survey, (A-485), Fort Bend County, being more particularly described by metes and bounds s Tract 3 in that certain Special Warranty Deed from

> Vision Metals, Inc., a Delaware corporation to White Lion Holdings, L.L.C., a Texas limited liability company dated April 5, 2004, effective as of and from April 6, 2004 recorded under Document Number 2004042731 of the Official Public Records of Fort Bend County, Texas; less and except any conveyances heretofore made.

It appears to the Court, and it is so found based on the Court's review of matters on file in this cause, that concerning the Morello Tract (a) Seaway deposited in the registry of the captioned court of Fort Bend County, Texas the amount of TWENTY-TWO THOUSAND THREE HUNDRED SIXTY-EIGHT AND NO/100 DOLLARS ($22,368.00), and (b) Seaway posted its Surety Bonds and Cost Bonds to satisfy Section 21.021 of the Texas Property Code.

It also appears to the Court, and it is so found based on the Court's review of matters on file in this cause, that concerning the White Lion Tract (a) Seaway deposited in the registry of the captioned court of Fort Bend County, Texas the amount of FIFTY-SEVEN THOUSAND SIX HUNDRED AND SEVENTY-FIVE AND NO/100 DOLLARS ($57,675.00), and (b) Seaway posted its Surety Bonds and Cost Bonds to satisfy Section 21.021 of the Texas Property Code.

Based on the evidence, IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court as follows:

1. That this Final Judgment be, and the same is hereby made, the Final Judgment of this Court.

2. That the Clerk of this Court record this Final Judgment in the minutes of this Court.

Morello Tract

3. That by virtue of this Judgment Seaway does have and recover of and from Morello a permanent right-of-way and easement that is fifty feet (50') wide, approximately 0.975 acres, and as more particularly described and depicted on Exhibits A and B, attached hereto and made a part hereof for all purposes, to survey, clear and excavate along a route, to lay, construct, reconstruct, operate, maintain, inspect, test, repair, alter, protect, move, remove or replace the Pipeline and appurtenant facilities, including and limited to, valves, risers, meters, communication wires, cables, conduits and devices and pigging facilities, as well as pipeline markers and any such facilities and appurtenances as may be required for cathodic protection on, in, over, under, through and across the Morello Tract (the Morello Tract Permanent Easement").

4. That by virtue of this Judgment Seaway does have and recovers of and from Morello temporary workspace and additional temporary workspace on the Morello Tract during construction and installation of the Pipeline. The temporary workspace and additional temporary workspace are approximately 1.655 and 0.754 acres, respectively, and as more particularly described and depicted on Exhibits A and B, attached

hereto and made a part hereof for all purposes (collectively the "Morello Tract Temporary Work Space Easement") (the Morello Tract Permanent Easement and Morella Tract Temporary Work Space Easement collectively the "Morello Tract Easements"). Seaway may use and occupy the Morello Tract Temporary Work Space Easement during the original construction of the Pipeline and restoration of the Morello Tract, but in no event longer than one (1) year from the date Seaway commences construction on the Morello Tract (the "Morello Tract initial Construction Period").

5. That Seaway's pipeline shall not exceed thirty inches (30") in nominal pipe diameter (the "Pipeline"). Seaway will not construct, build, install, maintain or have any above ground structures, installations, equipment or apparatus of any kind on or within the boundaries of the Morello Tract Permanent Easement other than pipeline markers (that may be required to be placed along the easement and right-of-way by applicable Department of Transportation Code regulations and other applicable statutes and regulations of governmental authorities) and cathodic test leads.

6. That no pipeline or permanent facility will be constructed on the Morello Tract Temporary Work Space Easement. Seaway shall have the right to select the exact location of the Pipeline within the Morello Property Permanent Easement. Further, Seaway shall have the right to construct, maintain and change slopes of cuts and fills to ensure proper lateral and subjacent support and drainage for the Pipeline and appurtenant facilities.

7. That Seaway, from time to time and as often as necessary, shall have the right of ingress and egress over, along, and across the Morello Tract Permanent Easement (and the Morello Tract Temporary Work Space Easement during the Morello Tract Initial Construction Period) and to access such rights-of-way and Morello Tract Easements where they intersect any public road or public rights-of-way or other easement to which Seaway has the right to access.

8. That Seaway shall have the right to cut or clear from the Morello Tract Permanent Easement (and the Morello Tract Temporary Work Space Easement during the Morello Tract Initial Construction Period), all trees, shrubbery, undergrowth, and any other obstructions that may injure, endanger or interfere with the construction, operation, maintenance, repair or use of the Pipeline and/or Morello Tract Permanent Easement (and the Morello Tract Temporary Work Space Easement during the Morello Tract Initial Construction Period). Seaway shall dispose of all brush and debris, if any, cleared from the Morello Tract Easements by burning, chipping into less than four (4) inch chips, burying and/or removing to an authorized disposal site. The method of disposal shall be selected by Seaway. Upon completion of initial construction, Seaway will, insofar as reasonably practicable, level, regrade, and reseed the ground disturbed by its use of the Morello Tract Easements and will restore any existing fences within the Morello Tract Easements to at least the condition of the fences prior to Seaway's entry upon the Morello Tract Easements. Seaway agrees to

reseed the Morello Tract Easements with the same type of grass that existed on the Morello Tract Easements before Seaway's use of the Morello Tract Easements. From and after the Initial Construction Period, Seaway shall pay any damages which may arise to growing crops, timber, fences and other improvements from the construction, maintenance, and operation of the Pipeline.

9. That during the Morello Tract Initial Construction Period, the trenching shall be done by double ditching in such a manner so that the topsoil will be separated from the balance of the dirt removed in making the ditch or trench for installation of the Pipeline. In backfilling after installation of the Pipeline, the topsoil first removed shall be used as cover soil in such a manner so as to result in it being returned to the top of the ditch as topsoil. Seaway will maintain the Morello Tract Permanent Easement (and the Morello Tract Temporary Work Space Easement during the Morello Tract initial Construction Period) clear of all litter and trash during periods of construction, operation, maintenance, repair or removal.

10. That Seaway shall, during the Morello Tract Initial Construction Period, maintain suitable crossings on, over, and across the Morello tract Easements.

11. That Seaway shall comply in all material respects, at its sole cost, with all applicable federal, state, and local laws, rules, and regulations which are applicable to Seaway's activities hereunder, including,

without limitation, the construction, use, operation, maintenance, repair and service of the Pipeline.

12. That Seaway shall indemnify and hold harmless Morello, and his heirs, executors. administrators and assigns, from and against all liability, damages, suits, actions, costs and expenses of whatsoever nature (including reasonable attorneys' fees) to persons or property including damages to Seaway or Seaway's property, caused by or arising out of Seaway's operations hereunder relating to the construction, operation, maintenance, alteration or service of the Pipeline, associated equipment, and appurtenances thereto.

13. That from and after the Initial Construction Period, except as provided for in paragraph 14, Seaway shall have the right to prevent the construction by Morello within the boundaries of the Morello Tract Permanent Easement, and the right to remove therefrom, any and all types and sizes of houses, barns, buildings, structures, permanent impoundments of water. and natural or man-made obstructions, including but not limited to trees, brush, roots and other growth, whether growing on the Morello Tract Permanent Easement or overhanging the Morello Tract Permanent Easement. Morello shall not have the right to substantially change the grade of the land, or remove the cover, over the Pipeline.

14. That Morello shall, upon ninety (90) days prior notice to Seaway, have the right to construct, maintain, repair, underground communications conduits, electrical transmission and bridges, railroad

tracks, underground communications conduits, electric transmission and distribution lines, telephone lines, gas, water, drainage and sewer pipelines, and other utilities, across the Morello Tract Permanent Easement at any angle of not less than forty-five (45) degrees to the Pipeline; and the right to use the Morello Tract covered by the Morello Tract. Permanent Easement for recreation or other similar purposes, not inconsistent or conflicting with Seaway's use and enjoyment of the Morello Tract Permanent Easement for the purposes set forth herein; provided, however, Morello shall exercise said rights in such a manner so that (i) the Pipeline and facilities located within the Morello Tract Permanent Easement shall not be endangered, obstructed, injured or interfered with; (ii) Seaway's access to the Morello Tract Permanent Easement, the Pipeline and its other facilities is not interfered with; (iii) Seaway shall not be prevented from traveling within and along the entire length of the Morello Tract Permanent Easement on foot or in vehicles or machinery; (iv) the Pipeline is left with the amount of cover originally installed to allow safe operation of the Pipeline; (v) the Pipeline is left with proper, sufficient, and permanent lateral support; and (vi) Seaway's use of the Morello Tract Permanent Easement for the purposes set forth herein is not unreasonably impaired or interfered with. Morello can plow, cultivate and farm the Morello Tract Permanent Easement without notice to or the consent of Seaway, provided that these operations do not disturb the Morello Tract Permanent Easement to a subsurface depth below sixteen inches (16") from the ground surface.

15. That Seaway shall, at Seaway's sole cost and expense, lower and/or encase-the Pipeline, and/or take other protective measures, as Seaway deems necessary to permit Morello to Easement consistent with paragraph 14 above, provided that Morello first presents Seaway with the following: (i) engineering plans and profiles showing the design, specifications, and exact location(s) of all proposed road, street, and/or railroad crossings; (ii) copies of any governmental permits or approvals required for construction of the proposed road(s), street(s), and/or railroad tracks; (iii) in the case of railroad tracks, proof that a railroad company that owns or operates the railroad right-of-way along Texas State Highway Spur 529 has agreed to provide rail service to the Morello Tract and/or the White Lion Tract; and (iv) proof that sufficient funding for construction of all of the proposed road(s), street(s), and railroad tracks is in place. Upon being presented with the foregoing, Seaway shall have 180 days in which to complete any necessary work contemplated by this paragraph. Seaway shall not be required to make accommodations for crossings under the terms of this paragraph more than one time. Morello's rights in this paragraph shall inure to the benefit of the successor owners of the Morello Tract.

16. That Seaway reserves the right to install gates in any fences that cross the Morello Tract Permanent Easement. Seaway shall bury the Pipeline to a minimum depth of thirty-six inches (36") below the surface of the ground and any then-existing drainage ditches, creeks and roads, except at those locations

where rock is encountered the Pipeline may be buried at a lesser depth.

17. That Seaway and its designated contractors, employees and invitees agree to keep all gates and fences closed and locked at all times except when passing through them so that cattle, horses and/or other livestock located on the remainder portion of the Morello Tract cannot stray from the fenced pastures and unauthorized persons cannot pass through them. Seaway shall have no right to fence or enclose the Morello Tract Permanent Easement for any other purpose than as stated in this paragraph.

18. That Seaway shall use the Morello Tract Easements solely for the purposes specified herein. There shall be no hunting or fishing on the Morello Tract Easements or the Morello Tract by Seaway, its officers, agents, employees, contractors, invitees, guests or representatives at any time. No firearms or fishing equipment shall be taken on the Morello Tract Easements by Seaway, its officers, agents, employees, contractors, invitees, guests or representatives at any time.

19. That Morello shall retain all the oil, gas and other minerals in, on and under the Morello Tract Easements; provided, however, that Morello will not be permitted to drill or operate equipment or develop the minerals on the Morello Tract Easements, but will be permitted to extract the oil and other minerals from and under the Morello Tract Easements by directional drilling and other means, so long as such activities do

not damage, destroy, injure or interfere with Seaway's use of the Morello Tract Easements.

20. That to the extent permitted by law, Seaway has the right to assign this Judgment for the Morello Tract Easements in whole or part. The pipeline will be utilized by Seaway, and its successors and assigns, as a common carrier pipeline transporting oil, oil products, and crude petroleum.

21. That Morello or Morello's heirs, successors or assigns may be entitled to repurchase the Morello Tract Easements, at the price paid to Morello by Seaway at the time Seaway acquire the Morello Tract Easements by this proceeding, and request from Seaway information relating to the use of the Morello Tract Easements and actual progress made toward the use, as required under Title 4, Chapter 21, Subchapter E of the Texas Property Code.

White Lion Tract

22. That by virtue of this Judgment Seaway does have and recovers of and from White Lion a permanent right-of-way and easement that is fifty feet (50') wide, approximately 1.791 acres, and as more particularly described and depicted on Exhibits A-1 and B-1, attached hereto and made a part hereof for all purposes, to survey, clear and excavate along a route, to lay, construct, reconstruct, operate, maintain, inspect, test, repair, alter, protect, move, remove or replace the Pipeline and appurtenant facilities, including and limited to, valves, risers, meters, communication wires,

cables, conduits and devices and pigging facilities, as well as pipeline markers and any such facilities and appurtenances as may be required for cathodic protection on, in, over, under, through and across the White Lion Tract (the "White Lion Tract Permanent Easement").

23. That by virtue of this Judgment Seaway does have and recovers of and from White Lion temporary workspace and additional temporary workspace on the White Lion Tract during construction and installation of the Pipeline. The temporary workspace and additional temporary workspace are approximately 2.550 and 0.556 acres, respectively, and as more particularly described and depicted on Exhibits A-I and B-1, attached hereto and made a part hereof for all purposes (collectively the "White Lion Tract Temporary Work Space Easement") (the White Lion Tract Permanent Easement and White Lion Tract Temporary Work Space Easement collectively the "White Lion Tract Easements"). Seaway may use and occupy the White Lion Tract Temporary Work Space Easement during the original construction of the Pipeline and restoration of the White Lion Tract, but in no event longer than one (1) year from the date Seaway commences construction on the White Lion Tract (the "White Lion tract Initial Construction Period").

24. That said Pipeline shall not exceed thirty inches (30") in nominal pipe diameter. Seaway will not construct, build, install, maintain or have any above ground structures, installations, equipment or apparatus of any kind on or within the boundaries of the

White Lion Tract Permanent Easement other than pipeline markers (that may be required to be placed along the easement and right-of-way by applicable Department of Transportation Code regulations and other applicable statutes and regulations of governmental authorities) and cathodic test leads.

25. That no pipeline or permanent facility will be constructed on the White Lion Tract Temporary Work Space Easement. Seaway shall have the right to select the exact location of the Pipeline within the White Lion Tract Permanent Easement. Further, Seaway shall have the right to construct, maintain and change slopes of cuts and fills to ensure proper lateral and subjacent support and drainage for the Pipeline and appurtenant facilities.

26. That Seaway, from time to time and as often as necessary, shall have the right of ingress and egress over, along, and across the White Lion Tract Permanent Easement (and the White Lion Tract Temporary Work Space Easement during the White Lion Tract Initial Construction Period) and to access such rights-of-way and White Lion Tract Easements where they intersect any public road or public rights-of-way or other easement to which Seaway has the right to access.

27. That Seaway shall have the right to cut or clear from the White Lion Tract Permanent Easement (and the White Lion Tract Temporary Work Space Easement during the White Lion Tract Initial Construction Period), all trees, shrubbery, undergrowth, and any other obstructions that may injure, endanger

or interfere with the construction, operation, maintenance, repair or use of the Pipeline and/or White Lion Tract Permanent Easement (and the White Lion Tract Temporary Work Space Easement during the White Lion Tract Initial Construction Period). Seaway shall dispose of all brush and debris, if any, cleared from the White Lion Tract Easements by burning, chipping into less than four (4) inch chips, burying and/or removing to an authorized disposal site. The method of disposal shall be selected by Seaway. Upon completion of initial construction, Seaway will, insofar as reasonably practicable, level, re-grade, and reseed the ground disturbed by its use of the White Lion Tract Easements and will restore any existing fences within the White Lion Tract Easements to at least the condition of the fences prior to Seaway's entry upon the White Lion Tract Easements. Seaway agrees to reseed the White Lion Tract Easements with the same type of grass that existed on the White Lion Tract Easements before Seaway's use of the White Lion Tract Easements. From and after the Initial Construction Period, Seaway shall pay any damages which may arise to growing crops, timber, fences and other improvements from the construction, maintenance, and operation of the Pipeline.

28. That during the White Lion Tract Initial Construction Period, the trenching shall be done by double ditching in such a manner so that the topsoil will be separated from the balance of the dirt removed in making the ditch or trench for installation of the Pipeline. In backfilling after installation of the Pipeline, the topsoil first removed shall be used as cover soil

in such a manner so as to result in it being returned to the top of the ditch as topsoil. Seaway will maintain the White Lion Tract Permanent Easement (and the White Lion Tract Temporary Work Space Easement during the White Lion Tract Initial Construction Period) clear of all litter and trash during periods of construction, operation, maintenance, repair or removal.

29. That Seaway shall, during the White Lion Tract Initial Construction Period, maintain suitable crossings on, over, and across the White Lion Tract basements.

30. That Seaway shall comply in all material respects, at its sole cost, with all applicable federal, state, and local laws, rules, and regulations which are applicable to Seaway's activities hereunder, including, without limitation, the construction, use, operation, maintenance, repair and service of the Pipeline.

31. That Seaway shall indemnify and hold harmless White Lion, and its heirs. executors, administrators and assigns. from and against all liability, damages, suits, actions, costs and expenses of whatsoever nature (including reasonable attorneys' fees) to persons or property including damages to Seaway or Seaway's property, caused by or arising out of Seaway's operations hereunder relating to the construction, operation, maintenance, alteration or service of the Pipeline, associated equipment, and appurtenances thereto.

32. That from and after the Initial Construction Period, except as provided for in paragraph 33, Seaway

shall have the right to prevent the construction by White Lion within the boundaries of the White Lion Tract Permanent Easement, and the right to remove therefrom, any and all types and sizes of houses, barns, buildings, structures, permanent impoundments of water, and natural or man-made obstructions, including but not limited to trees, brush, roots and other growth, whether growing on the White Lion Tract Permanent Easement or overhanging the White Lion Tract Permanent Easement. White Lion shall not have the right to substantially change the grade of the land or remove the cover, over the Pipeline.

33. That White Lion shall, upon ninety (90) days prior notice to Seaway, have the bridges, railroad tracks, underground communications conduits, electric transmission and distribution lines, telephone lines, gas, water, drainage and sewer pipelines, and other utilities, across the White Lion Tract Permanent Easement at any angle of not less than forty-five (45) degrees to the Pipeline; and the right to use the White Lion Tract covered by the White Lion Tract Permanent Easement for recreation or other similar purposes, not inconsistent or conflicting with Seaway's use and enjoyment of the White Lion Tract Permanent Easement for the purposes set forth herein; provided, however, White Lion shall exercise said rights in such a manner so that (i) the Pipeline and facilities located within the White Lion Tract Permanent Easement shall not be endangered, obstructed, injured or interfered with; (ii) Seaway's access to the White Lion Tract Permanent Easement, the Pipeline and its other facilities is not

interfered with; (iii) Seaway shall not be prevented from traveling within and along the entire length of the White Lion Tract Permanent Easement on foot or in vehicles or machinery; (iv) the Pipeline is left with the amount of cover originally installed to allow safe operation of the Pipeline; (v) the Pipeline is left with proper, sufficient, and permanent lateral support; and (vi) Seaway's use of the White Lion Tract Permanent Easement for the purposes set forth herein is not unreasonably impaired or interfered with. White Lion can plow, cultivate and farm the White Lion Tract Permanent Easement without notice to or the consent of Seaway, provided that these operations do not disturb the White Lion Tract Permanent Easement to a subsurface depth below sixteen inches (16") from the ground surface.

34. Seaway shall, at Seaway's sole cost and expense, lower and/or encase the Pipeline, and/or take other protective measures, as Seaway deems necessary to permit White Lion to construct and maintain roads, streets, and/or railroad tracks across the White Lion Tract Permanent Easement consistent with paragraph 33 above, provided that White Lion first presents Seaway with the following: (i) engineering plans and profiles showing the design, specifications, and exact location(s) of all proposed road, street; and/or railroad crossings; (ii) copies of any governmental permits or approvals required for construction of the proposed road(s), street(s). and/or railroad tracks; (iii) in the case of railroad tracks, proof that a railroad company that owns or operates the railroad right-of-way along Texas

State Highway Spur 529 has agreed to provide rail service to the White Lion Tract and/or the White Lion Tract; and (iv) proof that sufficient funding for construction of all of the proposed road(s), street(s), and railroad tracks is in place. Upon being presented with the foregoing, Seaway shall have ISO days in which to complete any necessary work contemplated by this paragraph. Seaway shall not be required to make accommodations for crossings under the terms of this paragraph more than one time. White Lion's rights in this paragraph shall inure to the benefit of the successor owners of the White Lion Tract.

35. That Seaway reserves the right to install gates in any fences that cross the White Lion Tract. Permanent Easement. Seaway shall bury the Pipeline to a minimum depth of thirty-six inches (36") below the surface of the ground and any then-existing drainage ditches, creeks and roads, except at those locations where rock is encountered the Pipeline may be buried at a lesser depth.

36. That Seaway and its designated contractors, employees and invitees agree to keep all gates and fences closed and locked at all times except when passing through them so that cattle, horses and/or other livestock located on the remainder portion of the White Lion Tract cannot stray from the fenced pastures and unauthorized persons cannot pass through them, Seaway shall have no right to fence or enclose the White Lion Tract Permanent Easement for any other purpose than as stated in this paragraph.

37. That Seaway shall use the White Lion Tract Easements solely for the purposes specified herein. There shall be no hunting or fishing on the White Lion Tract Easements or the White Lion Tract by Seaway, its officers, agents, employees, contractors, invitees, guests or representatives at any time. No firearms or fishing equipment shall be taken on the White Lion Tract Easements by Seaway, its officers, agents, employees, contractors, invitees, guests or representatives at any time.

38. That White Lion shall retain all the oil, gas and other minerals in, on and under the White Lion Tract Easements; provided, however, that White Lion will not be permitted to drill or operate equipment or develop the minerals on the White Lion Tract Easements, but will be permitted to extract the oil and other minerals from and under the White Lion Tract Easements by directional drilling and other means, so long as such activities do not damage, destroy, injure or interfere with Seaway's use of the White Lion Tract Easements.

39. That to the extent permitted by law, Seaway has the right to assign this Judgment for the White Lion Tract Easements in whole or part. The pipeline will be utilized by Seaway, and its successors and assigns. as a common carrier pipeline transporting oil, oil products, and crude petroleum.

40. That White Lion or White Lion's heirs, successors or assigns may be entitled to repurchase the White Lion Tract Easements, at the price paid to White

Lion by Seaway at the time Seaway acquires the White Lion Tract Easements by this proceeding, and request from Seaway information relating to the use of the White the use, as required under Title 4, Chapter 21, Subchapter E of the Texas Property Code.

41. That each party shall bear its/their own respective costs, attorneys' fees, and expenses.

42. The Surety Bonds filed and posted by Seaway are cancelled and any obligation arising thereunder shall be null and void.

43. The Cost Bonds filed and posted by Seaway are cancelled and any obligation arising thereunder shall be null and void.

44. Seaway is indebted to Morello in the amount of $29,533.50, offset by the $22,368.00 previously deposited amount contained in the registry of the Court for Morello, excluding interest. In lieu of payment directly to Morello, Seaway may tender into the registry of the Court the amount of $7,165.50 (the difference of $29,533.50 and the previously deposited amount of $22,368.00). Morello shall be entitled to any accrued interest on amounts contained in the Court's registry for said deposits.

45. Seaway is indebted to White Lion in the amount of $58,693.50. offset by the $57,675.00 previously deposited amount contained in the registry of the Court for White Lion, excluding interest. in lieu of payment directly to White Lion, Seaway may tender into the registry of the Court the amount of $1,018.50 (the

difference of $58,693.50 and the previously deposited amount of $57,675.00). White Lion shall be entitled to any accrued interest on amounts contained in the Court's registry for said deposits.

46. That no execution for any damages awarded to Defendants against Seaway shall issue, provided that Seaway makes the tender of the amounts set forth in Paragraphs 44 and 45 of this Judgment.

47. That by virtue of the Court's entry of this Final Judgment, the Notice of Lis Pendens recorded at Documents 2013027093 relating to the Morello Tract and 2013027092 relating to the White Lion Tract of the Official Public Records of Fort Bend County, Texas are hereby released.

48. All relief not granted is denied. This is a Final Judgment.

Signed this 21st day of September 2016.

/s/ Elizabeth Ray
Presiding Judge
Honorable Elizabeth Ray

Counsel for Plaintiff:
tforestier@winstead.com **and** orsaklaw@gmail.com

Counsel for Defendants:
jls@luccismithlaw.com **and** jbain@bainandbainlaw.net

CAUSE NO. 13-CCV-050231

SEAWAY CRUDE PIPELINE COMPANY LLC,	§	EMINENT DOMAIN PROCEEDING
Plaintiff,	§	IN THE COUNTY COURT AT LAW NUMBER 3
v.	§	
BERNARD J. MORELLO, ET AL,	§	FORT BEND COUNTY, TEXAS
Defendants	§	

Order on Plaintiff's Motion to Strike Testimony of Experts Carter and Sikes

(Filed Aug. 11, 2016)

Plaintiff filed a motion to strike the opinions and/or testimony of the following defense experts: Jack Carter, Mike [sic] Sikes, Richard Kuprewicz, David Heslep, Jacqueline Lucci Smith, Joan Lucci Bain, Mike Stafford, R. Dale Morris, Chris Farrar. Defendants filed responsive papers. This order relates to only two of these experts, Mr. Carter and Mr. Sikes. In reaching its opinion, the Court has considered the written motions, the responses and the oral arguments of counsel.

Most of the objections are based on three issues. 1. Are the experts' opinions relevant; 2. Were the experts timely designated under the Docket Control Order ("DCO"); and 3. Are the experts' *amended* reports admissable.

The Relevancy Argument: Jack Carter is an engineer and site planner. He opines that the highest and best use of the property at issue is the development of a "rail served, heavy truck, industrial, warehouse development." His expert opinion states that the new pipeline impacts development of this warehouse center, but that the damage can be cured for $2,835,000. Mr. Carter arrives at that number based on testimony from Expert Sikes.

Mike [sic] Sikes is a real estate appraiser. He opines that the highest and best use of the taken property is industrial development with rail access. He bases this opinion on the opinion of Expert Carter. In his first expert opinion, Mr. Sikes values the property at $30,000 per acre for a total "cost to cure" of $3,200,727. In his second opinion, filed in July 2016, he raises the value to $50,000 per acre as a result of the diminution in value of the remainder of the property resulting from the amended petition filed by Plaintiff in May, 2016.

From a relevancy (and therefore admissibility) standpoint, Expert Carter's opinion is flawed. The opinion is based on 'remote, speculative, and conjectural uses" and, as such, must be excluded. *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177 (Tex. 2001).

At the point in time of the taking, there was (and still is) a Development Agreement in place between the property owners and the City of Rosenberg that prohibits the development envisioned by the expert.

Defendants have made no effort whatsoever to get that agreement modified or rescinded. Even today, but more importantly, at the time of the taking, there were no rail spurs, no attempts to obtain necessary railroad approvals, and no conversations had or meetings planned to get the City of Rosenberg to agree to alter the Development Agreement (which remains in place until 2027). Mr. Carter's opinion improperly speculates upon the use of the property fifteen years in the future, not as of the time of the taking. In fact, even though the original petition was filed in March of 2013, and the taking occurred on August 2, 2013, to date none of these steps have been attempted by the Defendants. There were and still are no actual plans for development and literally no improvements have been attempted or made to the property which support the expert's opinion. If that were not enough, Mr. Moreno [sic] testified at deposition that he might make the improvements in 15 years or so. (Morello deposition, p. 188, line 2). While the defense has provided case law to support anticipated use in the future, all of those cases require there to be some reality-based, real-life action happening or at least reasonably anticipated at the time of the taking. A "woulda-coulda-shoulda" expert opinion, with no concrete, realistic, timely plan or evidence of some type of action by the Defendants is irrelevant and thus inadmissible.

The Motion to exclude the opinion of Expert Sikes only asks for a partial exclusion of his opinion, that portion dealing with the enhanced value of the lost

property as a result of the "new" allegations in Plaintiff's Amended Petition. This is discussed below.

The Timeliness Argument: The first agreed DCO was signed on April 15, 2015. In that DCO, the parties agreed to designate all experts and provide expert reports no later than June 2, 2015. The second agreed DCO set the designation of expert deadline at May, 2016. The experts at issue were never disclosed by the defense as testifying experts until June 23-July 15, 2016, many, many months beyond the initial deadline. The Defendant provided several responses to this aspect of the Plaintiff's motion to strike, including:

1. One expert testified in the Temporary Injunction hearing (so, no report is necessary);

2. The expert was known to the other side (so, no surprise); and

3. Because the Plaintiff amended its petition in July 2016, the new allegations necessitated a change in the opinions of the experts.

Relevant DCO deadlines are as follows:

Expert Deadline: June 2, 2015

Defendant's Amended Disclosure: June 23-July 15, 2016

None of the defense responses are sufficient to overcome the extreme tardiness of the designations and surely do not support the right to amend reports.

The Admissibility of the Amended Reports: In May 2016, the Plaintiff amended its original petition to include two new paragraphs (directed at each of the two

defendants). In those paragraphs, the Plaintiff essentially alleges that it will, at its own cost, make necessary alterations to the pipeline in the event the Defendant ever takes the necessary steps to prove that it is, in fact, able and willing to make the land and contract modifications it needs to use the property as a "rail served, heavy truck, industrial, warehouse development." In essence, the Plaintiff appears to be hinting that it does not believe the Defendants can or will use the property in the manner set out by their experts, and if they do, the Plaintiff will make the necessary modifications at its own cost. In response to this practical approach to the problem at hand, the Defendants INCREASED their damages and amended their expert reports to include opinions beyond what was contained in the original opinions. It is this amended expert report regarding the issue of the diminution of value of the remainder of the property by Mr. Sikes that is the subject of the Plaintiff's Motion to Strike. Mr. Sikes' opinion is also flawed as to the issue of diminution of value of the remainder for the same reasons articulated above. The Court **GRANTS** that motion as well and strikes that portion of Expert Sikes' opinion regarding the value of the remainder.

Simply put, none of defense arguments survives the fundamental issue – the amended expert report by Mr. Sikes and the expert opinions of Mr. Carter are irrelevant and are not timely filed.

Therefore, the Court **GRANTS** the motion to strike the expert report of Jack Carter in its entirety

and **GRANTS** the motion to partially strike the expert opinion of Mike [sic] Sikes.

SIGNED this 11th day of August, 2016.

/s/ Elizabeth Ray

Elizabeth Ray, Judge Presiding

FILED FOR RECORD
NO. ___ TIME: 4:40 P.M.

AUG 11 2016

/s/ Laura Richard
County Clerk Fort Bend Co. Texas

CAUSE NO. 13-CCV-050231

SEAWAY CRUDE PIPELINE COMPANY LLC,	§	EMINENT DOMAIN PROCEEDING
Plaintiff,	§	IN THE COUNTY COURT AT LAW NUMBER 3
v.	§	
BERNARD J. MORELLO, ET AL,	§	FORT BEND COUNTY, TEXAS
Defendants	§	

Order on Plaintiff's Motion to Strike Testimony of Experts Kuprewicz and Heslep

(Filed Aug. 16, 2016)

Plaintiff filed a motion to strike the opinions and/or testimony of the following defense experts: Jack Carter, Mike Sikes, Richard Kuprewicz, David Heslep, Jacqueline Lucci Smith, Joan Lucci Bain, Mike Stafford, R. Dale Morris and Chris Farrar. Defendants filed responsive papers. This order relates to only two of these experts, Mr. Kuprewicz and Mr. Heslep. In reaching its opinion, the Court has considered the written motions, the responses and the oral arguments of counsel.

The objections to Mr. Kuprewicz are three-fold. 1. He has not filed an expert report, 2. Since his ultimate opinion is not in dispute, his testimony does not relate to a jury issue and 3. His opinion is unreliable. Defense argues that he testified at the TI hearing, so no expert report is required. There is no legal basis

given for this statement. Since he has not filed an expert report, which is required, he cannot testify and since his expert opinion is not in dispute, his testimony is irrelevant anyway.

The objection to Mr. Heslep is that his expert "report" (which is solely comprised of reports that have been submitted to TECQ attempting to modify the permit with regards to groundwater contamination; e.g. not a report) describes current, ongoing work to modify the TCEQ permit. The only question before the jury will be the value of the property at the time of the taking. Since the Court has previously ruled that it would not admit testimony that is based on "remote, speculative, and conjectural uses", it will not admit testimony from Mr. Heslep regarding present day efforts to remediate the land.

Put another way, the testimony at trial will be limited to the value at the time of the taking. There has been nothing seen thus far by the court that would allow testimony regarding future anticipated use.

Therefore, the Court **GRANTS** the motion to strike the expert testimony of Richard Kuprewicz and **GRANTS** the motion to strike the expert testimony of David Heslep.

SIGNED this 16th day of August, 2016.

/s/ Elizabeth Ray

Elizabeth Ray, Judge Presiding

FILED FOR RECORD
NO. ___ TIME: 3:09 P.M.

AUG 16 2016

/s/ Laura Richard
County Clerk Fort Bend Co. Texas

CAUSE NO. 13-CCV-050231

SEAWAY CRUDE PIPELINE COMPANY LLC,	§	EMINENT DOMAIN PROCEEDING
Plaintiff,	§	IN THE COUNTY COURT AT LAW NUMBER 3
v.	§	
BERNARD J. MORELLO, ET AL,	§	FORT BEND COUNTY, TEXAS
Defendants	§	

Order on Plaintiff's Motion to Strike Testimony of Experts Smith, Bain, Stafford, Morris and Farrar

(Filed Aug. 16, 2016)

Plaintiff filed a motion to strike the opinions and/or testimony of the following defense experts: Jack Carter, Mike Sikes, Richard Kuprewicz, David Heslep, Jacqueline Lucci Smith, Joan Lucci Bain, Mike Stafford, R. Dale Morris and Chris Farrar. Defendants filed responsive papers. This order relates to five of these experts, Ms. Smith, Ms. Bain, Mr. Stafford (attorneys' fees), Mr. Morris (pipeline construction) and Mr. Farrar (Commercial Real Estate). In reaching its opinion, the Court has considered the written motions, the responses and, to the extent presented, the oral arguments of counsel.

The objections to Experts Smith, Bain and Stafford are that:

1. The designations are untimely;

2. There are no reports from any of the experts and

3. The testimony is cumulative.

The Court sustains the cumulative argument, but will allow one attorneys' fees expert to testify regarding reasonable and necessary fees IF that expert files a report seven days prior to trial and updates the report the night before he/she testifies. In the event Plaintiffs wishes to take the deposition of the designated expert, that person will make himself/herself available during the week of August 22, 2016 with 72 hours notice.

Expert Morris was originally a consulting expert until he was designated as a testifying expert on July 15, 2016. As a consulting expert, he opined about the estimated cost to lower the pipeline. His new designation states that he "may testify about construction cost impacts to Seaway/Enterprise related to the relocation of the 1975 Seaway easement on Defendants' property." However, the jury will not be asked to decide the cost of relocating the 1975 pipeline and therefore this testimony is irrelevant. His consulting expert opinions may be used by other testifying experts (if previously disclosed), but not by Mr. Morris as he was not timely designated as a testifying expert.

The objections to Mr. Farrar, a commercial real estate expert, are the timeliness of his designation (July, 2016) and likely the nature of his report (2 paragraphs

contained in the July, 2016 designation, unsigned by Mr. Farrar). He is designated to testify about . . . "Defendants' ability to raise capital or obtain funding and permitting for development." Defendants suggest he, like Mr. Morris, has been designated as a result of the amended petition filed by the Plaintiffs. Mr. Farrar's opinions are not related to the time of the taking and are, therefore, irrelevant.

Put another way, the testimony at trial will be limited to the value at the time of the taking. There has been nothing seen thus far by the court that would allow testimony regarding future anticipated use.

Therefore, the Court **GRANTS** the motion to strike the expert testimony of R. Dale Morris and **GRANTS** the motion to strike the expert testimony of Chris Farrar. The Court further **GRANTS** the motion to limit expert testimony regarding attorneys' fees to one witness, subject to the rulings set out above.

SIGNED this 16th day of August, 2016.

/s/ Elizabeth Ray

Elizabeth Ray, Judge Presiding

FILED FOR RECORD
NO. ___ TIME: 4:45 P.M.

AUG 16 2016

/s/ Laura Richard
County Clerk Fort Bend Co. Texas

FIRST COURT OF APPEALS
301 Fannin Street
Houston, Texas 77002-2066

November 27, 2018

RE: Case No. 01-16-00765-CV

Style: Bernard J. Morello and White Lion Holdings, L.L.C.
v. Seaway Crude Pipeline Company, LLC

Please be advised the Court today **Denied** Appellant's motion for rehearing en banc in the above referenced cause.

Panel consists of: Chief Justice Radack, Justices Keyes, Brown, Jennings, Massengale, Caughey, Bland, Higley and Lloyd

T. C. Case # 13-CCV-050231

Christopher A. Prine,
Clerk of the Court

Jacqueline Smith
Lucci Smith Law Firm, PLLC
2550 Gray Falls Dr Ste 395
Houston, TX 77077
DELIVERED VIA E-MAIL

RE: Case No. 19-0017 DATE: 5/31/2019

COA #: 01-16-00765-CV TC#: 13-CCV-050231

STYLE: MORELLO v. SEAWAY CRUDE PIPELINE CO.

Today the Supreme Court of Texas denied the petition for review as amended in the above-referenced case. (Justice Guzman not sitting)

RE: Case No. 19-0017 DATE: 12/13/2019

COA #: 01-16-00765-CV TC#: 13-CCV-050231

STYLE: MORELLO v. SEAWAY CRUDE PIPELINE CO.

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review. (Justice Guzman and Justice Bland not participating)

CONSTITUTION OF THE UNITED STATES
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CONSTITUTION OF THE STATE OF TEXAS
Article 1, Section 17

(a) No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person, and only if the taking, damage, or destruction is for:

(1) the ownership, use, and enjoyment of the property, notwithstanding an incidental use, by:

(A) the State, a political subdivision of the State, or the public at large; or

(B) an entity granted the power of eminent domain under law; or

(2) the elimination of urban blight on a particular parcel of property.

(b) In this section, "public use" does not include the taking of property under Subsection (a) of this section for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues.

(c) On or after January 1, 2010, the legislature may enact a general, local, or special law granting the power of eminent domain to an entity only on a two-thirds vote of all the members elected to each house.

(d) When a person's property is taken under Subsection (a) of this section, except for the use of the State, compensation as described by Subsection (a) shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof.

TEXAS STATE STATUTE
Property Code Section 21.019

(a) A party that files a condemnation petition may move to dismiss the proceedings, and the court shall conduct a hearing on the motion. However, after the special commissioners have made an award, in an effort to obtain a lower award a condemnor may not dismiss the condemnation proceedings merely to institute

new proceedings that involve substantially the same condemnation against the same property owner.

(b) A court that hears and grants a motion to dismiss a condemnation proceeding made by a condemnor under Subsection (a) shall make an allowance to the property owner for reasonable and necessary fees for attorneys, appraisers, and photographers and for the other expenses incurred by the property owner to the date of the hearing.

(c) A court that hears and grants a motion to dismiss a condemnation proceeding made by a property owner seeking a judicial denial of the right to condemn or that otherwise renders a judgment denying the right to condemn may make an allowance to the property owner for reasonable and necessary fees for attorneys, appraisers, and photographers and for the other expenses incurred by the property owner to the date of the hearing or judgment.

STATE OF TEXAS §
§
COUNTY OF FORT BEND §

CHAPTER 43 TEXAS LOCAL GOVERNMENT CODE DEVELOPMENT AGREEMENT

This Agreement is entered into pursuant to Sections 43.035 and 212.172 of the Texas Local Government Code by and between the City of Rosenberg, Texas (the "City") and the undersigned property owner(s) (the "Owner"). The term "Owner" includes all owners of the Property.

WHEREAS, the Owner owns a parcel of real property (the "Property") in Fort Bend County, Texas, which is more particularly and separately described in the attached Exhibit "A"; and

WHEREAS, the Owner desires to have the Property remain in the City's extraterritorial jurisdiction, in consideration for which the Owner agrees to enter into this Agreement; and

WHEREAS, this Agreement is entered into pursuant to Sections 43.035 and 212.172 of the Texas Local Government Code, in order to address the desires of the Owner and the procedures of the City; and

WHEREAS, the Owner and the City acknowledge that this Agreement is binding upon the City and the Owner and their respective successors and assigns for the term (defined below) of this Agreement; and

WHEREAS, this Development Agreement is to be recorded in the Real Property Records of Fort Bend County, Texas.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the parties hereto agree as follows:

Section 1. The City guarantees the continuation of the extraterritorial status of the Owner's Property, its immunity from annexation by the City, and its immunity from City property taxes, for the term of this Agreement, subject to the provisions of this Agreement. Except as provided in this Agreement, the City agrees not to annex the Property, agrees not to involuntarily institute proceedings to annex the Property, and further agrees not to include the Property in a statutory annexation plan for the Term of this Agreement.

Section 2. The Owner covenants and agrees not to use the property for any use other than for agriculture, consistent with Chapter 23 of the Texas Tax Code, except for any now-existing single-family residential use of the property, without the prior written consent of the City.

The Owner covenants and agrees that the Owner will not file any type of subdivision plot or related developmental document for the Property with Fort Bend County or the City until the Property has been annexed into the City.

During the duration of this Agreement, the Owner covenants and agrees not to construct, or allow to be constructed, and buildings on the property that would require a building permit if the Property were in the City limits, subject to the exceptions set forth herein. The Owner reserves the right to construct, repair, or renovate buildings on the Property that are consistent with its agricultural use without obtaining a building permit or triggering annexation. Further, the Owner may construct an accessory structure to an existing single-family dwelling. Additionally, Owner reserves the right to construct a new residence on the Property, provided that Owner provides written notice of the construction to the City so that the parties can modify the description of the land subject to this Agreement.

The Owner acknowledges that each and every Owner of the Property must sign this Agreement in order for the Agreement to take full effect, and the Owners who sign this Agreement covenants and agrees, jointly and severably, to indemnify, hold harmless, and defend the City against any and all legal claims, by any person claiming an ownership interest in the Property who has not signed the Agreement, arising in any way from the City's reliance on this Agreement.

Section 3. The Owner acknowledges that if any plat or related development document is filled in violation of this Agreement, then in addition to the City's other remedies, such act will constitute a petition for voluntary annexation by the Owner, and the Property will be subject to annexation at the discretion of the City Council. The Owner agrees that such annexation shall

be voluntary and the Owner hereby consents to such annexation as though a petition for such annexation had been tendered by the Owner.

If annexation proceedings begin pursuant to this Section, the Owner acknowledges that the Agreement serves as an exception to Local Government Code section 43.052, requiring a municipality to use certain statutory procedures, including notices and hearings under an annexation plan. Furthermore, the Owner hereby waives any and all vested rights and claims that they may have under Section 43.002(o)(2) and Chapter 245 of the Texas Local Government Code that would otherwise exist by virtue of any actions Owner has taken in violation of Section 2 herein.

Section 4. Pursuant to Sections 43.035(b)(1)(B) of the Texas Local Government Code, the City is authorized to enforce all of the City's regulations and planning authority that do not interfere with the use of the area for agriculture, wildlife management, or timber. The City has the discretion to enforce regulations applicable to: fireworks, non-agriculture burning, flood plain management, and billboards within the area. The City states and specifically reserves its authority pursuant to Chapter 251 of the Texas Local Government Code to exercise eminent domain over property that is subject to a Chapter 43 and/or Chapter 212 development agreement.

Section 5. In accordance with Texas Local Government Code 212.172(d), the initial term of this Agreement (the "Initial Term") is fifteen (15) years from the

date that the City Manager's signature to this Agreement is acknowledged by a public notary; the total duration of this Agreement and any successive renewals or extensions may not exceed forty-five (45) years. Unless each party agrees to a subsequent term, the City will commence the annexation of the Property at the end of the Initial Term. In connection with annexation pursuant to this Section, the Owners hereby waive any vested rights they may have under Section 43.002(o)(2) and Chapter 245 of the Texas Local Government Code that would otherwise exist by virtue of any plat or construction any of the Owners may initiate during the time between the expiration of this Agreement and the institution of annexation proceedings by the City.

Section 6. Any person who sells or conveys any portion of the Property shall, prior to such sale or conveyance, give written notice of this Agreement to the prospective purchaser or grantee, and shall give written notice at the sale or conveyance to the City. Furthermore, the Owners and the Owners' heirs, successors, and assigns shall give the City written notice within 14 days of any change in the agricultural exemption status of the Property. A copy of either notice required by this Section shall be forwarded to the City at the following address:

City of Rosenberg
Attn: City Manager
2110 4th Street
Rosenberg, Texas 77471

Section 7. This Agreement shall run with the Property and be recorded in the Real Property Records of Fort Bend County, Texas.

Section 8. If a court of competent jurisdiction determines that any covenant of this Agreement is Void or Unenforceable, including the covenants regarding involuntary annexation, then the remainder of this Agreement shall remain in full force and effect.

Section 9. This Agreement may be enforced by any Owner or the City by any proceeding of law or in equity. Failure to do so shall not be deemed a waiver to enforce the provisions of this Agreement thereafter.

Section 10. No subsequent change in the law regarding annexation shall affect the enforceability of this Agreement or the City's ability to annex the properties covered herein pursuant to the terms of this Agreement.

Section 11. Venue for this Agreement shall be in Fort Bend County, Texas.

Section 12. This Agreement may be separately executed in individual counterparts and, upon execution, shall constitute one and same instrument.

Section 13. This Agreement shall survive its termination to the extent necessary for the implementation of the provisions of Sections 3, 4, and 5 herein.

In witness whereof, the above and foregoing provisions are hereby agreed to, and accepted and approved by the parties.

"OWNER"
BERNARD J. MORELLO

By: /s/ Bernard J. Morello

Printed Name: Bernard J. Morello

Date: 8/1/12

THE STATE OF TEXAS §
§
COUNTY OF FORT BEND §

This instrument was acknowledged before me on the 1 day of Aug., 2012, by Bernard Morello being known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he/she executed the same for the purposes and consideration therein expressed.

[SEAL] (NOTARY SEAL)	Vanessa Garza My Commission Expires 06/22/2013

/s/ Vanessa Garza
Notary Public,
State of Texas

"CITY"
City of Rosenberg, Texas

By: /s/ Jack S. Hamlett

Printed

Name: Jack S. Hamlett

Title: City Manager

Date: 9-10-12

THE STATE OF TEXAS §

§

COUNTY OF FORT BEND §

This instrument was acknowledged before me on the 10th day of Sept., 2012, by Jack S. Hamlett, as City Manager of the City of Rosenberg, Texas, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

[SEAL]	LINDA CERNOSEK MY COMMISSION EXPIRES April 17, 2016

/s/ Linda Cernosek
Notary Public,
State of Texas

(NOTARY SEAL)

After Recording, Return To:
Travis Tanner
City of Rosenberg
2220 Fourth Street
Rosenberg, Texas 77471

EXHIBIT "A"

Owner: Morello, Bernard
5100 SAN FELIPE ST UNIT 78E
HOUSTON, TX 77056-3680

Fort Bend Central Appraisal District Tax Account Number: 0485-00-012-0081-901

Legal Description: 0485 C N SIMPSON, TRACT 8 (PT), BLOCK 12, ACRES 115.22

FILED AND RECORDED
OFFICIAL PUBLIC RECORDS

/s/ Dianne Wilson
Dianne Wilson, County Clerk
Fort Bend County, Texas
September 14, 2012
02:59:04 PM

[SEAL]

FEE: $32.00 SP
AGREEMENT