

## “Procedural and Evidentiary Issues in Condemnation Cases: What Gets in and What Doesn’t?”

*presented by*

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### I. Introduction

Traditional eminent domain trial work is unique. Liability, in the true sense of the word, is not at issue, and very often there is only one simple question for the jury to answer – what amount of money will adequately and fairly compensate the property owner for the rights being acquired by the condemnor? The simplicity of the question often leads practitioners to believe that eminent domain trials will be similarly simple. In reality, practitioners on both sides of the bar are regularly confronted with thorny, and in some cases unsettled, procedural and evidentiary issues that must be adequately addressed. This paper examines four issues that have been repeatedly raised in eminent domain proceedings we have been involved with over the past year. First, to what extent are landowners testifying under the Property Owner Rule now subject to expert disclosure requirements, and how much market evidence must a landowner now offer in order to support his opinions regarding the fair market value of his property? Second, to what extent can a condemnee introduce evidence regarding the extent to which the condemnor will exercise its easement rights on the condemnee’s property, and to what extent can the condemnor introduce evidence regarding the likelihood that it will use such rights? Third, how, if at all, can a condemnee introduce fear of electric transmission structure failure and/or electromagnetic fields as an element of just compensation? Finally, what strictures govern the admissibility of paired sales as a method of proving remainder damages?

### II. Landowner Testimony: Evidentiary and Procedural Hurdles After *Justiss*

For over forty years, Texas courts have recognized landowners’ ability to testify to the fair market value of their property, even if they could not qualify to testify about the value of similar property belonging to

someone else.<sup>1</sup> This “Property Owner Rule” is premised on the idea that property owners are generally familiar with the value of their property. While the existence of the Property Owner Rule has remained uncontroversial, the amount of evidence required to substantiate landowner valuation testimony has been the subject of much litigation. In 1984, the Texas Supreme Court held that very little was required to substantiate landowner valuation testimony – it was enough to testify to a general familiarity with a property’s fair market value without offering any specific supporting evidence.<sup>2</sup>

That standard changed on December 14, 2012. In *Natural Gas Pipeline Company of America v. Justiss*, the Supreme Court re-defined the bounds of the Property Owner Rule, equating landowner testimony to expert testimony and mandating that such testimony be supported by factual market evidence.<sup>3</sup> While the Court clarified many aspects of the Property Owner Rule, it also raised several questions. For instance, if landowner testimony is the functional equivalent of expert testimony, are landowners now subject to the same disclosure requirements as expert witnesses? How much market evidence must a landowner offer to support his/her opinions of fair market value? What types of evidence? Is landowner testimony subject to the same substantive requirements as an appraisal expert?

#### **A. The Property Owner Rule After *Justiss***

The *Justiss* case involved allegations by several homeowners that noise and odor emanating from a gas company’s compressor station caused a permanent nuisance.<sup>4</sup> The homeowners testified that the nuisance decreased their property values—and offered testimony reflecting the monetary amount of depreciation they believed had occurred—but none explained the factual basis for their conclusions.<sup>5</sup> At trial, the jury found that the noise and odor created a permanent nuisance and awarded nine of the twelve homeowners \$1,242,500 based

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<sup>1</sup> See, e.g., *State v. Berger*, 430 S.W.2d 557, 559 (Tex. Civ. App.—Waco 1968, writ ref’d n.r.e.).

<sup>2</sup> See *Porras v. Craig*, 675 S.W.2d 503, 505 (Tex. 1984).

<sup>3</sup> See *Natural Gas Pipeline Co. of America v. Justiss*, 397 S.W.3d 150 (Tex. 2012).

<sup>4</sup> *Id.* at 152.

<sup>5</sup> *Id.*

on their testimony.<sup>6</sup> On appeal, Natural Gas Pipeline Company of America challenged the sufficiency of the homeowners' testimony under the Property Owner Rule.<sup>7</sup>

Prior to reaching its decision, the Supreme Court endeavored to clarify the Property Owner Rule. The Court began by reaffirming that, while property owners are presumed qualified to testify to the value of their property, their testimony "must be based on market, rather than intrinsic or some other speculative value of the property."<sup>8</sup> The Court then ratcheted up the extent to which property owners must substantiate their value opinions, equating their testimony to expert testimony:

Because property owner testimony is the functional equivalent of expert testimony, it must be judged by the same standards. Thus, as with expert testimony, property valuations may not be based solely on a property owner's *ipse dixit*. An owner may not simply echo the phrase "market value" and state a number to substantiate his diminished value claim; he must provide the factual basis on which his opinion rests.<sup>9</sup>

The Court then analyzed the testimony of the homeowners, ultimately concluding that each homeowner's testimony was insufficient to support the jury's verdict.<sup>10</sup> Because each homeowner offered only conclusory valuation opinions without any specific factual support, the Court held the testimony was "no evidence" of fair market value and remanded the case for a new trial on liability and damages.<sup>11</sup>

#### **B. Does *Justiss* Transform Landowners into Experts?**

As previously stated, the *Justiss* opinion includes several statements analogizing landowner valuation testimony under the Property Owner Rule to expert testimony. For example:

Like expert testimony, landowner valuation testimony may be based on hearsay.<sup>12</sup>

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Because property owner testimony is the functional equivalent of expert testimony, it must be judged by the same standards.<sup>13</sup>

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<sup>6</sup> *Id.* at 153.

<sup>7</sup> *Id.* at 155. While *Justiss* involved a nuisance claim and not a condemnation action, the Supreme Court's discussion of the Property Owner Rule is equally applicable to condemnation actions.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 159.

<sup>10</sup> *Id.* at 161-62.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 157-58.

In light of the aforementioned language, several practitioners throughout the state have argued that landowners testifying under the Property Owner Rule are now subject to the expert disclosure requirements set forth in the Texas Rules of Civil Procedure.<sup>14</sup>

This is an inaccurate reading of *Justiss*. Neither *Justiss* nor the case law that preceded it transform landowners testifying under the Property Owner Rule into expert witnesses. In *Justiss*, the Supreme Court unambiguously held that “the Property Owner Rule falls under Texas Rule of Evidence 701, which allows a lay witness to provide opinion testimony if it is (a) rationally based on the witness’s perception and (b) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue.”<sup>15</sup> As such, the Supreme Court and several courts of appeals have held that the Property Owner Rule allows landowners to testify to the fair market value of their property as lay witnesses without being designated as expert witnesses.<sup>16</sup>

From a practical standpoint, this is the right outcome. It is a fundamental tenet of Texas law that communications with testifying experts are not privileged and are subject to discovery. If landowners testifying under the Property Owner Rule were transformed into expert witnesses, landowners would effectively be stripped of their attorney-client privilege by virtue of exercising their right to testify to the value of their property.

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<sup>13</sup> *Id.* at 159.

<sup>14</sup> Texas Rule of Civil Procedure 194.2(f) states that, for any testifying expert, a party must disclose: (1) the expert’s name, address, and telephone number; the subject matter on which the expert will testify; the general substance of the expert’s mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting such information; if the expert is retained by, employed by, or otherwise subject to the control of the responding party: (A) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by or prepared by or for the expert in anticipation of the expert’s testimony; and (B) the expert’s current resume and bibliography. TEX. R. CIV. P. 194.2(f).

<sup>15</sup> *Justiss*, 397 S.W.3d at 157.

<sup>16</sup> See *Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 850-55 (Tex. 2011), reh’g denied (June 10, 2011) (holding that, where a landowner testifies to the fair market value of his property pursuant to the Property Owner Rule, the landowner’s testimony falls under Texas Rule of Evidence 701, and the landowner need not be designated as an expert witness); *Natural Gas Pipeline Co. of Am.*, 397 S.W.3d at 157 (“Based on the presumption that an owner is familiar with his property and its value, the Property Owner Rule is an exception to the requirement that a witness must otherwise establish his qualifications to express an opinion on land values.”); *Red Sea Gaming, Inc. v. Block Investments (Nevada) Co.*, 338 S.W.3d 562, 572 (Tex. App.—El Paso 2010, pet. denied) (“[T]he property owner rule applies to corporate entities owning property and [ ] a representative of the corporate owner who is familiar with the market value of the property in question may testify under this rule as to the market value of the property, *without being designated as an expert witness.*”) (emphasis added); *Custom Transit, L.P. v. Flatrolled Steel, Inc.*, 375 S.W.3d 337, 350-353 (Tex. App.—Houston [14th Dist.] 2012, pet. filed) (where a landowner was designated both as a fact witness and an expert witness but was prevented from providing expert testimony for failure to comply with written discovery obligations, the landowner was still allowed to testify regarding the fair market value of his property under the Property Owner Rule); *Preston Reserve, L.L.C. v. Compass Bank*, 373 S.W.3d 652, 659-61 (Tex. App.—Houston [14th Dist.] 2012, no pet.) (where a representative of a corporate landowner had not been designated as an expert witness, court engaged in an analysis regarding whether the representative could still testify as to the fair market value of the land in question under the Property Owner Rule).

### C. How Much Market Evidence is Required under *Justiss* and What Type?

The *Justiss* case provides practitioners with a useful framework as to the type of market evidence a land owner must provide in support of his or her valuation opinion. While some market based factual basis must be supplied, “[t]his burden is not onerous.”<sup>17</sup> Evidence of “price paid, nearby sales, tax valuations, appraisals, online resources, and any other relevant factors may be offered to support the claim.”<sup>18</sup>

Not only is a landowner’s burden not onerous, but the *Justiss* opinion implicitly allows landowners to base their fair market value opinions on evidence that would otherwise be inadmissible if offered by a testifying expert. For instance, although tax valuations are ordinarily inadmissible to establish fair market value opinions in condemnation actions,<sup>19</sup> *Justiss* specifically allows landowners to utilize such evidence to support their valuation opinions.

While *Justiss* offers useful insight in determining the *type* of evidence required to substantiate landowner testimony, the opinion does not offer much guidance on *how much* market evidence a landowner must offer. Can a landowner testify that a pipeline easement diminished the market value of his/her property by 40% by merely testifying to the price paid for the property 15 years earlier? Probably not. Must the landowner also offer a more recent tax valuation? An appraisal? What did the Supreme Court mean by “any other” relevant factors? These questions will surely receive attention in the years to come as practitioners attempt to navigate the contours of the Property Owner Rule. However, if one thing is clear, it is that landowners must now do more than merely invoke the phrase “market value” – landowners testifying under the Property Owner Rule must offer specific, market-based rationale for their valuation opinions.

### III. Accounting for the Unaccountable with a View Towards Probabilities

While all good lawyers try to account for as many contingencies as possible when drafting legal documents, lawyers are not clairvoyant. When drafting a condemnation petition for the taking of an easement

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<sup>17</sup> *Justiss*, 397 S.W.3d at 159.

<sup>18</sup> *Id.*

<sup>19</sup> *Am. Guar. Life, Health & Acc. Ins. Co. v. State*, 332 S.W.2d 135, 144 (Tex. Civ. App.—Austin 1960, writ ref’d n.r.e.) (“Since ad valorem taxes are, as the name implies, based on value of the property taxed the amount of the taxes paid would be meaningless in determining value unless the rate was known. Furthermore the law is that tax assessments or renditions made by others than the owners of the property are inadmissible on the issue of value.”).

(whether for a pipeline, transmission line, water flowage structure, or some other type of easement), it is impossible to predict and/or set forth with certainty every eventuality that might occur throughout the life of the easement (i.e., crime, natural disaster, technological advancement, or change in the law). After all, for most condemning authorities, the intent is to generally acquire easements into perpetuity.

In an attempt to plan for future changes, lawyers – particularly when it comes to easement language – will include catchall statements and open-ended provisions where appropriate. For instance, in a pipeline easement, it would not be uncommon to see the following purpose-driven language:

XYZ Company seeks a 20-foot wide right of way for the purposes of constructing, laying, maintaining, operating, inspecting, altering, repairing, removing, replacing, reconstructing, relocating, changing the size of, and abandoning in place a pipeline not to exceed 24 inches in diameter.

While XYZ Company’s immediate need may only be to construct the pipeline, the company must preserve its right to alter the pipeline in the future for reasons that cannot be foreseen. For the same reason, it is possible to find transmission line easement language that does not place a cap on the height or number of poles or towers within an easement. In both cases, it would be common for a condemning authority to seek the right to utilize “all necessary or desirable appurtenances,” or to provide for the ability to take any action “required by law, whether currently in place or enacted in the future.”

Where a condemning authority seeks easement rights that allow for unforeseeable future contingencies, several evidentiary questions arise. For instance, to what extent is a landowner able to introduce evidence of rights that a condemnor, in all likelihood, will not exercise? Can a condemning authority offer evidence concerning the reasonably probable uses of its easement rights? Even though there is a presumption under Texas law that condemning authorities *may* exercise easement rights to their full extent, are landowners therefore entitled to an instruction from the court to the jury that the condemnor *will* necessarily exercise its rights to the fullest extent?

The Texas Supreme Court had the opportunity to answer many of the aforementioned questions in *City of Pearland v. Alexander* – a condemnation action where the City of Pearland brought suit to condemn ten acres of

land for a sewerage disposal plant.<sup>20</sup> At trial, a motion in limine was granted restricting the City from presenting the jury with any evidence as to the reasonably foreseeable and probable actual uses it would undertake on the ten acres.<sup>21</sup> At the conclusion of evidence, the trial court issued the following instruction to the jury:

You are instructed that the surface estate of the ten (10) acre tract of land condemned by the City of Pearland in this case . . . will be used by the City of Pearland as a site for a sewerage disposal plant and you are to presume that the City of Pearland will exercise its rights and use and enjoy this property to the full extent for such a sewerage disposal plant.<sup>22</sup>

On appeal, the Supreme Court held that the above jury instruction failed to conform to the established “willing-seller willing-buyer” method of determining market value and remanded the case for a new trial.<sup>23</sup>

In reaching its decision, the Supreme Court harkened back to the fundamentals of condemnation law, restating the foundation on which the determination of adequate compensation is based:

Where a part of a tract of land has been taken for a public use, damages to the remainder tract are to be determined by ascertaining the difference between its market value immediately before and after the appropriation, taking into consideration the nature of the improvement, the use to which the land is to be put, and all circumstances which tend to increase or diminish the present market value.<sup>24</sup>

The recovery is for “damages which reasonably could have been foreseen and determined at the time of condemnation,” and the “willing-seller willing-buyer test” of market value is to be applied, affording consideration to those factors “which would reasonably be given weight in negotiations between a seller and a buyer.”<sup>25</sup>

The Supreme Court ultimately held that the trial court’s instruction that the City of Pearland *would* exercise its rights to the fullest extent wrongfully replaced the willing-seller willing-buyer test. The Court offered the following quote from Nichols on Eminent Domain:

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<sup>20</sup> 483 S.W.2d 244 (Tex. 1972).

<sup>21</sup> *Id.* at 246.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 247.

<sup>25</sup> *Id.*

The condemnee is entitled to consideration of the damage which the condemnor has a right to inflict although it cannot be assumed that the property will be put to its most damaging use.<sup>26</sup>

The jury must be allowed to receive evidence as to how the condemnor will likely exercise its rights and how the market will react to that intensity of use. Moreover, the condemnor:

should not be required to pay severance damages on the basis of uses of the tract taken which are not at the time of the taking so reasonably probable as to be reflected in the present market value and the jury should be permitted to give such weight to this factor as a prospective purchaser of the remainder tract would give.<sup>27</sup>

The Supreme Court held the trial court's instruction could only be understood by the jury as a mandate that they must:

presume a full use of the entire ten acres for an actual plant, rather than as a site for the plant and facilities that would be reasonably required; and as a further directive that in answering the market value issues the jury was to be governed by this presumption regardless of any evidence to the contrary, and whether or not such presumed use of the entire site for an actual plant was reasonably probable at the time of taking and would, or would not, be reflected in the market value of the remainder tract at such time.<sup>28</sup>

As a result, the Court concluded the trial court's instruction was "reasonably calculated to cause and probably did cause the rendition of an improper judgment."<sup>29</sup> The Court, therefore, remanded the matter back to the trial court for a new trial and instructed that the City of Pearland be allowed to present evidence on "the reasonably foreseeable and probable uses of the ten acre site which at the time of taking would be required" to accomplish the purpose of the taking.<sup>30</sup> The jury would be permitted to consider this evidence along with "all else a prospective purchaser would consider in reaching a" decision about market value.<sup>31</sup>

After *City of Pearland*, it is clear that, while landowners are entitled to elicit testimony regarding the full scope of rights sought by condemning authorities, they are not entitled to a jury instruction that a condemning authority will exercise its rights to the fullest extent possible. In addition, while condemning authorities may not

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 248.

<sup>28</sup> *Id.* at 249.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*



testify that they will absolutely abstain from exercising their rights to the fullest extent, they may offer testimony regarding the reasonably foreseeable and probable uses of their rights. For example, where a condemnation petition allows a pipeline company to relocate its pipeline within its easement, the company should be entitled to elicit testimony that, based on the cost, expense, and engineering requirements associated with the pipeline's initial construction, it would be highly unlikely that the company would relocate the pipeline in the foreseeable future. Where a condemnation petition allows a transmission line company to increase the height and number of its poles or towers within an easement, the company should be able to offer testimony explaining why it would be improbable to take either action in the foreseeable future.

In light of *City of Pearland*, condemning authorities should always request that juries be instructed to consider only "the reasonably foreseeable and probable uses" the condemnor will exercise for its public purpose. On the front end of a trial, a condemning authority might even try to preclude testimony regarding remote, speculative, and conjectural uses with a motion in limine. On the other side of the aisle, landowners should always be aware of the distinction between representations regarding reasonably probable uses and promises to completely abstain from certain uses. While *City of Pearland* allows testimony regarding the former, it disallows the latter.

#### **IV. Admissibility of Fear in the Marketplace – Electric Transmission Lines**

With an increase in the number of eminent domain proceedings involving electric transmission lines in recent years, the following evidentiary question has arisen: To what extent, if at all, can landowners introduce fear of electric transmission lines as a component of damages? The question has come to light most frequently in the context of electromagnetic fields emanating from transmission lines, as well as the possibility of transmission line structure failure. While there is a lack of legal authority to provide a definitive answer in either of the foregoing contexts, the Texas Supreme Court's standard for assessing the admissibility of fear in the marketplace establishes a large hurdle for the landowner in each case.

##### **A. The *Heddin* Standard**

In 1975, the Supreme Court set forth the standard for assessing admissibility of fear in the marketplace. In *Heddin v. Delhi Gas Pipeline Company*, Delhi Gas condemned the Heddin family's property for the purpose of

laying a gas transmission line.<sup>32</sup> At trial, the Heddins sought to prove the market value of their property had diminished due to fear in the minds of the buying public of a potential pipeline rupture.<sup>33</sup> Over objection from Delhi Gas, the trial court permitted the Heddins to introduce evidence of damages caused by a rupture in a different pipeline almost eight months after the date of taking.<sup>34</sup>

On appeal, the Supreme Court acknowledged that fear in the minds of the buying public on the date of taking is relevant to proof of damages when the following elements appear:

1. That there is a basis in reason or experience for the fear;
2. That such fear enters into the calculations of persons who deal in the buying and selling of similar property; and
3. Depreciation of market value because of the existence of such fear.<sup>35</sup>

To establish a basis in reason or experience for the fear, a landowner must show “either an actual danger forming the basis of such fear or that the fear is reasonable, whether or not based upon actual experience.”<sup>36</sup> Reduction in market value “due to fear of an unfounded danger is not recoverable.”<sup>37</sup> In the case of Delhi Gas’s pipeline, the Court found that “actual danger” could be adduced from “specific instances in which similar pipelines have developed ruptures under similar circumstances.”<sup>38</sup> The Court ultimately concluded that, because the pipeline rupture offered by the Heddins occurred *after* the date of taking, the evidence was inadmissible from the onset.<sup>39</sup> In other words, because condemnation damages are measured by the market value of a piece of property on the date of taking, a rupture occurring after the date of taking could not have possibly affected market value.

In *Stinson v. Arkla Energy Resources*, the Texarkana Court of Appeals further clarified the *Heddin* standard.<sup>40</sup> At trial, the landowners in *Stinson* – another case involving a pipeline condemnation – sought to introduce numerous Department of Transportation reports concerning pipeline failures. The trial court allowed the introduction of those reports concerning pipelines similar to the pipeline at issue and disallowed all other

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<sup>32</sup> 522 S.W.2d 886, 887 (Tex. 1975).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 888.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 888-89.

<sup>39</sup> *Id.*

<sup>40</sup> *Stinson v. Arkla Energy Res., a Div. of Arkla, Inc.*, 823 S.W.2d 770, 771 (Tex. App.—Texarkana 1992, no writ).

reports.<sup>41</sup> The landowners appealed the trial court's exclusion of the "dissimilar" pipeline reports. The court of appeals upheld the trial court's decision on the basis of *Heddin*.

With regard to the first *Heddin* factor – a basis in reason or experience for fear – the court held that, "when the proof fails to show that two pipelines are generally similar in their essential characteristics, then proof of an explosion on one line offers no reasonable basis for depreciating the market value of the land housing a dissimilar line."<sup>42</sup> Because there was no proof that the excluded pipeline failure reports involved pipelines similar to the one at issue, the trial court properly excluded the reports.<sup>43</sup>

The excluded reports also failed to pass muster under the second and third *Heddin* factors. The second *Heddin* factor requires proof that fear actually enter into the calculations of persons who deal in the buying and selling of property similar to the property being condemned. Because the landowners in *Stinson* offered no testimony demonstrating that the community or buying public feared the pipeline at issue (i.e., examples of individuals moving because of the pipeline), there was no evidence that any fear was taken into consideration by the buying and selling public.<sup>44</sup> Finally, *Heddin* requires an actual depreciation of fair market value due to fear. Again, because the *Stinson* landowners offered no evidence of diminishment of land values due to fear, they failed the third *Heddin* factor as well.<sup>45</sup>

#### **B. Electric Transmission Line Structure Failure**

In the realm of electric transmission lines, the fact pattern most analogous to *Heddin* and *Stinson* would involve the collapse of an electric transmission line structure. While such occurrences are few and far between, they are not unheard of. Consider the following hypothetical:

Outside of El Paso, Texas, ABC Transmission ("ABC") erected a 345-kV electric transmission line resting on concrete monopoles, a portion of which crosses the property of the Johnson family. ABC and the Johnsons are in the third day of an eminent domain trial, and the Johnsons seek to introduce testimony through their appraisal expert that the value of their property has been diminished due to a general fear in the minds of the buying public that ABC's

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<sup>41</sup> *Id.* at 772.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* ("There was no testimony regarding the amount of reduction in value which this land would suffer because of the pipeline.").

transmission line might collapse. The appraiser is prepared to offer testimony that – 1,500 miles away in Milwaukee, Wisconsin – a 345-kV transmission line resting on steel lattice towers collapsed in the middle of an ice storm in 2007. Is the evidence admissible?

In light of *Heddin* and *Stinson* how should the court analyze this admittedly extreme fact pattern? First, the court should consider whether there is a basis in reason or experience for the fear. Is a steel lattice tower really similar enough to a concrete monopole for comparison purposes? The *Stinson* court would suggest not. Even if we were dealing with two transmission lines supported by concrete monopoles, would we need to know more? What type of concrete was used? Who engineered the monopoles? Who manufactured the monopoles? What about the circumstances surrounding the structure failure? Would it really be reasonable for a prospective buyer of property in El Paso to be fearful because of a structure failure in frigid Milwaukee? Must the Johnsons offer an expert meteorologist to explain the similarities in weather patterns between El Paso and Milwaukee? What if the incident occurred during calm weather conditions in nearby Marfa, Texas? Must evidence be proffered regarding the likelihood of a future occurrence? From a landowner's standpoint, the more parallels that can be drawn between the El Paso line and the Milwaukee line the better. Conversely, a condemning authority will benefit from drawing as many contrasts as possible between the two lines.

Moving on to the second and third *Heddin* factors, how would the Johnsons establish that fear of transmission line structure failure actually enters into the minds of the buying and selling public in El Paso? How would the Johnsons prove an actual depreciation in market value due to the fear? *Heddin* would seem to require actual testimony from market participants for each factor (i.e., buyers, sellers, brokers, etc.). The obvious conclusion is that *Heddin* and its progeny make it very difficult for the landowner to introduce evidence of fear in the marketplace.

### **C. Electromagnetic Fields**

Far more abstract and amorphous than the concept of structure failure is the concept of electromagnetic fields. From household appliances to electric transmission lines, electromagnetic fields ("EMF") surround anything that generates, transmits, or uses electricity. Because we are constantly exposed to EMFs, many researchers have questioned whether EMF-exposure is linked to any negative health effects. While scientific

research has consistently failed to adduce any association between EMF exposure and disease (including cancer),<sup>46</sup> landowners in condemnation cases persistently attempt to introduce fear of EMFs as an element of remainder damages.

However, because there is a lack of uncontroverted scientific support linking EMFs to negative health effects, it is quite possible that fear of EMFs fails the *Heddin* standard at the outset. In other words, it seems likely that EMFs may be one of those “unfounded dangers” for which there is no basis in reason or experience. In 2013, at least one central Texas court completely prohibited any mention of EMFs where a landowner’s appraiser failed to offer any credible evidence of EMF-related danger, and could not point to any specific examples of market participants being affected by a fear of EMFs.

Due to the relative novelty of fear stemming from EMFs, testimony regarding such fear is ripe for exclusion in condemnation cases. In electric transmission line cases, attorneys for condemning authorities should always try to exclude evidence of EMFs before trial through a motion in limine. In the event that a landowner has not designated any witness qualified to establish a basis in reason or experience for fear of EMFs, a condemning authority might also consider moving to exclude any such testimony.

#### **V. Non-Comparable Paired Sales**

In partial takings cases the most hotly debated and contested issue at trial is almost always the impact of the easement taking (and the condemnor’s use) on the value of the remainder of the property. In a traditional comparable sales based appraisal for a partial taking resulting from a utility based condemnation, the appraiser will use comparable sales in the market to determine the fair market value of the whole property prior to the taking. The appraiser will then consider “paired sales” (a comparative analysis that compares two or more pieces of property, one of which is encumbered with a utility easement) in an effort to determine the difference in the fair

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<sup>46</sup> See, e.g., Health Effects of Exposure to Powerline-Frequency Electric and Magnetic Fields, Public Utility Commission of Texas (1992) (“The Committee believes that, based on its evaluation of the existing EMF research, the evidence at this time is insufficient to conclude that exposure to EMF from electric power transmission lines poses an imminent or significant public health risk. In general, the Committee’s evaluation is corroborated by other EMF literature summaries and background reports.”); E.R. Schoenfeld, *Electromagnetic Fields and Breast Cancer on Long Island: A Case-Control Study*, 158 AM. JOURNAL OF EPIDEMIOLOGY 47, 47-58 (2003) (“In EBCLIS, we found no association between EMF levels (wire coding or measurements) and breast cancer risk. This study thus provides no empirical evidence suggesting that residential EMF exposures contribute to the risk of breast cancer on Long Island.”).

market value of the remainder before and after the taking caused by the utility easement. While Texas courts have offered numerous opinions on comparable sales and their admissibility, very little has been written regarding what juries should be allowed to hear when it comes to paired sales.

Texas courts have devoted considerable attention to examining the circumstances under which a comparable sale is deemed “sufficiently similar” to the subject property to warrant its admissibility. At least three areas of “comparability” to the subject tract have been addressed by Texas courts in some detail: the date the comparable properties were sold in relation to the subject property,<sup>47</sup> the comparable sales’ locations in relation to the subject property,<sup>48</sup> and the nature and use of the comparable sales in relation to the subject property.<sup>49</sup>

Comparatively, only two Texas appellate courts have addressed the admissibility of paired sales in a meaningful way. In *Boswell v. Brazos Electric Power Cooperative*,<sup>50</sup> Brazos Electric Power Cooperative (“BEPC”) sought to condemn an electric transmission line easement across two vacant tracts owned by Ms. Boswell. The appraiser for BEPC, relying on paired sales,<sup>51</sup> testified there was only slight damage to the remainder caused by acquisition of the electric transmission line easement.<sup>52</sup> Ms. Boswell conceded the paired sale’s relevancy to the issue of value, but argued that the information contained in the analysis was highly prejudicial because the paired sale tracts used by BEPC’s appraiser were located outside of the county in which

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<sup>47</sup> See *Board of Regents of Univ. of Tex. Sys. v. Pruett*, 519 S.W.2d 667, 672 (Tex. Civ. App.—Austin 1975, writ ref’d n.r.e.) (sales occurring approximately four and a half years before the subject taking were admissible); *Holcombe v. City of Houston*, 351 S.W.2d 69, 72 (Tex. Civ. App.—Houston 1961, no writ) (sales of asserted comparable property made within four and a half years from the date of taking were admissible); *Frankfurt v. City of Dallas*, 299 S.W.2d 722, 726–27 (Tex. Civ. App.—Dallas 1957, no writ) (prices paid on sales made within one and a half years of the date of taking were admissible); *Curfman v. State*, 240 S.W.2d 482, 485 (Tex. Civ. App.—Dallas 1951, writ ref’d n.r.e.) (contiguous property sales that were made three to six years previously were admissible); *Holiday Inns, Inc. v. State of Texas*, 931 S.W.2d 614, 623–24 (Tex. App.—Amarillo 1996, writ denied) (applying the general proposition that sales beyond five years are too remote in upholding the trial court’s ruling that excluded a comparable sale for the remainder property that occurred more than seven years after the taking).

<sup>48</sup> See *Simpkins v. City of Dallas*, 542 S.W.2d 701, 703–04 (Tex. Civ. App.—Waco 1976, no writ).

<sup>49</sup> See *Sharboneau*, 48 S.W.3d 177 (Tex. 2001).

<sup>50</sup> 910 S.W.2d 593, 604 (Tex. App.—Fort Worth 1995, writ denied).

<sup>51</sup> In *Boswell*, the Fort Worth Court of Appeals defined a “paired sale” as “a comparison of two or more pieces of property that, with one exception, have the same characteristics. A comparison of their value (sale price) identifies the effect, if any, that the one different characteristic has on the market value of the property.” *Id.* at 604.

<sup>52</sup> *Id.*

the subject property was located.<sup>53</sup> The trial court admitted evidence of the paired sale. Considering the issue on appeal, the Fort Worth Court of Appeals held:

On balance, we conclude that the [paired sale] data was not so prejudicial as to warrant exclusion. [Boswell's] own valuation expert testified that the "paired sales" approach was the ideal model for evaluating the effect of constructing a transmission line on a parcel of property. [BEPC's] "paired sales" information included data from the sale of two identical tracts of land. One tract was encumbered with an electrical transmission line easement; the other tract was not. Because the tract encumbered by the easement sold for more than the tract without encumbrance, [BEPC] concluded Boswell's property, encumbered by a similar easement, experienced little or no damage to the remainder.<sup>54</sup>

The court further noted that the landowner "cited no authority showing that evidence on 'paired sales' comparisons must originate in the same geographical area when it was used to demonstrate that the property has little or no damage."<sup>55</sup>

Roughly seventeen years after *Boswell*, the Dallas Court of Appeals considered the comparability of paired sales in *Collin County v. Hixon Family Partnership*.<sup>56</sup> In *Hixon*, Collin County condemned several tracts of land in connection with construction of a highway known as the Collin County Outer Loop. In an effort to support his location adjustments the appraiser for the landowner employed a paired sales technique in which he attempted to isolate the benefit of being located next to a major arterial roadway.<sup>57</sup> The paired sales data utilized by the appraiser was from the I-35 corridor in Waco, Texas—roughly 100 miles away from the properties in question. The condemnor challenged the admissibility of the paired sales based on their lack of proximate location to the property being condemned. The court was not persuaded. Parroting *Boswell*, the court stated that "[t]he County has cited no authority, and we have found none, holding that evidence of paired sales comparisons must originate in the same geographical area [as the taking in question]."<sup>58</sup>

Unfortunately, *Boswell* and *Hixon* do not provide much guidance to the condemnation practitioner, as the only challenge to the paired sales involved their location outside the county of the subject property.<sup>59</sup> The

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> 365 S.W.3d 860 (Tex. App.—Dallas 2012, pet. denied).

<sup>57</sup> *Id.* at 872.

<sup>58</sup> *Id.* at 873.

<sup>59</sup> *Boswell*, 910 S.W.2d at 604; *Hixon*, 365 S.W.3d at 873.

*Boswell* opinion gives no indication how far away the paired sales were located from the subject property—an important factor considering that a paired sale analysis from an adjacent or closely situated county would appear inherently more similar to the subject than a paired sale from a county located hundreds of miles away. The *Boswell* opinion is also highlighted by the court’s reference to the “lack of support” provided by the landowner to demonstrate that paired sales should be treated differently.<sup>60</sup> While the *Hixon* court did acknowledge that the paired sales utilized by the landowner were located over 100 miles away, it is unclear what arguments of similarity may have been advanced by the parties. Furthermore, it appears that Collin County may have diluted its location-based challenge to the landowner’s paired sales because its own appraiser may have also utilized out of county paired sales.<sup>61</sup>

In light of these facts, it would be easy to argue that paired sales which are non-comparable with the subject property are most likely admissible—but assuming that virtually all paired sales analysis will be deemed admissible could be a costly mistake. If challenged, paired sales must still comply with the established legal and appraisal standards in order to be deemed admissible. A strong argument exists that some paired sales may lack relevance and or be so misleading that they should not be allowed to go to the jury

The Texas Rules of Evidence provide a framework for admissibility of relevant evidence. Rule 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.”<sup>62</sup> Similarly, Rule 403 provides that even though evidence is relevant under Rule 401, it may still be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”<sup>63</sup>

The challenge becomes strongest when a paired sale is sufficiently dissimilar from the subject property that its presentation to the jury is either irrelevant, misleading, or both under Texas rules.<sup>64</sup> One could argue that a paired sale that occurred many years before the date the subject property was condemned is so dissimilar to the

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<sup>60</sup> *Boswell*, 910 S.W.3d at 604.

<sup>61</sup> *Hixon*, 365 S.W.3d at 873.

<sup>62</sup> TEX. R. EVID. 401.

<sup>63</sup> TEX. R. EVID. 403.

<sup>64</sup> TEX. R. EVID. 401; TEX. R. EVID. 403.



subject property that it should be inadmissible. For example, consider a paired sales analysis used to determine the percent damage to the remainder of a subject property recently encumbered by an electric transmission line. Assuming that the date of take is February 14, 2014 would a paired sale that occurred in 2006, eight years prior to the take on the subject property, really provide relevant comparable information for the jury? How relevant is information contained in a paired sale that occurred in the boom market of the early-2000s when the taking on the subject tract occurs in the midst of recession? Would market conditions, fluctuations and understandings over an eight-year period (or over a lesser period of high market fluctuation) make application of the percent damage from an old paired sale a poor indicator of the remainder damage for the same feature on the subject property? If comparable sales that occurred more than five years before the date of take are generally inadmissible, shouldn't a court deny entry to a paired sale wherein the sales being examined occurred more than five years apart?

What about paired sales that have a different highest and best use than the subject property? It could easily be argued that paired sales depicting properties with different highest and best uses from the subject property are not sufficiently similar to be admissible. For example, consider the simple differences presented between highly populated urban areas and sparsely populated rural areas. Assume that a Travis County urban property paired sales analysis, designed to highlight the damage from an electric transmission line, demonstrates that the electric transmission line results in no damage to the remainder. Further assume that this pairing was used to measure the potential remainder damages to a subject property located in rural Callahan County, Texas. Would you not object to this pairing? Could you not argue that the results of the urban paired sales analysis is sufficiently dissimilar to the rural setting—due to market perception, general tolerance of infrastructure development in urban environments, or any number of other factors—that application of the percent damage from the urban paired sales to the rural subject property would be irrelevant and wholly misleading to a jury? Do you decline to challenge the validity of this pairing and simply point out its flaws to the commissioners or jurors?

While trial courts are provided wide discretion to determine relevance and admissibility of evidence, there is some point at which paired sales are no longer relevant or mislead the jury and must be excluded. A condemnation practitioner may be able to prevent the jury from hearing evidence of paired sales that are not “sufficiently similar” to the subject property.

