



An important Eminent Domain update from the law firm of Jackson Walker.

February 27, 2012

Resources

[JW Eminent Domain Practice Area](#)

[JW Eminent Domain Attorneys](#)

[Contact JW](#)

www.jw.com

Offices

Austin

100 Congress Avenue
Suite 1100
Austin, TX 78701

Dallas

901 Main Street
Suite 6000
Dallas, TX 75202

Fort Worth

777 Main Street
Suite 2100
Fort Worth, TX 76102

Houston

1401 McKinney Street
Suite 1900
Houston, TX 77010

San Angelo

301 W. Beauregard
Avenue
Suite 200
San Angelo, TX 76903

San Antonio

112 E. Pecan Street
Suite 2400
San Antonio, TX 78205

Texas Supreme Court Heard Condemnation Case Today - \$48,000 or \$21 million?

By [Sue Ayers](#)

Today the Texas Supreme Court heard an oral argument to decide whether a pipeline company will pay \$48,000 or \$21 million to condemn 24 acres for a gas processing facility.

Rent was less than \$23,000 annually; the condemnation award was \$48,000; the trial judgment was \$21 million

In 1973, Avinger Timber leased 24 acres to Tonkawa Gas for the construction and operation of gas processing facilities. The lease would renew every 10 years for another 10 years as a continuing option. Upon renewal, the \$500 annual rent would be renegotiated or would be decided in arbitration. Tonkawa built a large gas processing plant on the site and over the years, 15 natural gas pipelines were connected to the plant by various third party companies.

The lease was renegotiated several times. The final lease had a three-year term, with annual rent of \$22,265. It no longer contained a term providing for the lessee's right of never-ending renewal. Every successive lessee had been a private company, but in 2004 the lessee merged into Enbridge Pipeline, a public utility with the power of eminent domain. Enbridge offered \$35,685 to purchase the land in fee simple. When that offer was rejected, Enbridge filed a petition in condemnation. Avinger did not attend the special commissioners hearing at which an award of \$47,580 was entered. Avinger objected and the case went to trial in Marion County, Texas.

At trial, Avinger's *Daubert* challenge to Enbridge's appraiser was successful; his opinions were excluded as unreliable. Avinger presented an expert on the economics associated with natural gas processing plants and a real estate appraiser who considered the presence of the gas processing plant in valuing the land. The jury awarded Avinger \$21 million. The trial court rendered judgment on the verdict.

The Texarkana Court of Appeals affirmed the judgment of \$21 million

The Texarkana Court of Appeals defined the "main question" on appeal as "whether the expert was entitled to consider the gas processing plant in valuing the land underneath it." Because Enbridge's expert valued the land as vacant, rural, residential property, his testimony had been properly excluded. While residential use was theoretically physically possible, it would not likely be legally permitted, and would not be financially feasible.

Avinger's real estate appraiser determined that the land's highest and best use was for an industrial gas processing plant and that the active market included gas processors. Using the comparable sales

approach he appraised the property at \$20,995,000. Using the income approach, he found the market value of the tract to be \$18.9 million. Under the direct capitalization approach, he testified to a value of \$22,275,000. The court of appeals held there was no abuse of discretion in admitting his testimony.

The court of appeals explained that even if Enbridge removed the plant as permitted under the lease, the value of the remaining infrastructure – pipelines owned by third parties, gathering system contracts, air permits, electrical power, proximity of customers – would permit a purchaser to spend more than \$20 million to acquire the land, and more than \$50 million to construct a new plant, and still come out ahead. The real estate with improvements would be worth at least \$165 million.

The Project Enhancement Rule precludes consideration of enhancements in land value attributable to the project for which the land is being condemned. The court of appeals held that the Project Enhancement Rule did not apply to these facts.

Enbridge argues that the judgment gives the landowner a "windfall"

Enbridge urges three issues on appeal. First, damages in condemnation should compensate the landowner for what he has lost. Enbridge argues that Avinger's appraiser impermissibly calculated the value to the taker in retaining possession of the land as the location for a gas processing plant. Instead Avinger's appraiser should have done as Enbridge's appraiser did – appraised the value of what the landowner lost – 24 unimproved and unencumbered acres.

Second, Avinger asks the Texas Supreme Court to make it clear that the Project Enhancement Rule applies even when the project for which the property is being condemned has been completed before the condemnation occurs.

Finally, Enbridge – which purchased the gas processing plant from its predecessor, a private company – urges an issue of first impression in Texas. Enbridge asks the court to hold that the Project Enhancement Rule applies even when the condemnor did not build the project. Enbridge asserts that the judgment gave a windfall to the landowner and will increase costs for consumers because under the judgment, Enbridge essentially had to pay twice to acquire the same plant.

Avinger argues that the judgment is in conformity with Texas condemnation law

Avinger's brief stresses the fact that this land is in the state's second most productive natural gas field, and that by 1973 – the date of the first lease for the purpose of constructing a gas processing plant – the property already had 8-9 gas pipelines that made it a desirable plant site. Prior to receipt of the 2004 final offer letter from Enbridge – the first manifestation of any intent to condemn – the landowners had granted several pipeline easements and a high voltage electric line easement, and roads provided necessary ingress and egress.

Avinger asserts that its appraiser did not arrive at his \$21 million number by appraising the land's value to Enbridge in particular – that number was even larger. Rather Avinger's appraiser testified to the value that any one of more than 60 industry buyers would have been willing to offer to purchase this site, which was uniquely situated as a long-standing, profitable gas processing hub.

Avinger also argues that under the Project Enhancement Rule, the landowner is entitled to the value of the infrastructure that was privately constructed and in existence before Enbridge delivered its final offer in 2004 – only six days before it acquired the plant. Nothing Enbridge did after it made the final offer increased the value of the site. And Avinger states that the jury heard evidence that Enbridge's review appraiser agreed with the methods, data, sales approaches, and adjustments of Avinger's own real estate appraiser.

The Court peppered the parties with questions

Eight of the nine Justices on the Texas Supreme Court asked a combined total of 24 questions of counsel for Enbridge and Avinger at oral argument today. Enbridge fielded the lion's share, taking 13 questions during the main argument and five more on rebuttal. Justice Lehrmann was especially active throughout the entire argument – asking the first, last, and greatest number of questions. It sounds like the Court will carefully examine the record.

Enbridge argued strenuously that Avinger tried this case on one impermissible theory – what a prospective buyer would pay for the property in order to gain the right to negotiate a coercive deal with Enbridge. Justice Johnson drilled down on that assertion in each of his three questions, noting that the court of appeals' opinion identifies a different theory – that the land, without the plant, would still have valuable infrastructure in the form of pipelines, high voltage electric transmission line, permits, nearby customers, and roads, making the land worth \$21 million. Enbridge's counsel responded that the record actually contained "no analysis at all" of that theory.

Not surprisingly, the first question to Avinger focused on this allegation that the court of appeals affirmed on a theory that did not exist or was not supported by the record. Justice Hecht promptly asked where one could look in the record for expert testimony that the land without the plant, but with other infrastructure, was worth \$21 million. In fact, every one of the questions to Avinger focused on the evidence: whether there was specific testimony regarding the 66 possible prospective purchasers; whether there is a gap in the record regarding the number of pipelines and the easement terms; whether the record contains evidence of Enbridge's cost to remove the plant. Justice Wainwright asked the last question of Avinger: how could the "market" rent be \$2.5 million or 100 times the actual rent? Avinger answered that all the value in the final lease – for the landowner – was in the new right of reversion because in that lease, the lessee relinquished the highly prized perpetual right of renewal.

Justice Willet saved all his questions for rebuttal, asking whether there is any precedent for applying the Project Enhancement Rule when the condemnor did not build the project, or when the condemnor did not have the power of eminent domain until after it completed construction of the project. The answer in each instance was "no." Justice Willet followed up by asking if the Rule were applied on those facts, whether the landowner would ever be able to recover the value of the project. Answer – he would not. In response, Justice Willet, joined by Justice Lehrmann noted that this property was "uniquely adapted" for use as a gas processing plant, in part, because it was in the second most productive gas field in Texas. Counsel for Enbridge concluded by noting that this property – when compared to other properties with gas processing plants – is not really unique. Moreover, he stated that the outcome of the case should not turn on whether the property is "unique."

We'll be watching for the Court's opinion in *Enbridge Pipeline (East Texas) L.P. v. Avinger Timber, LLC*, Cause No. 10-0950.

If you have any questions regarding this e-Alert, please contact [Sue Ayers](mailto:SueAyers@jw.com) at 512.236.2336 or sayers@jw.com.

If you wish to be added to this e-Alert listing, please [SIGN UP HERE](#). If you wish to follow JW on Twitter, please [CLICK HERE](#).

Austin

Dallas

Fort Worth

Houston

San Angelo

San Antonio



used as a substitute for legal advice or opinion which can be rendered only when related to specific fact situations. For more information, please call 1.866.922.5559 or visit us at www.jw.com.

© 2012 Jackson Walker L.L.P.

Click here to unsubscribe your e-mail address
901 Main Street, Suite 6000 | Dallas, Texas 75202