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Supreme Court of Texas.
Enbridge Pipelines (East Texas) L.P.
v.
Avinger Timber, LLC.
No. 10-0950.

February 27, 2012.

Appearances:

Stephen G. Tipps of Baker Botts, L.L.P., for Petitioner.

Glenn Sodd of Dawson & Sodd, for Respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 10- 0950 Enbridge Pipelines v. Avinger Timber.

MARSHAL: May it please the Court. Mr. Tipps will present argument for the Petitioner. The Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF STEPHEN G. TIPPS ON BEHALF OF THE PETITIONER

ATTORNEY STEPHEN G. TIPPS: May it please the Court. I want to make two overarching points this morning. First, Bolton's valuation opinion violates bedrock principles of Texas condemnation law. It is apparent from Mr. Bolton's original report and from his and Mr. Niemiec's trial testimony, relevant excerpts of which we have included in our bench book that the sole basis for the opinion that this land was worth $20.9 million was that a willing buyer would pay up to that amount of money for the opportunity to negotiate a coercive deal with Enbridge, one in which Enbridge would be forced either to sell the plant for a deep discount or pay an inflated price to purchase or release the land in order to avoid its very expensive removal obligations under the lease. This hypothetical price does not reflect what the land would be worth to a willing buyer with no necessity to buy, but rather what a buyer wishing to negotiate a hold-up deal with Enbridge would be willing to pay. Moreover, because Mr. Bolton's valuation is based on the value added to the land by Enbridge's interest in avoiding the cost of its removal obligations, the opinion violates the project enhancement rule and its corollary value to the taker principle in ways that no American jurisdiction, including this one, has ever permitted.

JUSTICE DEBRA H. LEHRMANN: So what type of valuation approach do you think would have been appropriate?

ATTORNEY STEPHEN G. TIPPS: Which brings me to my second point. The valuation approach that Avinger could have chosen to have pursued was one that ignored the plant, one that ignored the removal obligation under the lease, but rather one that focused solely on the value of the land in light of the adjacent infrastructure, which consisted of pipelines, a permit, a power line. Avinger chose not to develop that case. What Avinger chose to do at trial was to offer that as an alternative way to look at the case, but it did so without providing any analytical basis. Mr. Bolton, at trial, in what was referred to as his tornado testimony, testified that this land would be worth the same $20.9 million without the plant that it would be worth with the plant.

JUSTICE EVA M. GUZMAN: What was the land's highest and best use as it stood on the date of the evaluation?

ATTORNEY STEPHEN G. TIPPS: Well, the only evidence that the jury heard on that was that it's highest and best use was as a gas processing plant. Enbridge's expert, Allen, was of the opinion that the highest and best use was residential rural. We think that there was evidence to support both of those uses and the trial judge erred in not letting the jury hear Mr. Allen's testimony as we think it should have been able to hear under the Windham case, but there certainly is evidence to support the view that the highest and best use is as a gas processing plant.

JUSTICE EVA M. GUZMAN: Even given the adjacent infrastructure that you just referred to? And I guess you just said as a power plant highest and best use, is that what you just said?

ATTORNEY STEPHEN G. TIPPS: The existence of the adjacent infrastructure provides evidence that the highest and best use was as a gas processing plant, but our complaint about Bolton's testimony that that infrastructure made the land worth the same $20.9 million that it would be worth in light of the plant and in light of the lease is that he never undertook to analyze that. He could have done that. They could have tried the case on that theory. They could have tried the case with that as an alternative theory, but what instead they chose to do was to try the case based upon a theory that was based upon the value of the plant to Enbridge and what Enbridge would pay in order to avoid having to remove the plant. There simply is, under Gammill, there's no evidence to support the alternative theory.

CHIEF JUSTICE WALLACE B. JEFFERSON: If it wasn't based on the amount it would cost to remove the plant, but based on the value as it was on that date, I mean, isn't it true there are pipelines and easements and a lot of not just adjacent, but on the land itself that was valuable. Is that not correct?

ATTORNEY STEPHEN G. TIPPS: There were pipelines.

CHIEF JUSTICE WALLACE B. JEFFERSON: That had been developed over years. So this wouldn't be an enhancement just for the purpose of valuing that lease, right? I mean that property.

ATTORNEY STEPHEN G. TIPPS: There were pipelines. The record is murky concerning how many pipelines there were. Avinger itself admitted before the court of appeals that the record was unclear about that. The record is deficient with regard to the nature of the contracts applicable to those pipelines. Mr. Niemiec testified that he reviewed 12 boxes of documents and included in those boxes were the pipeline contracts, but he never provided any explanation for what they said, but yes, we acknowledge that a valuation theory could have been developed based upon the adjacent infrastructure, not looking at the plant, not looking at the removal obligations under the lease, but Avinger chose not to do that. Rather, Avinger simply chose to have its expert offer the ipsy-dickst opinion that the land was worth under this alternative theory, which is their only coercion-free theory, precisely the same amount under that theory that it would be worth under his primary theory, which is focused on the plant and the removal obligation.

JUSTICE PHIL JOHNSON: I thought the court of appeals said that there was testimony that the land was worth the same amount whether the plant was removed or whether it was left. Am I misremembering what the court of appeals said?

ATTORNEY STEPHEN G. TIPPS: Well, I suspect the court of appeals did say that. I don't remember it precisely. Mr. Bolton said that. He said that at on volume 5, pages 109-110, but the testimony there simply is well, Mr. Bolton, assume that this plant was blown away by a tornado. Would the plant still have the same value based upon this infrastructure even without the plant and he said yes.

JUSTICE PHIL JOHNSON: Because you have the advantage that someone could reconstruct the plant for what, $50 million or so and then have property worth close to $200 million as I recall the court of appeals stating.

ATTORNEY STEPHEN G. TIPPS: The court of appeals did say that. The problem with their effort to attribute the cost savings that Mr. Bolton's report addresses solely with regard to the cost that Enbridge would save by negotiating with Avinger or its purchaser rather than having to remove and relocate its plant. The problem of trying to attribute to those cost savings to some other buyer is that that says nothing with regard to what the other buyer would pay for the land in the first place because the only theory that they have that has an analytical basis concerning what the buyer would pay for the land in the first place is what a buyer would pay Avinger in order to position itself to negotiate a coercive deal with Enbridge and the best evidence of that is Mr. Niemiec's testimony. Mr. Niemiec was a businessman and he testified repeatedly that knowing what he knew about the lease and its expiration and the removal obligation and what Enbridge would have to do under that removal obligation, he'd like to own the land because he would like to get himself in a position to negotiate with Enbridge. Perfectly fair, but that's not the way you value land under condemnation. You have to look for a market value and the value that one would pay in order to get himself in a position to negotiate a coercive deal with somebody who's over a barrel, if you were, is not the market value.

JUSTICE PHIL JOHNSON: On that issue, you simply, if the court of appeals relied on that theory, you're simply disagreeing with the evidentiary basis for the court of appeals' decision, I take it?

ATTORNEY STEPHEN G. TIPPS: Yes, to the extent that we have a lot of disagreement with the court of appeals, but to the extent that the court of appeals' opinion can be read as relying upon the existence of the infrastructure. Our objection under Gammill is that there is an analytical gap between the facts upon which Mr. Bolton relied and his conclusion. There's no analysis at all and more to the point, it simply cannot be that the land is worth precisely the same amount down to the last dollar or at least down to the last $5000 without the plant as is worth with the plant. Let me direct the Court's attention to what the point we're making central with regard to Mr. Bolton's report. We have in our bench book excerpts from the relevant portions of Mr. Bolton's report and just a couple of things I want to call to the Court's attention. The substance of this report in terms of the valuation begins on page 14 in a section entitled "lease agreement" and on pages 14, 15 and 16, Mr. Bolton goes through an analysis that focuses on the two options available to Enbridge as a result of its removal obligation under the lease and basically calculates costs. In one example, it's $29 million and the other example is $38 million. Those are costs that would only be faced by Enbridge because it's only Enbridge that has the obligation to remove the plant and he then on page 16 goes through this exercise in which he apotheosizes what a knowledgeable and prudent investor would pay in order to get himself in a position to take advantage of those costs and comes to the conclusion that that investor would require a 50% return. Frankly, I can't understand the numbers. I think the calculation he's done here results in a 33% return, which means that his numbers are overstated. But in any event, the point that I want to make is that it is clear from pages 14 through 16 that the only analytical exercise that Mr. Bolton ever went through in order to get to this $20,955.00 figure was based upon the cost to Enbridge and the cost that Enbridge would wish to avoid by doing some kind of deal with Avinger or its successor and then in the succeeding pages that we've included under Tab 1, Mr. Bolton goes through three different approaches, the sales comparison approach, the income approach. He does it in two different ways and the intrinsic value approach and in every one of those approaches, he goes back to relying upon the removal provision in the lease. He first comes up with a $22 million figure that you can only get to if you look at these costs that

Enbridge would be willing to avoid, willing to pay to avoid having to incur.

JUSTICE DAVID M. MEDINA: The Amicus brief by the Texas Farm Bureau says that your experts agreed with that methodology.

ATTORNEY STEPHEN G. TIPPS: I'm sorry, Your Honor, I didn't hear you.

JUSTICE DAVID M. MEDINA: That the, your expert agreed with that approach according to [inaudible].

ATTORNEY STEPHEN G. TIPPS: We hired an expert named Sherwood.

JUSTICE DAVID M. MEDINA: Right.

ATTORNEY STEPHEN G. TIPPS: Who, whom Mr. Sodd disposed and did a good job of deposing. Mr. Sodd then called him at trial by deposition and he did indeed agree generally with Mr. Bolton's methodology. Mr. Sherwood, though, is not a lawyer. Our objections to Mr. Bolton's opinions are that they are not supported by the law and at the end of the day, Mr. Sherwood said not once, but twice that having said what he said, he still didn't think or he still questioned whether or not anyone would pay $20 million for this 24 acres of land. Mr. Sherwood's testimony. I could understand why it was why it helped him with the jury. That's not a good situation to be in, but as a legal matter, Mr. Sherwood's testimony does not vaccinate Mr. Bolton's testimony from the requirements of the law. It still remains deficient.

JUSTICE NATHAN L. HECHT: Respondent says there are two Enbridges.

ATTORNEY STEPHEN G. TIPPS: There were two Enbridges. The Enbridge that owned the land for, owned the plant from 2001 through 2004 was Enbridge Processing. Enbridge Processing undertook to try to renegotiate a lease with Avinger, was not successful. At that point, Enbridge decided to exercise its right to eminent domain which it had through Enbridge Pipelines. It did a perfectly legal merger and as a result of that merger, Enbridge Pipelines became the lessee under the lease every bit as obligated with regard to removing the plant as its affiliate Enbridge Processing had been and it proceeded to condemn the land. It's a red herring. It's an effort to confuse the record, but at the end of the day, the condemnor, Enbridge Pipeline was in a position in which it would have paid money to avoid being coerced into this transaction.

JUSTICE DEBRA H. LEHRMANN: Are you conceding that this land should not have been valued simply as unimproved rural land?

ATTORNEY STEPHEN G. TIPPS: No. I think the jury should have had the opportunity to decide whether or not or what the highest and best use was.

JUSTICE DEBRA H. LEHRMANN: How can you possibly think that that would be reasonable given the fact that the infrastructure did exist and had been improved in that way for years?

ATTORNEY STEPHEN G. TIPPS: In doing the analysis that he was required to do, Mr. Allen was required to assume the plant didn't exist and to assume the lease didn't exist and I understand the factual argument that given the fact that there are pipelines under the property maybe it's not usable as rural residential. Having grown up in the west Texas oil patch, there were pipelines all over the town that I grew up in, but I understand that there's a fact issue about that and obviously that's not the most important point of our petition. Otherwise, we wouldn't talk about it on page 49 of our brief, but I do think that under Windham, the jury should have been given the opportunity to make that decision, but even if the land's highest and best use as a gas processing plant, this judgment cannot or should not be affirmed because the only, because the primary theory violates the willing buyer, willing seller and the project enhancement rule and the alternative theory is without a sufficient analytical basis.

JUSTICE EVA M. GUZMAN: Is a landowner ever entitled to the value of the enhancements that take place in a circumstance like this?

ATTORNEY STEPHEN G. TIPPS: Under the project enhancement rule, recognized this in state and across the country, a landowner is not entitled to the value by which his land is enhanced as a result of the public project for which it is condemned.

JUSTICE EVA M. GUZMAN: Is there a case, Barshop v. City of Houston involving the Continental Airport in the increase in value that might have resulted when that was announced? Are you familiar with that case cited in your briefs?

ATTORNEY STEPHEN G. TIPPS: Yeah, we talk about Barshop. Barshop is one of four cases in which the Court applied its manifestation of definite purpose rule which is an exception to the project enhancement rule, which has only been applied in the typical case of prospective projects following a condemnation. It has never been applied in the way in which Avinger would have this Court apply it and in Barshop as in Shackelford and Fuller and Corbin. This Court made very clear that under the project enhancement rule, the landowner does not get the benefit of enhanced value resulting not from the condemnation as the court arguably said in Zwahr, but from the project because it is the project that enhances the value of the land. I think I'm over my time.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions?

ATTORNEY STEPHEN G. TIPPS: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Tipps. The Court is now ready to hear argument from the Respondent.

MARSHAL: May it please the Court, Mr. Sodd will present argument for the Respondent.

ORAL ARGUMENT OF GLENN SODD ON BEHALF OF THE RESPONDENT

ATTORNEY GLENN SODD: Your Honors, this record shows clearly that our two value witnesses followed the procedures that you set out to the "T" in boring detail. They considered every possibility, every risk, every type of buyer, every legally presumed use that could possibly have been put to this property and they decided on the legally presumed current use. They used the best available data, the proper methodology as confirmed by their expert hired to criticize our appraiser.

JUSTICE NATHAN L. HECHT: Did Mr. Bolton say that the property with the infrastructure, but all the other, the plant and everything else aside, was worth $21 million other than in the tornado testimony?

ATTORNEY GLENN SODD: Well, he explains elsewhere. He started off with his first report, which is what they focus you on. He analyzed three kinds of buyers, someone like Avinger who might want to sell it or release it to somebody else, the tenant, Enbridge Processing, before the Petitioner ever showed up and the tenants before that, private all of them, non-condemnors and 66 other buyers. He went through a stair step analysis. They quote step one. He went to step two and step three and ultimately, decided not on the $38 million that the value was to Enbridge Processing never this Petitioner to the prior tenant. Instead, he decided on a $20.9 million value that applied to all the buyers across the board. Was it worth more to the tenant who, if this Petitioner hadn't come along and condemned it, would have been sitting there on the date of taking? His lease would have been expired five days ago. He had a little less than six months left to move his plant. Their expert agreed you have to consider that. The use pap requires considering the lease. This lease, they call it their project-related lease and their project, the plant, which is extremely frustrating. This plant was there on this site. That lease was in place between my private client and their private affiliate and two other tenants before that, before Enbridge ever

came to America from Canada. The value Mr. Bolton was considering because you say in Sharboneau and we take it to heart, you've got to consider everything, all the possibilities in doing your highest and best use analysis. You must consider the good and the bad and he considered everything. Now they picked part of it that sounds like it's them. Why does it sound like it's them? Two reasons. They got the same first name as the old tenant and secondly, they chose to condemn this land for the use to which it was already being put and had been for 31 years in which the undisputed evidence. They didn't put anybody on the witness stand to dispute this. The undisputed evidence was there was 66 other companies out there in this East Texas market who would have loved to have had this site and Mr. Niemiec is just not a guy. He was the CEO of UP Fuels, who owned the plant that was nearest to this plant. He knew this market to a "T."

JUSTICE NATHAN L. HECHT: Was there testimony that any of the 66 would take it with the obligation to remove it if they couldn't negotiate a deal?

ATTORNEY GLENN SODD: No, Your Honor, the obligation to remove it was there. His testimony was if the plant's got to be moved, we were not willing to have a value that depended on Enbridge Processing selling the old plant to somebody or not doing what the lease said they were going to do and that is move it. So we went further and said, okay, assume, we could make them move it at the end of that six months. The lease said that. So we assumed the worst situation. They'll be stupid. They won't sell it to somebody else. They won't sell it for salvage value. So we went to the worst scenario. We got to make them move it so he's a buyer knowing it's going to be gone here in a little less than six months, going to be willing to spend $50 million to build a new plant on this $21 million site and the answer is absolutely because as you pointed out, he gains a facility, plant and land, that's worth $165 to $231 million for only spending $71 million, which incidentally is the highest and best use analysis. They're real bad about confusing when you're talking about the highest and best use as you said in Sharboneau, as you quoted the U. S. Supreme Court, the highest and most profitable use. A use isn't the highest and best use unless the buyer who's going to make that use can make money doing it. So yeah, we proved all that stuff in the highest and best use, but we didn't apply the difference between a new plant, $50 million, and $165 to $231 million as the land value. We valued the land at about 10% of what the buyer would have in place. We proved that any buyer, including the one who has to build a new plant, the worst situation, can save between $94 and $160 million by buying this site, but we didn't assign those figures because we didn't feel comfortable with it. He felt comfortable that any buyer would pay $20.9 million. Now, you asked a question and maybe I didn't answer it. His statement that even if the plants moved, occurs primarily in one location, but his analysis he explains over and over again, it was because of all those pipelines that were there. Plant's gone, but the pipelines are still there. The power line's still there. The site's been permitted. It had as much as a 24-month head start over any other buyer, including them, their Enbridge Processing or them, they go to somewhere else. This site can be up and running with a new plant-

CHIEF JUSTICE WALLACE B. JEFFERSON: Is there a gap in the record, though, about the pipelines-

ATTORNEY GLENN SODD: How many there were?

CHIEF JUSTICE WALLACE B. JEFFERSON: --and the contracts related to them and easements and permits and all that?

ATTORNEY GLENN SODD: No, Your Honor. We proved there were 15 or 16 pipelines. The reason we say 15 or 16 is because some of those, they are old easements. Most of them were there in 1973. That's why this plant came in the first place, which, incidentally, proves the highest and best use of this site was for gas processing plant back in 1973, but we could only say 15 or 16 because some of those easements are multiple-line easements. They're buried in the ground and we couldn't physically count for sure the pipes. There's no gap. The contracts, Mr. Niemiec testifies in detail. He reviewed 12 boxes of documents, including all of those contracts. He read those contracts. He's familiar with the business and he said there's nothing about those contracts that would stop any buyer from being able to buy this site, put in a new plant and operate it and capture the business. So there is no gap there. They just failed to notice that it's there.

JUSTICE DALE WAINWRIGHT: Was there evidence about what it would cost to remove the plant?

ATTORNEY GLENN SODD: Yes, there was.

JUSTICE DALE WAINWRIGHT: That was?

ATTORNEY GLENN SODD: There was evidence from two different, three engineers, one their engineer, Mr. Hart, who was their area manager and a guy named Spearman and a guy named Niemiec. We didn't put Spearman on the witness stand, but we talk a lot about Spearman's report and his analysis on the record. The cost to relocate the plant was going to be $38 million plus moving the pipelines, plus buying another site, plus a bunch of stuff, but a minimum of $38 million, but it wasn't the cost to the Petitioner. It was the cost to the tenant if Petitioner hadn't ever come along. The prior tenant, we never relied on a holdup of this company. Enbridge Processing bought this thing in 2001 and assumed the lease. At that time, it had 2-1/2 years to go. The record shows that they considered that fact, that their lease was about to expire and lowered the price they paid for the plant accordingly. We proved they considered it, but they don't want Bolton or Mr. Niemiec to be able to consider it at arriving at the market value to other buyers. They considered it. It's what any buyer on the marketplace. They say ignore the plant and ignore the lease. Now they say in a footnote 25 in their brief, that it's okay for them to consider everything except the plant and the lease. On page 16, they say this is a project-related lease. It only became a project-related lease because they bought the plant, acquired the plant in their merger with Enbridge Processing so they would have a public use and a pubic necessity to condemn the land. You said in Zwahr and it's the law over the United States of America. Ask yourself why did they accuse you of using imprecise language in Zwahr and the answer is you didn't use imprecise language. You were exactly correct. That's always been the law in Texas. It's the law in every state in the United States as far as I know and it's the Federal law. You cannot use the taking itself. Exxon made a deal with Coke in Zwahr before the taking to let them put their easement partially overlapping Coke's easement. Enbridge Pipeline made a deal with Enbridge Processing to acquire the plant and the lease that was expiring in a few days to allow them to condemn the land under the plant, the same thing. You said the landowner's appraiser couldn't do it in Zwahr. To raise the value because he said that old easement of Coke's wasn't worth anything until Exxon made the deal to overlap it. Now it's worth a lot of money and you said you can't do that. You can't use the taking to change the value that already exists. This $20.9 value existed before Enbridge ever showed up. Niemiec testified that the market rent in 1998 if the parties had not negotiated a short-term, 6-year renewable, 3 and 3, would have been $2.5 million a year. The reason they accuse you of imprecise language is they have to rely on and this is not easy for me to explain. I'm not articulate enough. They have to rely on their acquisition so they could condemn a fact of the taking itself to even make the project influence argument or the value to the taker argument or the argument that Bolton considered something he shouldn't have considered. In the court of appeals and in the trial court, they told both courts that the central issue in this case is whether we can relate this taking back to 1973. Why do they need to go back to 1973? We're entitled to any enhancement, as Your Honor pointed out, even if this old plant was their new improvement contemplated or projected to be built according to this taking, we're entitled to all the enhancement until they manifest a definite intent to condemn so they told the court of appeals, we silently announced our intent to take back in 1973 when Tonkawa first made that lease. They didn't announce any definite intent to condemn in 1973. They weren't even in the neighborhood or in the state, but the reason they have to relate back and violate Zwahr is to be able and I don't begrudge our opponents from having to make a pitch because they've got a case to make, but they misunderstand the law as you said it. They misrepresent the facts. Mr. Bolton and Mr. Niemiec explained in great detail how it was worth so much money even with the plant gone, even with the plant gone. Mr. Niemiec explained the pipe and said, look, assuming that the plant is gone, the pipelines are still coming in, the pipelines are still going out, the site's still permitted, the site still has a huge time savings over any other site. So saying the times they said it's worth this $20.9 million, but ignoring what they said about why is a whole other matter. They did explain why it was still worth $20.9 million. Look, the value to Enbridge Processing was $38 million at least because that was at least their living costs and we proved it. It's in the record. Yet they arrived at a value of $20.9 million.

JUSTICE NATHAN L. HECHT: The question how the value could be the same taking into account the plant and not taking into account the plant and your response to that is what?

ATTORNEY GLENN SODD: My response if you leave the plant there, it's worth $38 million. The site isn't leased. Bolton, as I said, he went through three steps. He looked at every type of buyer and every possibility under the lease. What could have happened at the end of the lease? The lease is ending. They got to move it. If they don't move it and they sell it somebody else or they buy it, Enbridge Processing buys it, it's worth $38 million, but they were raising Cain. They're citing you to his first report. We had a hearing in November. They're raising Cain. That's our plant and I'm saying, Your Honor, he can't consider that that's his plant because the only reason it's his plant is because he acquired it so he could condemn the land, but nonetheless, he did further work and he went a lot further. That first report was never put in evidence at the trial to the jury. He did what he's entitled to. He continued to refine his work. He added more information. Niemiec came up with a lot more information. The testimony at trial. We had a Rule 11 agreement that the admissibility of his testimony was going to be based on his testimony at the trial. So if you look at his testimony at the trial, he explains how it's worth $20.9 million without the plant there. Now, it's interesting to me what he's really saying is we undervalued it with the plant there. He's not saying there's something illogical about the value without the plant, because our guys explained if I'm valuing at the Enbridge Processing, the prior private tenant, it's $38 million bucks.

JUSTICE DALE WAINWRIGHT: You said that the market value to lease the land was about $2.5 million?

ATTORNEY GLENN SODD: In '98.

JUSTICE DALE WAINWRIGHT: Wasn't that 100 times the actual rental that was being paid. What are we to make of that description?

ATTORNEY GLENN SODD: Here's the deal. In 1998, before the lease was, the last renewal was done, this lease had 10-year renewals in it forever so the landowner had no right of reversion to get the property back and no ability to ever negotiate with another buyer. The Avinger family made a lease in '98 in which they traded two things and incidentally, Mr. Sherwood agreed with this. Mr. Sherwood said that all the value in that '98 lease was the right of reversion, getting your right of reversion back so now you can deal both with the tenant at the time who at that time was Coke. You can deal with them in six years without hanging over your head that you can't ever swipe the sack from them. The option if you guys couldn't agree on rent back in those days was to go to arbitration and get an arbitrated rent. They traded a market rent in 1998 for the right to negotiate with anybody in 2004. The value that we got is not the value they lost. It's not the value to the taker. It's the value that we lost. It's the value that we could have sold it to anyone for. They're just grasping for straws. As far as your question, Mr. Sherwood believed that the value of that "98 lease was in the right of reversion, not in the dollar amount of the rent. Mr. Bolton explained that it's grossly under market rent. The law requires an appraisal technique requires appraisers to set the market rent when they're looking at it. They can't go back to a 1998, six years ago, under different circumstances at a time when you can never cancel the lease and take that 1998 rent and call it the 2004 rent without analyzing is that the market rent and that's what we did and that's the answer to that question [inaudible]. Have I answered your question? The reason they're able to say that was my plant, that was my project, that's my project-related lease and that's the value to me is real simple. They condemned it to put it to the same use that it had been previously put to and that any new buyer would have put it to so of necessity, when we're talking about the value to other buyers or the costs savings that the site provides, which we proved like I said were $94 to $160 million to any buyer more to Enbridge Processing, I might add, but the reason that seems to them are they're able to say that's me, that's mine is simply because they chose to condemn it to continue the same use. When you condemn a piece, if the City of Austin condemns an office building near City Hall to continue to use it for an office building, there is no new project. The project influence rule doesn't apply to anything except a new project to be built, but when you're condemning property to use it like it is, there isn't a new project. There's no new project. There doesn't have to be a project in every condemnation, which their briefing assumes. Even if this thing with their project, we're entitled to any enhancement from it up until the time they manifest a definite attempt to condemn, which was 8 days before they filed the lawsuit. Even if we

weren't, even if we weren't, Mr. Bolton explained even without the plant, it's worth $21 million. He was perfectly proper to consider Enbridge Processing, the prior private tenant and their moving cost as any landlord would when his tenant's lease is about up. One of the things that every landlord and Mr. Sherwood agreed with this, every landlord looks at is what's it going to cost my tenant to relocate. What can I do and make a new deal here to keep him? What we talked about was private considerations with private parties ignoring the taking itself. Their arguments are all based on using the fact of the taking to even make their arguments. This plant was not their project. This value was not the value to the taking. We did it right. You asked the question what's the proper methodology? Mr. Bolton used six different methodology approaches. Three comparable sales, three different comparable sales analysis the first one in his first report, two more in his second, two different income approaches and an intrinsic value approach because the truth was you couldn't find a track of land sitting under an existing gas processing plant that sold so there was an argument about how comparable the sales were, but we addressed it every possible way. Thank you for your time.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court will hear rebuttal.

JUSTICE DON R. WILLETT: Mr. Tipps, can you point to any precedent that extends the property enhancement rule to projects that were not constructed by the condemnor?

REBUTTAL ARGUMENT OF STEPHEN G. TIPPS ON BEHALF OF PETITIONER

ATTORNEY STEPHEN G. TIPPS: I don't think we found a Texas case that addressed that issue or projects and our argument, there are, of course, numerous cases that address the project enhancement rule in situations in which the project was constructed many years before the taking. In this Court's Sutor opinion, the project was constructed 17 years before the ultimate taking, 21 years in Anderson-Tulley. We did not find a case in which the ultimate condemnor purchased the project rather than constructed it itself, but I cannot think of any logical reason why an ultimate condemnor who pays money to purchase a public project should be treated differently from one who builds the project with his own money in the first place because in either case, failing to apply the project enhancement rule results in the condemnors having to pay for the project twice, which is inconsistent with the public good that is sought to be achieved by designating certain kinds of projects as public projects in the first place.

JUSTICE DON R. WILLETT: Do any cases extend or apply the project enhancement rule to projects where the constructing party who built the project initially itself could not exercise the power of eminent domain when it constructed the project?

ATTORNEY STEPHEN G. TIPPS: Well, since I haven't found any cases in which there was a change of hands. I don't have that case either, but with regard to that issue and we've touched on this in our brief. Quite frankly, Texas law is not as clear on this point as I would expect Texas law to be on an oil and gas issue, but all of these companies that own the land, Tonkawa, Coke, Enbridge Processing were gas corporations under Texas law and under Texas law, the leading opinion is the Austin's court of appeals' decision in Loesch. A gas corporation that chooses to exercise its right of eminent domain thereby submits to the regulation of the Texas Railroad Commission and obligates itself to pay taxes and I think that it's pretty clear to me from looking at the law and the factual record in this case that if any one of these prior companies had chosen to condemn the land and been willing to subject itself to regulation, it could have done so.

JUSTICE DON R. WILLETT: Help me understand this. If the project enhancement rule would apply even to projects not constructed by the condemnor, help me understand when would a landowner have the right to receive compensation for valuable enhancements that were constructed on his or her land?

ATTORNEY STEPHEN G. TIPPS: Well, under the project enhancement rule, I don't think a landowner is entitled to that if it is a public project and Mr. Sodd just got through saying well, the plant is not the project. Well, with all due respect, if the plant's not the project, what is? The rule is the project enhancement rule. It's not the

condemnation enhancement rule. The court did use imprecise language in Zwahr. Nothing wrong with Zwahr, but the court used shorthand and said you can't take into account the condemnation. Well, that makes sense in the typical situation in which the condemnation precedes the construction of the project, but condemnations don't add value to land. What adds value to land is a project and the value is added whether the land is acquired by condemnation or purchase; putting a valuable project on a piece of land makes the land more valuable.

JUSTICE DON R. WILLETT: But this land was-

ATTORNEY STEPHEN G. TIPPS: And so, and -- I'm sorry,

JUSTICE DON R. WILLETT: But you would agree, this land was uniquely adapted as a gas processing venue or plant.

ATTORNEY STEPHEN G. TIPPS: Well, it was adapted as the site for a gas processing plant. I don't know that it was unique in the sense that we have gas processing plants all across Texas.

JUSTICE DON R. WILLETT: But it was particularly well suited for use as a gas processing plant?

ATTORNEY STEPHEN G. TIPPS: I don't know that it was any better suited than any other tract of land on which a gas processing plant had been located. I do not argue that a jury could not have concluded that the highest and best use of this land was as a gas processing plant, but I do think that the record is entirely deficient with regard to whether or not the $20.9 million in value can be explained analytically without regard to the plant because the land can't be worth the same amount without the plant as it's worth with the plant and in that regard, I found it interesting that in the exhibits that Avinger filed on Friday, this is a "doctored trial exhibit." This is an aerial view of the land and at trial, there was a gas processing plant in the middle here and what's happened here is they've taken the gas processing plant out, I guess in an effort to avoid the project enhancement rule. But I would--

CHIEF JUSTICE WALLACE B. JEFFERSON: It's on the next page, though.

ATTORNEY STEPHEN G. TIPPS: I beg your pardon?

CHIEF JUSTICE WALLACE B. JEFFERSON: It's on the next page, right?

ATTORNEY STEPHEN G. TIPPS: Well, yeah, that's the picture of the plant, but my point simply is if they had really tried the case under what is now their alternative theory, the jury would have seen this, the trial judge would have seen this and we would not be seeing this for the first time in the history of the case in the Texas Supreme Court.

JUSTICE DEBRA H. LEHRMANN: You say that this land wasn't particularly unique, but wasn't it in the second-most productive natural gas field in Texas?

ATTORNEY STEPHEN G. TIPPS: Yes.

JUSTICE DEBRA H. LEHRMANN: Doesn't that make it particularly unique?

ATTORNEY STEPHEN G. TIPPS: Well, I mean, maybe so. Unique sounds to me like there's not anything like it anyplace else.

JUSTICE DEBRA H. LEHRMANN: Not much, right?

ATTORNEY STEPHEN G. TIPPS: Well, I guess it's more unique than some. I just have a hard time saying

that-

JUSTICE DON R. WILLETT: All but one.

ATTORNEY STEPHEN G. TIPPS: Well, this may be the second-most productive gas field. There's the first most-productive gas field. There's the third and there's the fourth and there's the fifth and they have gas processing, all of them have gas processing plants. I don't think that the case turns on or should turn on whether or not this site is unique. I agree and acknowledge that the jury had there been a choice could have concluded that the highest and best use of this land was as a gas processing plant, but there's no sufficient evidence to support the view that as a result, if you ignore the plant, the land is worth $20,955,000.00.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel.

ATTORNEY STEPHEN G. TIPPS: Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: The cause is submitted and the Court will take another brief recess.

MARSHAL: All rise.

END OF DOCUMENT