

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 1604

THE BOARD OF COMMISSIONERS NORTH LAFOURCHE CONSERVATION,
LEVEE AND DRAINAGE DISTRICT

VERSUS

DEL-MAR FARMS, INC.

Judgment rendered **MAY 22 2014**

Appealed from the
17th Judicial District Court
in and for the Parish of Lafourche, Louisiana
Trial Court No. 90543
Honorable Jerome J. Barbera, III, Judge

PATRICK M. AMEDEV
THIBODAUX, LA

ATTORNEY FOR
PLAINTIFF-APPELLANT
THE BOARD OF COMMISSIONERS
NORTH LAFOURCHE CONSERVATION,
LEVEE AND DRAINAGE DISTRICT

WOODY FALGOUST
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ATTORNEY FOR
DEFENDANT-APPELLEE
DEL-MAR FARMS, INC.

BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

PMF = McCleendon, J. CONCURS AND ASSIGNS REASONS.

PETTIGREW, J.

The Board of Commissioners of the North Lafourche Conservation, Levee and Drainage District ("NLCLDD") appeals a judgment awarding Del-Mar Farms, Inc. ("Del-Mar") a total of \$567,147.00, plus costs, legal interest, and \$100,000.00 in attorney fees, as just compensation following the expropriation of land for the purpose of constructing a flood protection levee in Lafourche Parish. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On January 25, 2001, NLCLDD filed a petition for expropriation of approximately 55 acres of land owned by Del-Mar. NLCLDD's purpose for the expropriation was to construct a flood protection levee. According to the record, Del-Mar is owned by the Delaune family. Elson Delaune, President of Del-Mar, testified that the family had primarily used the western portion of the property as cattle land since the 1950s. In 1990, Russell Savoie began leasing property from Del-Mar for his cattle operation. Del-Mar leased approximately 1,100 acres of property to Mr. Savoie. Initially included in Mr. Savoie's lease from Del-Mar was acreage on the northern end of Del-Mar's property. However, sometime in 2002, Mr. Savoie learned of the expropriation proceedings and NLCLDD's plans to build the levee. Mr. Savoie knew that with the building of the levee, the access road to the northern section of the property would become impassable and he would no longer be able to tend to his cattle in that area. Thus, he began moving his cattle to the south side of his lease.

At the time the petition was filed, NLCLDD deposited \$41,100.00 into the registry of the court for the value of the land. On May 7, 2001, Del-Mar filed a motion to withdraw funds, noting that although it did not contest the propriety of the expropriation, it did contest the adequacy of the funds deposited. An order was signed on May 8, 2001, by the trial court directing the Lafourche Parish Clerk of Court to issue a check to Del-Mar for the full amount deposited, *i.e.*, \$41,100.00, plus accrued and accumulated interest. Del-Mar was issued a check in the amount of \$41,336.95 on May 9, 2001.

Thereafter, the record indicates that discovery was pursued and a trial date was set. Settlement negotiations took place, but the parties disagreed as to whether a binding

settlement was ultimately reached. NLCLDD filed a "Rule To Enforce Settlement" on December 28, 2006, which the trial court granted by judgment dated April 27, 2007. In a judgment rendered on March 26, 2008, this court reversed the trial court's ruling, finding that the purported settlement was not enforceable. The matter was remanded to the trial court for further proceedings. **The Board of Commissioners of the North Lafourche Conservation, Levee and Drainage District v. Del-Mar Farms, Inc.**, 2007-1587 (La. App. 1 Cir. 3/26/08) (unpublished).

Upon remand to the trial court, Del-Mar requested an increase in the value of the land, an amount that the parties stipulated to be \$3,200.00. Del-Mar also requested compensation for loss of the spoil bank, lost rental from the northern acreage, and the cost of a replacement access road to the north. Additionally, Del-Mar asked for attorney fees, judicial interest, expert witness fees, and court costs. The matter proceeded to a bench trial on March 19-22, 2013, following which the trial court took the matter under advisement. On May 1, 2013, the trial court gave oral reasons for judgment in favor of Del-Mar, concluding that Del-Mar was entitled to \$567,147.00 in damages, itemized as follows:

| | |
|---|--------------|
| Increase in the value of the land taken: | \$3,200.00 |
| Lost rentals: | \$51,675.00 |
| Replacement costs of the expropriated road: | |
| Embankment | \$431,272.00 |
| Crossover/Turnarounds | \$10,000.00 |
| Culverts | \$10,000.00 |
| Culvert Gates | \$3,000.00 |
| Pipeline Crossing | \$3,000.00 |
| Road Maintenance | \$20,000.00 |
| Permits | \$5,000.00 |
| Engineering & Surveying | \$30,000.00 |

The trial court also awarded Del-Mar court costs, \$100,000.00 in attorney fees, and legal interest. The trial court signed a judgment on May 15, 2013, in accordance with its findings. It is from this judgment that NLCLDD has appealed, assigning the following specifications of error for our review:

1. The Court erred in awarding the 2013 value of a replacement road together with legal interest from date of judicial demand (2001) and

should have used the value of a replacement road at the time of the taking in 2001. Such an award is contrary to law and places the landowner in an exceedingly better position than in the absence of the expropriation, at the expense of the taxpayer.

2. The Court miscalculated the amount of dirt to construct the replacement road based upon simple mathematical calculations. Said error constituted manifest error.

3. The headland road was not indispensable since the testimony of the tenant was that he abandoned use of the northern half of the property prior to any construction work to the levee or embankment as a result of constant, longstanding drainage problems. Because the road was not indispensable, Del-Mar was not entitled to replacement value of the headland road.

4. The award of rental damages was improper since the tenant abandoned the property for reasons unrelated to the expropriation. Further the State's ownership claim to almost one-half of the abandoned northern section further mitigates and reduces the value of the north end.

5. Should the Court reduce the award of severance damages, then attorneys fees should be reduced so as not to exceed the statutorily authorized amount. The award of engineering costs in the amount of \$30,000 for a dirt road should be considered equally excessive should the court reduce the district court's award for the cost of the replacement road.

STANDARD OF REVIEW

In an expropriation proceeding, a trial judge's factual determinations as to value of property and entitlement to any other types of damages will not be disturbed on review in the absence of manifest error. **West Jefferson Levee Dist. v. Coast Quality Const. Corp.**, 93-1718, p. 23 (La. 5/23/94), 640 So.2d 1258, 1277, cert. denied sub nom, 513 U.S. 1083, 115 S.Ct. 736, 130 L.Ed.2d 639 (1995). Likewise, where the testimony of the experts and witnesses is contradictory and where the judge decides to give more or less weight to the testimony of certain individuals, his findings cannot be overturned unless manifest error appears in the record. **State Through Dept. of Highways v. McPherson**, 261 La. 116, 259 So.2d 33, 39 (La. 1972). Those factual findings the trial judge has made that do not directly involve the valuation of the property or the credibility of the appraisers are also entitled to deference. **West Jefferson Levee Dist.**, 93-1718 at 23, 640 So.2d at 1277.

In **Arceneaux v. Domingue**, 365 So.2d 1330, 1333 (La. 1978), the Louisiana Supreme Court set forth a two-part test for the appellate review of facts: (1) the

appellate court must find from the record that there is a reasonable factual basis for the finding of the trial court, and (2) the appellate court must further determine that the record establishes the finding is not clearly wrong or manifestly erroneous. Where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). Under the manifest error-clearly wrong standard, the reviewing court does not decide whether the trier of fact was right or wrong, but whether the fact finder's conclusion was a reasonable one. **Stobart v. State through Dept. of Transp. And Development**, 617 So.2d 880, 882 (La. 1993).

**AWARD FOR REPLACEMENT ROAD
(Assignment of Errors Nos. 1, 2, and 3)**

NLCLDD argues on appeal that the access road that was taken as part of the expropriation was not indispensable. As support for this position, NLCLDD points to Mr. Savoie's testimony that he had abandoned use of the northern section of the property prior to any construction work on the levee as a result of constant, longstanding drainage problems. NLCLDD also asserts that the trial court's use of \$20/cubic yard of dirt (which was four-times the value of dirt at the time of the expropriation) in calculating the value of the replacement road was in contravention to the plain and unambiguous language of La. R.S. 38:387(B). Moreover, NLCLDD attempts to argue that judicial interest from the date of judgment on the damages awarded would offset the inflationary costs associated with the delays of getting the matter to trial. Finally, NLCLDD alleges error in the \$431,272.00 award for the embankment, urging that a simple miscalculation in math resulted in said error.

In response, Del-Mar argues there is no manifest error in the trial court's finding that the access road was indispensable and cites **State, Dept. of Transp. And Development v. Dietrich**, 555 So.2d 1355, 1359 (La. 1990), in support of its position that the trial court properly awarded costs of replacing the road that "reflect the economic effect of protracted judicial proceedings." Furthermore, while acknowledging that the trial

court's full calculations are not available in its oral reasons for judgment, Del-Mar maintains that the \$431,272.00 award is reasonably supported by the evidence in the record and is not manifestly erroneous.

Louisiana Revised Statutes 38:387 provides, in pertinent part, as follows:

A. The measure of compensation for the property expropriated is determined as of the time the estimated compensation was deposited into the registry of the court without considering any change in value caused by the proposed improvement for which the property is expropriated.

B. The measure of damages, if any, to the defendant's remaining property is determined on a basis of immediately before and immediately after the expropriation **taking into consideration the effects of the completion of the project in the manner proposed or planned.**

C. The owner shall be compensated to the full extent of his loss.

D. The levee district or levee and drainage district shall present its evidence of value first. [Emphasis added.]

After hearing four days of testimony and considering various documents introduced into evidence by the parties, the trial court concluded that Del-Mar was entitled to a replacement road and that a road of 6,200 feet would be of sufficient length to provide access to the northern section of the property, which was the goal of the replacement road. In very detailed oral reasons for judgment, the trial court made the following findings:

So, this case is not a complicated case. This is a case about [NLCLDD] expropriating a servitude for the construction of a levee in the south Lafourche area. The law is very clear that applies to it. This taking occurred in January 2001. The levee construction took place, according to the testimony, sometimes after that, 2002 or 2003 for the engineered levee, and then the rest of it, the un-engineered portion was built a couple of years later.

[Del-Mar] in this case - well, let me back up. [Del-Mar] owns this property, has other property in the area. This property is not used for farming, sugar cane farming or any other type of crop from the evidence that was presented. It was mainly used by [Del-Mar], leased to a cattle farmer by the name of Russell Savoie, who had cattle all over the property for over 20 years when the expropriation was done.

[Del-Mar] claims as damage the value of the spoil bank that served as the farm road, traversing the property in a north/south fashion. [Del-Mar] also claims that [NLCLDD] must pay to construct a new road to allow their tenant, Mr. Savoie, to access the northern section of the property. [NLCLDD's] response is that adequate compensation has already been paid, but if a road is due, nothing should be paid for the spoil bank and the road should be a farm road, one foot above grade, just adequate

enough for a cattleman to drive his truck to the northern area to service his herd.

The amount of \$41,100 was deposited.

[Del-Mar] also claims attorney's fees of 25 percent of the difference between the amount deposited in any judgment of the court if that is greater than the amount deposited.

[Del-Mar] also asked for court costs and legal interest.

Each side in the case presented expert testimony on the value of the land, the spoil bank, and the cost of constructing a road to allow access to the northern part of the property.

The law on these matters as stated in the cases has developed over a period of time since the new constitution in 1974, and what the law says and what the cases say is that what our Supreme Court has confirmed is that the owner in an expropriation case should be compensated to the full extent of his loss. And we know that there are cases that say that if that requires replacement of something that is destroyed by the taking, the owner should be put in as good a position pecuniarily as he would have been if there had been no taking.

The law that applies, Title 38, Section 387, also referenced to Title 48, Section 453, basically saying the same thing, that the measure of damages is determined on the basis of immediately before and immediately after the taking, taking into consideration the effects of the completion of the project in the manner proposed or planned.

During the trial the parties stipulated that the value of the land is \$44,300. I think that was - we had 41,100, which was deposited and then there was a number of forty-seven-something but the difference, as I recall, we split, and I think Mr. Amedee had some question about that or some difference of opinion but it wasn't an average. We split the difference. Which brings the value to \$44,300, \$3,200 over the amount deposited.

[Del-Mar] complains and asks in this case that it be compensated for the loss of the road, the land area, the spoil bank that was consumed in the construction.

[NLCLDD] contends that the new road is not necessary because the tenant, Mr. Savoie, moved cattle off the northern portion of [Del-Mar's] property actually before the levee construction. And he did so, according to [NLCLDD's] argument, not because of the construction of the levee but because of drainage problems.

Mr. Savoie testified in the case that he now has cattle in the southern portion of the property and [NLCLDD] contends that he does not need any other access to that area since there is adequate highland that exists to accommodate his farming needs.

Mr. Savoie testified in the case, and [Del-Mar] contends that he moved his cattle off the north piece and demanded a reduction in rent because of the levee construction and not because of the drainage. And he says that he used the road for over 20 years to service his herd and

that's why he moved his herd not because of drainage but because of the construction of the levee, because the road that he had been using was destroyed.

The court accepts the testimony of Mr. Savoie and finds that the replacement of the road destroyed by the taking is a proper form of compensation in this case. The road to the north is necessary and indispensable to [Del-Mar] being able to reap the maximum economic benefit from this property, which, according to the testimony and the evidence, really has no other viable economic use.

Construction of a new road would allow the tenant to reintroduce cattle onto the northern portion, thereby providing [Del-Mar] with an increase in rental income, restoring [Del-Mar] to the previous pecuniary position that it held before 2001.

This form of compensation is recognized by the Louisiana Supreme Court as proper and the line of cases that begin with the 1979 decision in the Constant case, Department of Highways v. Constant. ...

I have examined and studied the testimony and reports presented by the engineer experts, Mr. Milford and Mr. Chauvin. The goal in this case, - with a replacement, which is my judgment, that there should be a replacement - the goal is to provide a road that will be efficient for cattle farming on the northern part of the property and also provide easy access to the entire property from La. Hwy. 1. The goal is not to replicate or improve upon the pre-existing road. Actually, the pre-existing road, as counsel are well aware, was kind of a de facto road, that is, it was not engineered. It wasn't built by contractors hauling in dirt. It was formed by the digging of the Forty Arpent Canal. The landowner said you can dig the canal but I want the spoil and I want you to put it where I tell you to put it. And after years of settling and compaction, it basically became the north/south access road for Del Mar and for Del Mar's guests and tenants.

My finding in this case is that Mr. Chauvin's approach to road construction, for this case, is more utilitarian than Mr. Milford's, that Mr. Chauvin's approach is more aimed at reaching the goal. The goal is to provide access. The goal is not to duplicate the road or to improve upon it. The goal is to provide access.

Mr. Milford's report and his estimates are professional. They're not faulty. They're not deficient. I just found Mr. Milford's plan to be too much, that it contains too many features and amounts that [Del-Mar], I think, in this case is just not legally entitled to.

I have used Mr. Chauvin's numbers ... and I have tweaked those numbers somewhat. And I will award damages for a replacement road as follows: the road would be a 16 foot base with a 12 foot crown, three feet high, and would extend 6,200 feet from the LA 1 access road to the crossover at Nolan Toups, which is about midway up the engineered levee.

I find that that road would be an adequate replacement for anyone farming cattle in any part of that property. It would allow access ... and basically allow someone to go up all the way into the northern part of the property where they would have access to that part.

The details are basically Mr. Chauvin's numbers with a few changes. I have priced the soil at \$20 a cubic yard. Mr. Chauvin and Mr. Milford had different numbers. Mr. Chauvin was at \$16 based on bids that he says that he solicited in another levee project in 2012. Mr. Milford's numbers he said came from calls that he made. So, I compromised at \$20 a cubic yard thinking that the numbers that Mr. Chauvin was able to get and bids on a public project might not be an accurate reflection of what a private landowner might get in response to soliciting bids from contractors.

So, 16 foot base with a 12 foot crown, three feet high, 6,200 feet.

So, for the embankment the number is \$431,272.

I've allowed \$10,000 for either a crossover or turnaround on the northern part of the property, whatever the landowner thinks would be appropriate.

Ten thousand dollars (\$10,000) for culverts.

Three thousand dollars (\$3,000) for gates.

Thirty thousand dollars (\$30,000) for engineering and survey.

Three thousand dollars (\$3,000) for a pipeline crossing.

Twenty thousand dollars (\$20,000) for construction maintenance.

And \$5,000 for permit fees.

The total \$512,272.

Considering the applicable law and jurisprudence as it relates to the record before us, we find no error in the determination by the trial court that Del-Mar suffered compensable damages. There was sufficient evidence to prove that Del-Mar was entitled to a replacement road that would allow for the continued leasing of the land on the northern section of the property for its intended purpose, *i.e.*, cattle farming. Moreover, we find no error in the trial court's \$431,272.00 award for the embankment.

As stated by our supreme court in **Dietrich**:

Proof of economic loss may be determined by various methods, and it may exceed the market value of the property. However, the method employed for proof of loss must demonstrate by a preponderance of the evidence that an actual loss was sustained by the business because of the taking. In addition, the award may reflect the economic effect of protracted judicial proceedings.

Dietrich, 555 So.2d at 1359. The embankment award is more than reasonable in light of the record reviewed in its entirety. Furthermore, there is ample testimony in the

record from the two experts concerning the many factors and calculations that go into building a road of this type. The trial court had the benefit of this expert testimony in awarding Del-Mar \$431,272.00 in embankment costs, an amount the trial court determined to be a fair price for the replacement road to be built.¹ We find no merit to NLCLDD's arguments to the contrary.

LOST RENTALS
(Assignment of Error No. 4)

NLCLDD argues in this assignment of error that the trial court's \$51,675.00 award for rental damages² was improper because Del-Mar continued to receive rental revenues following the expropriation and the discontinuation of rental payments from Mr. Savoie was because of drainage issues unrelated to the expropriation of the property. NLCLDD also alleges that the State's ownership claim to almost one-half of the abandoned northern section of Del-Mar's property further mitigates and reduces the value of the north end and that the trial court's award for lost rentals should be reduced by the percentage of land owned by the State.

Del-Mar contends that the trial court's award for lost rental was proper and had nothing to do with NLCLDD's never pled and unproven defense of the State claiming ownership of a portion of the northern acreage of Del-Mar's property. Furthermore, Del-Mar maintains that this alleged ownership by the State had no effect on Mr. Savoie's lease as he had every intention of returning to the northern portion of the property as soon as his access to the property was restored. We agree with Del-Mar on this issue.

As previously noted, Mr. Savoie was clear in his testimony that he abandoned the northern section of Del-Mar's property because he was no longer able to tend to his

¹ As pointed out by Del-Mar in brief to this court, in post-trial memoranda, Del-Mar requested \$806,400.00 in embankment costs, while NLCLDD requested \$118,402.00. The amount awarded by the trial court is very close to an average of these two numbers, \$462,401.00.

² We note that in its oral reasons for judgment, the trial court's award for lost rentals was \$51,655.00 as opposed to \$51,675.00 as it appears in the written judgment. When a trial court's oral reasons conflict with its written, signed judgment, the latter governs. **Northshore Capital Enterprises v. St. Tammany Hosp. Dist. No. 2**, 2001-1606, p. 4 n.3 (La. App. 1 Cir. 6/21/02), 822 So.2d 109, 112 n.3, writ denied, 2002-2023 (La. 11/1/02), 828 So.2d 584.

cattle after NLCLDD expropriated the only road that allowed him access to that portion of the property. Mr. Savoie also testified that he was always expecting to go back to the northern section of the property once a new access road was built. There is no evidence in the record that the alleged ownership claim by the State had any effect on Mr. Savoie's decision to leave the northern section of Del-Mar's property. Moreover, the record is replete with evidence to support an award of \$51,675.00 to Del-Mar for lost rentals that is suffered as a result of the delays in getting the replacement road built so that Mr. Savoie could return to the northern section of the property and resume his lease of said property. We find no merit to this assignment of error.

**ATTORNEY FEES
(Assignment of Error No. 5)**

The trial court awarded Del-Mar attorney fees in the amount of \$100,000.00 and \$30,000.00 in engineering costs for the replacement road. On appeal NLCLDD argues that in the event this court should determine a reduction of the award is in order, then the award of attorney fees should be reduced according to law. NLCLDD further asserts that the award for engineering costs was excessive and should be reduced by this court to the \$5,000.00 estimate testified to by its expert. In response, Del-Mar maintains that the record supports both awards.

It is well settled that attorney fees are not allowed except where authorized by statute or contract. **State, Dept. of Transp. and Development v. Wagner**, 2010-0050, p. 2 (La. 5/28/10), 38 So.3d 240, 241. Louisiana Revised Statutes 38:387(E) provides, as follows:

E. Reasonable attorney's fees may be awarded by the court if the amount of the compensation deposited in the registry of the court is less than the amount of compensation awarded in the judgment. Such attorney's fees in no event shall exceed twenty-five percent of the difference between the award and the amount deposited in the registry of the court.

Attorney fees in expropriation cases are discretionary with the trial court. Courts may inquire as to the reasonableness of attorney fees as part of their prevailing, inherent authority to regulate the practice of law. Factors to be taken into consideration in determining the reasonableness of attorney fees include: (1) the ultimate result

obtained; (2) the responsibility incurred; (3) the importance of the litigation; (4) the amount of money involved; (5) the extent and character of the work performed; (6) the legal knowledge, attainment and skill of the attorneys; (7) the number of appearances made; (8) the intricacies of the facts involved; (9) the diligence and skill of counsel; and (10) the court's own knowledge. **State, Dept. of Transp. and Development v. Williamson**, 597 So.2d 439, 441-442 (La. 1992).

In oral reasons for judgment, the trial court noted as follows with respect to attorney fees:

On the issue of attorney's fees the court will award \$100,000. This does not exceed 25 percent of the difference between the damage award and the deposited amount. I have taken into consideration all of the factors that were set out in the case law presented to me in the memorandum in arriving at this number. It is not the maximum amount but it is over 75 percent of the maximum amount. I believe the award is just and reasonable considering the type of case, the amount of money awarded and the number of court appearances over the years in this case. The law does not mandate the award to be 25 percent of the difference. The law mandates that the award be reasonable.

Based on our review of the record and considering our finding that the trial court's judgment on damages was appropriate, we find no abuse of discretion in the trial court's award of attorney fees in this case and will not disturb the trial court's award of \$100,000.00.

Likewise, with regard to the trial court's award of engineering costs for the replacement road, we decline to reduce the trial court's award of \$30,000.00. Our review of the record reveals that this award is reasonably supported by the evidence and is not manifestly erroneous.

CONCLUSION

For the above and foregoing reasons, we affirm the May 15, 2013 judgment of the trial court. Appeal costs in the amount of \$9,064.50 are assessed against plaintiff-appellant, the Board of Commissioners of the North Lafourche Conservation, Levee and Drainage District.

AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1604

THE BOARD OF COMMISSIONERS NORTH LAFOURCHE CONSERVATION,
LEVEE AND DRAINAGE DISTRICT

VERSUS

DEL-MAR FARMS, INC.

 **McCLENDON, J., concurs and assigns reasons.**

Under the provisions of the Louisiana Constitution of 1974, the measure of damages in expropriation cases was broadened so that an owner of property that is expropriated by the state "shall be compensated to the full extent of his loss." LSA-Const. Art. 1, § 4. The change allowed an owner to be put in as good a position pecuniarily as he would have been had his property not been taken. See **State Through Dept. of Highways v. Constant**, 369 So.2d 699, 701 (La. 1979). Nonetheless, Article 1, Section 4 does not specify how to fully compensate a landowner whose property is taken. **State, Dept. Of Transp. and Dev. v. Dietrich**, 555 So.2d 1355, 1358 (La. 1990).

Considering the unique and indispensable value of the road to Del-Mar Farms' business operations in this matter, I agree that the replacement cost for the expropriated road is appropriate. However, the supreme court has not directly answered the question of whether the cost of replacement is valued at the time of the taking, or at a later date. See **Constant**, 369 So.2d 699, and **Dietrich**, 555 So.2d 1355. Nevertheless, considering the constitutional requirement that property owners be fully compensated and made whole when their property is expropriated, I concur in the result reached by the majority.