

**ST. BERNARD PORT,
HARBOR & TERMINAL
DISTRICT**

VERSUS

**VIOLET DOCK PORT, INC.,
LLC**

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NO. 2016-CA-0096

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

CONSOLIDATED WITH:

**ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT**

VERSUS

VIOLET DOCK PORT, INC., LLC

CONSOLIDATED WITH:

**ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT**

VERSUS

VIOLET DOCK PORT INC., LLC

CONSOLIDATED WITH:

NO. 2016-CA-0262

CONSOLIDATED WITH:

NO. 2016-CA-0331

APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 116-860, DIVISION "E"
Honorable Jacques A. Sanborn, Judge

Judge Roland L. Belsome

(Court composed of Chief Judge James F. McKay, III, Judge Terri F. Love, Judge Roland L. Belsome, Judge Joy Cossich Lobrano, Judge Sandra Cabrina Jenkins)

LOBRANO, J., DISSENTS WITH REASONS TO FOLLOW

JENKINS, J., DISSENTS

ON REMAND FROM THE LOUISIANA SUPREME COURT

September 12, 2018

James Michael Garner
Peter L. Hilbert, Jr.
Joshua Simon Force
Ashley Gremillion Coker
SHER GARNER CAHILL RICHTER KLEIN & HILBERT, L.L.C.
909 Poydras Street, 28th Floor
New Orleans, LA 70112--1033

COUNSEL FOR PLAINTIFF/APPELLANT

Randall A. Smith
SMITH & FAWER, L.L.C.
201 St. Charles Avenue, Suite 3702
New Orleans, LA 70170

Val P. Exnicios
LISKA EXNICIOS & NUNGESSER
1515 Poydras Street, Suite 1400
New Orleans, LA 70112

W. Scott Hastings
LOCKE LORD LLP
601 Poydras Street, Suite 2660
New Orleans, LA 70130

Harry T. Lemmon
400 Mimosa Avenue
Luling, LA 70070

Alan Weinberger
HANGARTNER RYDBERG AND TERRELL, LLC
701 Poydras Street, Suite 310
New Orleans, LA 70139

COUNSEL FOR DEFENDANT/APPELLANT

Matthew M. Mize
Matthew E. Lognion
ROBICHAUX, MIZE, WADSACK, RICHARDSON & WATSON, L.L.C. 1777
Ryan Street (70601)
P O Box 2065
Lake Charles, Louisiana 70602-2065

COUNSEL FOR *AMICI* PORT AUTHORITIES

AFFIRMED AS AMENDED AND REMANDED

This matter was remanded from the Louisiana Supreme Court for the determination of just compensation for the Violet Dock Port's expropriated property.¹ Over several years, St. Bernard Port ("the Port") negotiated with Violet Dock Port ("VDP") for the purchase of its property along the Mississippi River ("the Property"). After negotiations failed, the Port instituted expropriation proceedings pursuant to La. Const. art. I, §4.² The courts have determined that the taking of the Property was for a public purpose.³ Thus, in accordance with La. Const. art. I, §4(B)(1), VDP was due just compensation.

After a trial on the issue of just compensation, the trial court found that \$16,000,000 was just compensation for the expropriated property. In so finding,

¹ *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 2017-0434 (La. 1/30/18) --So.3d--, 2018 WL 618831.

² La. Const. art. I, §4 reads in pertinent part:

Section 4. (A) Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property. This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power.

(B)(1) Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. Except as specifically authorized by Article VI, Section 21 of this Constitution property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity.

La. Const. Ann. art. I, § 4

³ *St. Bernard Port, supra*.

the trial court indicated it did not have the authority to “split the baby” and thus had to choose which party’s expert he was going to rely on. The trial court chose to adopt the valuation presented by the Port, which was the amount that had been deposited in the registry of the court. Reviewing that ruling under a manifest error/clearly wrong standard, this Court affirmed.⁴ The Supreme Court found that the trial court had made its ruling under an erroneous interpretation of the law. More specifically, the Supreme Court opined that the trial court was not bound by any one expert’s opinion in its entirety. Accordingly, this Court’s affirmation of just compensation was reversed. On remand, we have been directed to conduct a *de novo* review of the evidence in the record to arrive at a valuation of just compensation.

VDP has maintained throughout its appeals that the principles set forth by the Supreme Court in *State, Dept. of Highways v. Constant*, should guide the Court in determining just compensation.⁵ *Constant* recognized that the full extent of loss is not always satisfied by the market value analysis based upon comparable sales or other alternate methods that are used in place of fair market value. In *Constant*, the landowner was operating a marina business at the time that the highway department expropriated a portion of his land. The expropriated portion of land represented the entire loading and parking area of the business. It was established that the loading and parking area was indispensable to the landowner’s marina business. The Court noted that the property was unique because the barge slip and adjacent area was the only site available for the commercial loading of heavy

⁴ *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 2016-96, 2016-262, 16-331 (La.App. 4 Cir. 12/14/16), 229 So.3d 626, writ granted, 2017-0434 (La. 5/26/17), 221 So. 3d 853, and *aff’d in part, rev’d in part*, 2017-0434 (La. 1/30/18).

⁵ *State, Dept. of Highways v. Constant*, 369 So.2d 699 (La.1979).

equipment servicing the oil industry. The Court reasoned that the property was unique in nature; and the loading and parking area was indispensable to the business's operations. Therefore, the loading and parking area had to be reproduced at another location to maintain the marina business. Accordingly, the Court found that awarding replacement value was the only way to fully compensate the landowner even though that amount exceeded the market value of the land.⁶

In accordance with *Constant*, if a landowner establishes that the location of the expropriated property or some physical feature of it is unique and indispensably related to the success of the landowner's business, just compensation requires the court to award replacement value. Since *Constant*, several courts considering those factors have determined that some landowners can only be fully compensated by replacement cost.⁷

Likewise here, the evidence elicited at trial established that: 1) the Property is unique due to its location and its improvements; and 2) the Property was indispensable to VDP's business. The Property is located in Violet, Louisiana and has one mile of frontage along the Mississippi River and similar frontage on St. Bernard Highway and Norfolk Southern railroad, which gives the site access over land, road, rail, and water. It is zoned industrial and is located on a straight, self-dredging bank line making it an ideal location for river navigation. The Port's Executive Director, Dr. Robert Scafidel testified that the other potential locations along the river in St. Bernard Parish were not as desirable for the Port because they

⁶ *Id.*

⁷ *See, State ex rel Dept. of Transp. and Dev. v. Wade*, 07-1385 (La. App. 3 Cir. 5/28/08), 984 So.2d 918, writ denied, 08-1896 (La. 12/12/08), 997 So.2d 561; *State, DOTD v. McKeithen*, 42,830 (La. App. 2 Cir. 2/20/08), 976 So.2d 832; *City of Shreveport v. Standard Printing Co. of Shreveport, Inc.*, 427 So.2d 1304 (La. App. 1 Cir. 1983); and *Monroe Redevelopment Agency v. Kusun*, 398 So.2d 1159 (La. App. 2d Cir. 1981), writ denied, 405 So.2d 530 (La. 1981).

were positioned where the river bends, which would impede river traffic. He represented to the State that VDP's property presented a unique opportunity to greatly expand the Port's ability to handle bulk cargo.

Through the years, VDP had constructed a fully operational, private port facility with five steel and concrete docks. Three of the berths were certified by the Navy for lay berthing ocean-going ships. VDP had held contracts for providing services to the Navy for decades. To fulfill the needs of the Navy, VDP had renovated the Property by installing transformers, a potable water supply, six telephone lines per ship, and a boiler for steam necessary for the ships to be poised for immediate deployment. In addition to the mechanical support for the ships, VDP had also constructed landside improvements to comply with Navy specifications.

The Port highlighted the uniqueness of the Property in its application to the Louisiana Port Construction and Development Program.⁸ The Port wrote:

[t]he best attribute of this site is that it features three sturdy docks designed to berth some of the largest cargo ships in the world. These docks can be easily modified to support cargo handling operations similar to those currently taking place at the Chalmette Slip, such as ship or barge to truck or rail or to storage. The reverse movement is also available.

The application went on to state that:

[t]he opportunity to acquire three active docks on the Mississippi River with available uplands and access to highway and rail, for only \$14 million, is an opportunity that does not happen very often, if ever.⁹

Similarly, the Port's Strategic Business Plan stated that the Property "should be considered a national asset for transportation and manufacturing." The Port conceded that the site was one of the last major properties on the Mississippi River

⁸ In the application the Port was seeking State funding for the purchase of the Property.

⁹ At the time of the application, the Port thought VDP had accepted its offer of \$14 million.

that is suitable for cargo with highway, rail, and deep water access on a straight section of the river. Riverfront property is limited in St. Bernard Parish and property with these attributes is nonexistent. The Port relied on the uniqueness of the Property to secure a \$15,000,000 grant from the State and to support its public purpose argument.

Here, as in *Constant*, the Property was also indispensable for the operation of VDP's business. The appraisals in the record repeatedly recognized that the facility and business operations were highly specialized. That is further evident by the fact that the Port is now servicing the Navy contracts once held by VDP. The Port expropriated the Property because it is unique in nature and location. As a result of the expropriation VDP's business has ceased to exist. Thus, we find that the record supports a finding that the Property was unique in nature and location while also being indispensable to the landowners' business operations requiring just compensation to be calculated by assessing the replacement cost of the land and improvements.

At trial, VDP's experts presented reports and testimony suggesting that full replacement cost for the land and improvements would be \$73,148,000 without taking into account depreciation. Alternatively, if the land and improvements were to be depreciated, the replacement value would be \$50,930,000. Using numbers derived by the Port's experts, full replacement cost without depreciation amounts to \$41,084,000, and with depreciation the amount was determined to be \$28,764,685.¹⁰

¹⁰ The initial value was \$25,764,685, but after adjustments for omissions the value was increased to \$28,764,685.

The most significant reason for the vast discrepancy in the values is due to the experts' differing opinions on the highest and best use of the Property. VDP's experts' calculations were based on the Property being used as a multimodal bulk cargo facility, while the lower calculations were based on layberthing with a limited cargo operation. Multiple factors are considered when determining the highest and best use of land in an expropriation.¹¹ However, generally, "the current use of the property is presumed to be the highest and best use."¹²

The Port's expert appraiser, Bennett Oubre testified extensively as to his review of the appraisal reports offered by VDP's and the Port's experts. In reviewing the testimony regarding the rationale for the differing appraisals, we find Mr. Oubre's testimony realistically evaluated the character of the Property. Mr. Oubre acknowledged how specialized the Property was while also taking into account the attributes that were problematic. During his testimony, he explained various flaws within VDP's experts' appraisals. The most significant criticism Mr. Oubre had was the use of "extraordinary assumptions." Those "extraordinary assumptions" included zoning and permitting issues as well as the water depth of the docks and its proximity to non-industrial areas. Thus, his testimony supports the highest and best use of the Property to be the layberthing operations that VDP was using the Property for at the time of expropriation. We find his assessment of the condition of the property to be representative of and consistent with the

¹¹ According to the Supreme Court:

Factors which may be considered include: market demand; proximity to areas already developed in a compatible manner with the intended use; economic development in the area; specific plans of business and individuals, including action already taken to develop the land for that use; scarcity of the land available for that use; negotiations with buyers interested in the property taken for a particular use; absence of offers to buy the property made by the buyers who put it to the use urged; and the use to which the property was being put at the time of the taking.

Exxon Pipeline Co. v. Hill, 2000-2535 (La. 5/15/01), 788 So.2d 1154, 1160.

¹² *Id.*

evidence presented as a whole.¹³ During his testimony, he relied on estimates from the Port's expert engineer, Patrick Flowers and his own appraisal of the land value to formulate a depreciated value of improvements of \$23,515,404 and land value of \$3,962,000. Although Mr. Oubre stated that in his opinion this valuation was high, we find it is a reasonable estimation for the purpose of determining just compensation. However, when valuing the improvements one of the docks had been omitted. Based on Dr. Ragas' valuation, the depreciated value of the omitted dock was \$667,406.

Using the estimates discussed above, we find the record supports an estimated replacement cost after depreciation, of \$28,764,685.¹⁴ Based on the record, we find this to be a credible and accurate valuation of the Property. Accordingly, the trial court's award of just compensation is increased to \$28,764,685, together with interest and attorneys' fees as provided for by law. The matter is remanded for further proceedings.

AFFIRMED AS AMENDED AND REMANDED

¹³ "The characteristics examined by the experts cannot be speculative and must consider the property in its use at the time of expropriation." *Exxon*, 2000-2535, p. 11, 788 So.2d at 1162.

¹⁴ This figure was arrived at by valuing the depreciated replacement cost of docks 1,2,4, and 5 (as per the Port's expert engineer, Dr. Flowers), plus land (\$3,962,000) at \$27,477,404; plus a depreciated value for dock 3 of \$667,406 (using Dr. Ragas' valuation); plus \$619,875, the depreciated replacement cost for site improvements.

