Opinion issued May 22, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00765-CV

BERNARD J. MORELLO AND WHITE LION HOLDINGS, L.L.C., Appellants

V.

SEAWAY CRUDE PIPELINE COMPANY, LLC, Appellee

On Appeal from the County Court at Law No. 3
Fort Bend County, Texas
Trial Court Case No. 13-CCV-050231

O P I N I O N

This is a statutory condemnation case. Seaway Crude Pipeline Company, LLC sought to construct a common-carrier crude-oil pipeline that would travel the length of the State of Texas, from the Gulf Coast to Oklahoma, and would include in its path a 115-acre tract of land owned by Bernard Morello and a contiguous 82-

acre tract owned by Morello's holding company, White Lion Holdings, L.L.C. (collectively, Morello), near the City of Rosenberg, Texas. After Seaway and Morello failed to agree on terms for the pipeline installation, Seaway began condemnation proceedings. Special Commissioners were appointed, and an appraisal of damages was determined. Morello filed objections in the trial court.

Seaway moved for partial summary judgment, and Morello filed a plea to the jurisdiction. Both motions addressed whether Seaway effectively declared a necessity for the taking and, if it did, whether Morello presented any summary-judgment evidence in support of his affirmative defenses that Seaway acted arbitrarily or in bad faith, which, if found, would remove the conclusiveness of Seaway's necessity determination.[1] The trial court ruled in Seaway's favor on both motions.

Seaway also moved to strike various experts retained by Morello to opine on future uses of his property, damages for the taking of the easement, and damages to the remainder of the property because of the taking. The trial court granted Seaway's motions to exclude, leaving Morello without damages evidence on lost market value of the remainder.

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[1] Both parties agree that the necessity determination, as applied to the facts of this condemnation challenge, is a jurisdictional requirement. *See Whittington v. City of Austin*, 174 S.W.3d 889, 903 n.11 (Tex. App.—Austin 2005, pet. denied) ("*Whittington I*").

The trial court entered a final judgment in Seaway's favor, holding that Seaway could condemn easements across the land and ordering an award of approximately $88,000 to Morello for the taking, which was the amount Morello's expert had opined was the market value of the property actually taken, without any compensation for loss of market value of the remainder of the land.[2] *See City of Austin v. Cannizzo*, 267 S.W.2d 808, 812 (Tex. 1954) (noting that, when government takes only part of property, three controlling issues are (1) "market value of the land taken, considered as severed land," (2) "market value of the remainder of the tract immediately before the taking," and (3) "market value of the remainder of the tract immediately after the taking").

Morello challenges the trial court's judgment in four issues. In his first two issues, he contends that the trial court erred in ruling for Seaway and against him on Seaway's summary-judgment motion and his plea to the jurisdiction. He argues that Seaway failed to demonstrate that it determined a necessity for the taking and that he proved, or at a minimum presented more than a scintilla of summary-judgment evidence in support of, his affirmative defenses. In his last two issues, Morello contends that the trial court erred in denying his motion for costs and in excluding and limiting his experts' testimony.

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[2] Seaway was authorized to immediately construct the pipeline within the court-authorized easement, even though Morello appeals the judgment. The pipeline was completed and went into service in late 2014.

We affirm.

Background

There are currently three Seaway pipelines that cross Morello's two tracts of land (the Property). The first pipeline was laid in 1975, before Morello purchased the Property. The second pipeline was laid in 2014 and is the subject of this suit. A third pipeline was laid afterward and is not a part of this litigation.

First Seaway pipeline

In 1975, a previous owner of the Property entered into a Permanent Easement Agreement with Seaway that established a 60-foot pipeline easement running north-south across the Property. According to Morello, the terms of the 1975 agreement were favorable to the landowner and his future development of the land because Seaway agreed that it would move the pipeline at its own expense to allow future development. Since the 1970s, Seaway has operated a common-carrier pipeline that crosses the Property under the terms of the 1975 agreement as the pipeline travels from the Texas Gulf Coast to Oklahoma.

Morello purchases land with existing pipeline and other burdens

Morello purchased the Property in 2004. The land, combined, is approximately 200 acres. When purchased, the Property already had the 1975 easement and pipeline in place. It also was subject to a 1988 Texas Commission on Environmental Quality compliance plan that addresses groundwater contamination

in the northeastern corner of the Property that resulted from earlier use of the site for industrial pipe manufacturing. Three vacant metal buildings remain in that corner of the Property. The TCEQ plan limits the use of the 17 acres surrounding those buildings. Litigation between the TCEQ and Morello regarding plan compliance and related penalties remained pending when the trial court heard the dispositive motions in this litigation.[3]

Of particular interest to Morello, the Property has rail lines along its southern border. The lines are used by Union Pacific Railroad and Kansas City Southern Railroad. The Property has 3,500 feet of rail line frontage but has no railroad spurs to connect it to the rail lines. There is a high-voltage electricity transmission line, with its own easement, that runs between the Property and the rail lines.

There are roadways along two sides of the Property to the east of the 1975 pipeline. Scott Road is on its eastern boundary and can support industrial and heavy traffic. Muegge Road is on its northern boundary and can support only lighter traffic. There is no road frontage or improvements to the west of the pipeline. Below is a rough schematic of the Property.

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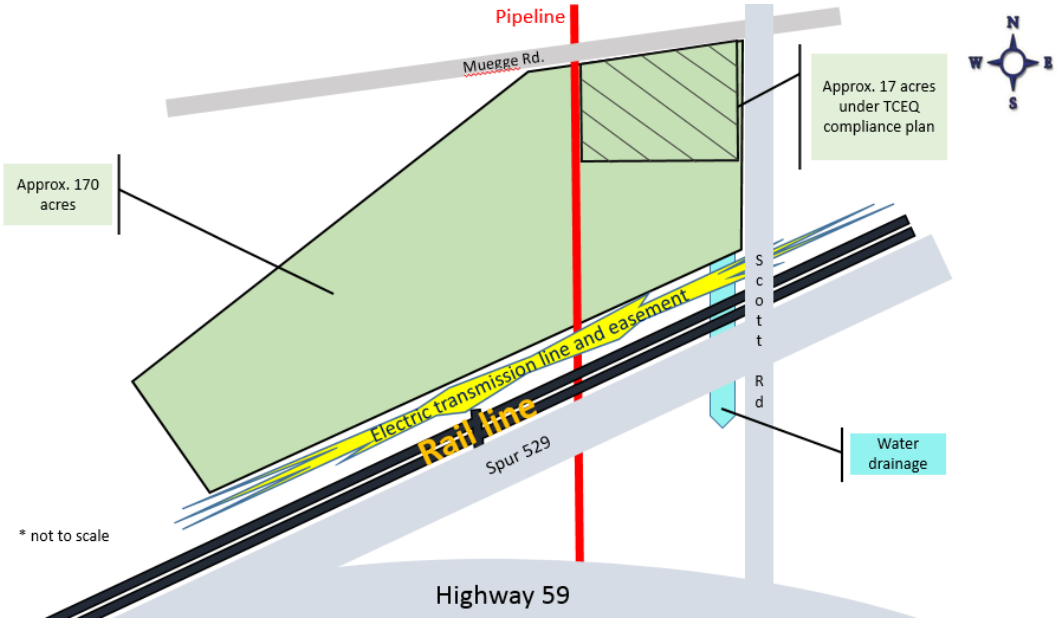
[3] In 2006, the State sued Morello and White Lion for violating the 1998 TCEQ compliance plan. *See State v. Morello*, No. 16-0457, 2018 WL 1025685, at *1 (Tex. Feb. 23, 2018); *White Lion Holdings, L.L.C. v. State*, No. 01-14-00104-CV, 2015 WL 5626564, at *2 (Tex. App.—Houston [1st Dist.] Sept. 24, 2015, pet. denied) (mem. op.).



In Morello's view, the Property's proximity to the rail lines made it ideal for a "rail-served, heavy truck served, industrial warehouse development." In 2009, five years after he purchased the Property, Morello wrote a letter to Kansas City Southern Railroad (but not the other rail line, Union Pacific) about obtaining rail service to the Property. He enclosed a summary site plan and aerial photograph of his land but did not specifically state his plans or provide any drawings or schematics for a rail-served industrial distribution center.[4]

[4] In March 2015, almost two years after the taking, Morello again contacted Kansas City Southern Railroad about obtaining rail service to the Property. The railroad responded in writing, stating that before it could hold any productive conversations with Morello, it would need projections on rail use, "including but not limited to rail traffic volumes, origins and destinations of rail traffic, frequency of loading and offloading, commodities and products shipped, and type of rail cars used," along with a diagram and conceptual plan for the development. There is no evidence that Morello provided the requested information.

In this lawsuit, Morello has stated an intent to develop the Property for heavy industrial use and to connect the land to the rail lines, but the record does not contain any evidence that he has taken any concrete steps toward that development. The land has remained relatively unchanged since its purchase, with no industrial development. It continues to be in a raw, undeveloped state, except for the three older metal buildings that sit vacant.

Morello enters into development agreement with City of Rosenberg

In 2012, Morello executed a Development Agreement with the City of Rosenberg that kept the Property in the City's extraterritorial jurisdiction and immune from city taxes but also required Morello to obtain the city's prior written consent to use the Property for anything other than agricultural use. The Development Agreement remains in effect until 2027.

Seaway plans second pipeline parallel to first

That same year, Seaway decided to add a second pipeline to its common-carrier pipeline system. The $2 billion upgrade would allow it to move crude oil in both directions simultaneously. The new pipeline would cross 2,820 separate tracts of land and travel in "mostly a straight line" parallel to Seaway's existing pipeline from the Texas Gulf Coast to Oklahoma. Because the first pipeline transverses Morello's land, the second pipeline would as well.

In June 2012, Seaway adopted a unanimous written Consent of its management committee, which states that the committee "hereby determines that there is a public need and necessity" to have crude petroleum transported by a second pipeline through various listed Texas counties as part of its common-carrier system. *Cf.* TEX. NAT. RES. CODE § 111.019(a)–(b) (providing that common carriers may condemn rights-of-way and easements "necessary for the construction, maintenance, or operation of the common carrier pipeline").

Seaway undertook to acquire the easements necessary to construct the second pipeline parallel to its older pipeline. It selected the amount of land needed, according to its project management, with the goal of making the project "as safe as possible, as timely as possible, and as cost effective as possible." Seaway sought a 50-foot easement across the Property, adjacent to its existing 60-foot easement.

Seaway contacts Morello about acquiring the second easement

As part of the state-long project, Seaway approached Morello regarding a 50-foot-wide pipeline easement across the Property adjacent to the 1975 easement and pipeline. The total land covered by the second easement, which courts treat as severed land, is 2.766 acres. *Cannizzo*, 267 S.W.2d at 812 (stating that in partial takings, land taken is "considered as severed land"). Combined, the two adjacent easements would span 110 feet as they transverse the Property.

Morello was not opposed to a second pipeline on the Property, but he did resist having a second pipeline easement. He requested, as an alternative plan, that the second pipeline be laid within the original 60-foot easement. He wanted the second pipeline within the original, 60-feet easement because he believed doing so would cause the second pipeline to be subject to the favorable terms of the 1975 easement. If the second pipeline had its own easement, he would, in his view, effectively lose access to the 1975 easement's favorable terms, and that would negatively impact his development plans. But there is no evidence Morello ever communicated his reasoning to Seaway during the negotiations. Neither his affidavit nor Seaway's communication notes indicate that Morello explained to Seaway before the taking why he wanted the second pipeline to be laid within the original easement. Likewise, there is no evidence that Morello ever told Seaway that he was contemplating developing the Property by building railroad tracks and roads across the Property for a rail-served warehouse distribution center.

Seaway rejected Morello's request to use a single easement for both pipelines, with two right-of-way agents telling Morello that the existing easement could not be used for the second pipeline for "safety reasons" and that a second, 50-foot easement was needed. One of the agents, Blake Box, told Morello that he nonetheless would convey Morello's request to his supervisor. Morello never

received a response. Morello states that he felt "pushed" to make a monetary counter-offer instead of negotiating the placement of the pipeline.

Around the same time, Seaway attempted to arrange a lunch between Morello and a Seaway engineer, but Morello refused to attend. Morello explains his refusal, saying that Seaway "had already made up their mind that they were going to create a new easement," and lunch would not change their "foregone conclusion."

Seaway contends that negotiations for an agreed easement faltered because Morello failed to engage in the process. Seaway then sent Morello its "final offer to acquire easements," which Morello did not accept.

Condemnation proceedings and post-condemnation litigation

After making its final offer, Seaway began condemnation proceedings. The trial court appointed Special Commissioners to determine appropriate compensation. Morello did not appear for the hearing. As a result, at the hearing, the commissioners had before them only Seaway's appraisal, which included damages for the severed land but did not include any damages for loss of market value of the remainder. The resulting commissioners' award compensated for the actual taking but not for losses to the remainder. Seaway deposited the amounts awarded in the court's registry and took possession of its easements in August

2013, establishing the date of the taking. *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 186 (Tex. 2001) (Baker, J., concurring).

Morello filed objections to the Special Commissioners' findings with the trial court. *See* TEX. PROP. CODE § 21.018(a). He argued that Seaway and its agents had acted arbitrarily and in bad faith, among other assertions. Morello also filed motions for injunctive relief and motions to dismiss, which were denied.

Morello then filed a plea to the jurisdiction, arguing that Seaway acted arbitrarily and in bad faith and that the award did not adequately compensate him for the taking. Seaway filed a motion for partial summary judgment, seeking an order decreeing that it has the right to condemn the easements and dismissing Morello's affirmative defenses. Morello asserted in his response that Seaway's Consent impermissibly authorized the taking out of "convenience," instead of the statutorily required necessity. *Cf.* TEX. NAT. RES. CODE § 111.019(a)–(b) (providing that common carriers may condemn easements "necessary for the construction, maintenance, or operation of the common carrier pipeline").

Morello also argued that Seaway demonstrated bad faith while negotiating for the easement. According to Morello, Seaway used the condemnation process as a pretext to avoid its potentially costly contractual obligations to him under the 1975 easement agreement. Morello reads the 1975 pipeline easement as giving him an unfettered right to have Seaway move the pre-existing pipeline if his

development plans require route adjustments. He contends that a second easement for a parallel pipeline that does not have as favorable of terms would, in effect, negate the advantages of the first easement: there would never be a scenario in which Morello could legitimately demand that the 1975 pipeline be rerouted if he did not have a contractual right to also have the parallel 2014 pipeline similarly rerouted.[5] Morello has not identified any Seaway documents that evidence this alleged pretext motivation nor any pre-taking documents that discuss the cost of compliance with the 1975 easement agreement.[6]

Seaway subsequently moved to exclude Morello's experts on the grounds that they were not timely designated and their opinions were irrelevant, speculative, and unreliable. Morello filed a response, seeking leave to late-designate experts for good cause. Thereafter, the trial court struck some of Morello's designated experts and limited the testimony of others.

Seaway filed an amended motion for partial summary judgment, seeking a ruling that it properly declared a necessity for the taking, that Morello's affirmative

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5 The 1975 contract is silent regarding future pipelines placed in separate easements. So, if a second pipeline were installed that did not have similar contractual rights favoring Morello, and Morello began to develop the Property, he would retain the contractual ability to have input into adjusting the location of the first pipeline (under the 1975 agreement) but would have no ability to have input into adjusting the location of the second pipeline.

6 The parties conducted extensive discovery, including fifteen depositions and the production of over 200,000 documents.

defenses to the condemnation fail as a matter of law, and that Seaway has the power of eminent domain to condemn the specified portion of the Property. Seaway's motion argued, in the alternative, that Morello has no evidence that Seaway's condemnation is in bad faith or arbitrary. Morello filed a response and also filed an amended plea to the jurisdiction.

The trial court granted Seaway's motion for partial summary judgment and motion for no-evidence partial summary judgment and denied Morello's amended plea to the jurisdiction. Seaway moved for final judgment, arguing that the only remaining issue was the value of the portion of the Property taken and stating its consent to entry of judgment in the amount of $88,227 for that taking.

Final judgment was entered awarding that amount, and Morello appealed.

Relevant Condemnation Law

The Texas Constitution provides that "[n]o person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by consent of such person." TEX. CONST. art. I, § 17. Thus, private land may be condemned only for "public use" with payment of "adequate compensation." *Whittington v. City of Austin*, 174 S.W.3d 889, 896 (Tex. App.—Austin 2005, pet. denied) ("*Whittington I*"). The power of eminent domain must be conferred by the Legislature, either expressly or by necessary implication. *Anderson v. Teco Pipeline Co.*, 985 S.W.2d 559, 564 (Tex. App.—San Antonio

1998, pet. denied). Statutes granting the power of eminent domain are strictly construed in favor of the landowner and against the condemnor. *Id.*

The statute that grants the power of eminent domain to common carriers is Section 111.019 of the Natural Resources Code, which provides, in pertinent part,

> (a) Common carriers have the right and power of eminent domain.
>
> (b) In the exercise of the power of eminent domain granted under the provisions of Subsection (a) of this section, a common carrier may enter on and condemn the land, rights-of-way, easements, and property of any person or corporation *necessary* for the construction, maintenance, or operation of the common carrier pipeline.

TEX. NAT. RES. CODE § 111.019(a)–(b) (emphasis added).

"The condemnor's discretion to determine what and how much land to condemn for its purposes—that is, to determine public necessity—is nearly absolute." *Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257, 268 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). And a condemnor's determination that a pipeline or other large-scale project is globally necessary and serves a public purpose suffices without the condemnor having to make granular determinations of necessity as to each tract of affected land. *Anderson*, 985 S.W.2d at 566 ("Teco was not required to produce a resolution finding that the Andersons' particular tract of land was necessary for the project."); *Houston Lighting & Power Co. v. Fisher*, 559 S.W.2d 682, 685–86 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.) (holding that board's approval of project for "Cedar Bayou to Webster

right-of-way" was sufficient to demonstrate that specific tract of land along route also was necessary); *cf.* TEX. GOV'T CODE § 2206.053(b) (providing that single "resolution . . . may be adopted for all units of property to be condemned").

One rationale for the high degree of discretion afforded condemnors in their necessity determinations is that, if less deference were given and each piece of a project were scrutinized for necessity, a finding that one small piece of a larger-scale project was not necessary could derail an entire project. *Wagoner v. City of Arlington*, 345 S.W.2d 759, 763 (Tex. Civ. App.—Fort Worth 1961, writ ref'd n.r.e.). In other words, one factfinder might conclude that the land in question was not necessary for the project, resulting in the destruction "of an entire project . . . because of the inability to obtain the small part of land which [was] made the subject of the particular condemnation suit." *Id.*; *see City of Austin v. Whittington*, 384 S.W.3d 766, 778 n.7 (Tex. 2012) ("*Whittington III*") (stating that courts should not second guess advisability of takings because tract-specific challenges to large-scale projects might result in takings being upheld in one county and invalidated in another, making straight-line courses difficult to secure); *see also Newsom*, 171 S.W.3d at 269 (discussing *Wagoner* and rationale for deference to necessity determination).

The condemnor's determination of necessity is presumptively correct and treated as conclusive, unless the landowner establishes an affirmative defense such

as arbitrariness or bad faith. *See FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619, 629 (Tex. 2008); *Hous. Auth. of City of Dallas v. Higginbotham*, 143 S.W.2d 79, 88 (Tex. 1940); *Anderson*, 985 S.W.2d at 565. The landowner has the burden of proof for its affirmative defense. *Clear Lake City Water Auth. v. Clear Lake Country Club*, 340 S.W.3d 27, 35 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *Newsom*, 171 S.W.3d at 269.

The landowner establishes its affirmative defense "by negating 'any reasonable basis' for determining what and how much land to condemn." *Clear Lake City Water*, 340 S.W.3d at 35 (quoting *Newsom*, 171 S.W.3d at 269); *compare Newsom*, 171 S.W.3d at 270 (stating that landowner could negate any reasonable basis by showing that condemnor "had completely abdicated its responsibilities in determining whether, what, or how much land to condemn" when it turned that decision over to interested party) *with Ludewig v. Houston Pipeline Co.*, 773 S.W.2d 610, 614–15 (Tex. App.—Corpus Christi 1989, writ denied) (holding that landowners' evidence that condemnor could have adopted different plans and taken less of their land was no evidence of arbitrary behavior if condemnor reached reasoned decision to do otherwise).

Whether the condemnor's determination of necessity was arbitrary or in bad faith generally is a question of law for the court. *Whittington III*, 384 S.W.3d 778 & n.7. "The trial court should only submit the issue to a jury if the underlying facts

are in dispute." *Id.* at 778. Thus, summary judgment against a landowner on the landowner's affirmative defense that the condemnor acted arbitrarily or in bad faith with regard to its necessity determination may not be granted if the landowner proffers evidence creating a factual dispute regarding the necessity determination. *See id.*

The parties have analyzed the issue of Morello's affirmative defenses, both at the trial court and on appeal, under the assumption that bad faith with regard to single-tract negotiations impacts necessity only as to that single tract of land. But, because a necessity determination for a large-scale project provides the necessity determination for all constituent tracts, it is not clear what the effect would be if there were a finding of tract-specific bad faith within a large-scale project.[7] We need not determine whether a landowner's arbitrariness defense should be examined in the context of a specific tract's necessity or project-wide necessity

[7] We note that a condemnor's statewide necessity determination logically may be treated as a necessity determination for each constituent tract, making an examination of a particular tract for the landowner's affirmative defense not inconsistent with a rule that project-wide necessity determinations suffice. But, if a tract-specific necessity determination is not required as part of a condemnor's affirmative proof and is not to be set aside unless it is arbitrary or in bad faith, the effect of tract-specific bad faith is unclear. We have located no case law holding that tract-specific bad faith sets aside necessity only as to the specific tract or that it sets aside an entire project, but we are mindful that both parties take the position that necessity was a jurisdictional requirement for Seaway to condemn any of the lands used to construct this second pipeline. *See* note 1 *supra*; *see also Whittington I*, 174 S.W.3d at 903 n.11; *Anderson v. Teco Pipeline Co.*, 985 S.W.2d 559, 566 n.5 (Tex. App.—San Antonio 1998, writ denied).

given our conclusion, discussed below, that there is no evidence to support Morello's affirmative defenses.

Necessity Determination

Seaway's motion for partial summary judgment and Morello's plea to the jurisdiction both raised the issue of Seaway's necessity determination and the conclusiveness of that determination. Morello seeks a reversal of the trial court's ruling on both motions and argues that the proper resolution is to sustain his plea to the jurisdiction, with the result that Seaway did not have the power of eminent domain to take its easement or to install, and now operate, the second pipeline.[8] We address the trial court's ruling on those two motions together.

A. Standard of review

Morello's plea to the jurisdiction and Seaway's summary-judgment motion were effectively cross-dispositive motions and are reviewable under the de novo standard that applies to cross-motions for summary judgment; therefore, we will review both motions de novo and render the judgment that the trial court should

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[8] Morello argued in his response to Seaway's amended motion to exclude designated experts Sikes and Carter that Seaway acted arbitrarily and "such conduct negates" Seaway's "right to take at all," meaning that the pipeline could be forced to shut down until Seaway properly condemns an easement. At oral argument, Morello asserted that he would not seek to shut down the pipeline but instead to have the second pipeline moved into the area covered by the 1975 agreement and subject to that agreement's terms. He concedes, however, that he believes he would have the legal right to require the state-long pipeline to be shut down while awaiting a compliant necessity determination and pipeline installation.

have rendered. *See Harris Cty. Hosp. Dist. v. Textac Partners I*, 257 S.W.3d 303, 311–15 & n.11 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

B. The Management Consent included a necessity determination

Morello's first argument is that the June 2012 Management Consent did not effectively declare a public necessity to invoke the right of eminent domain. Seaway relies exclusively on its Consent to establish that it made a necessity determination.

Morello focuses on a particular Consent resolution that authorizes Seaway "to file or cause to be filed . . . proceedings in eminent domain for the acquisition of such rights and interests in the land that may be *necessary, convenient, or required* for the purpose of . . . constructing, installing, . . . [or] operating . . . the common carrier Pipeline . . . ." (Emphasis added.) Morello argues that the Consent is fatally flawed in that it permits condemnation of property for the impermissible reason of mere convenience.

The Consent is a six-page document. Morello focuses on a single phrase within that larger document. Yet we are not permitted to read excerpts of legal documents in isolation to determine the drafter's intent; instead, we are to read them in their entirety, allowing each portion to provide context and guidance for the whole. *See Hysaw v. Dawkins*, 483 S.W.3d 1, 13 (Tex. 2016). The remainder of the Consent contains repeated declarations that Seaway determined a necessity

existed and does not support a conclusion that Seaway relied on mere convenience as a basis for condemnation.

1. Recital paragraph

The Consent's recital paragraph refers to public necessity three times. First, the recital states that Seaway "hereby determines that there is a *public need and necessity* to have oil . . . transported by pipelines through [various listed] Counties in the State of Texas . . . as a part of its common carrier System." It continues by stating that Seaway "finds and hereby affirms that the *public convenience and necessity* require the location, construction, operation and maintenance of said common carrier Pipeline . . . for the receipt, transportation . . . and processing of oil . . . through [various listed] Counties in the State of Texas." Finally, it states that the location will be "as *public necessity and engineering feasibility* may require," thus adding a limitation to the location of the pipeline to that which is both necessary and feasible. (Emphasis added.)

Morello argues that recital paragraphs cannot be considered to determine a legal document's meaning. But that rule has exceptions. While recitals are generally not considered part of a legal document, they may be considered if the drafter intended them to be. *All Metals Fabricating, Inc. v. Ramer Concrete, Inc.*, 338 S.W.3d 557, 561 (Tex. App.—El Paso 2009, no pet.). The Consent directly resolves that "all findings . . . as hereinabove recited be and the same are hereby

approved, adopted, and affirmed." We therefore will consider the recital paragraph, which include three statements that Seaway determined a public necessity, in determining the meaning of the agreement as a whole.[9]

2. Resolution paragraphs

In addition to the recital, the Consent's first two resolution paragraphs state that Seaway "hereby determines that in order to provide efficient common carrier service to the public . . . public convenience and *necessity* requires the location, construction, operation and maintenance of the common carrier Pipeline and appurtenant facilities generally along" the statewide route and that Seaway's agents are authorized to negotiate with "all persons or parties having or claiming an interest in the lands *necessary* for the location, construction, operation and maintenance of the common carrier Pipeline . . . ." (Emphasis added.)

The resolution paragraphs further authorize Seaway to exercise "the power of eminent domain for the acquisition of the *necessary* easement or easements . . .

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[9] Morello argues alternatively that the use of the conjunctive "and" in the recital—providing that Seaway found that "public convenience and necessity" required the pipeline—adds ambiguity that should be interpreted against the document's drafter. We disagree. To the extent Seaway determined that the pipeline is both necessary and convenient, the secondary finding is superfluous. *See Ex parte Williams*, 866 S.W.2d 751, 754 (Tex. App.—Houston [1st Dist.] 1993, no writ) (explaining that use of conjunctive "and" when listing two items means both have occurred and cannot be read to mean only one occurred); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 116 (2012) (discussing conjunctive/disjunctive canon of interpretation). The conjunction "and" does not inject ambiguity into the Consent.

for the construction of the common carrier Pipeline" and to use discretion in "routing of all parts of said common carrier Pipeline . . . and in causing said eminent domain proceedings to be filed." (Emphasis added.)

3. Consent, when read as a whole, contains necessity determination

Reading the Consent as a whole, and giving consideration to all of its terms, we conclude that Seaway expressed a determination of necessity and did not purport to authorize condemnation out of mere convenience. *See Circle X Land & Cattle Co., Ltd. v. Mumford Indep. Sch. Dist.*, 325 S.W.3d 859, 865–67 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) (concluding, on review of all evidence, that condemnor made necessity determination even if minutes did not expressly state finding); *cf. Whittington I*, 174 S.W.3d at 904–05 (holding that "magic words" of necessity are not needed and that determination of necessity can be established through evidence of affirmative acts manifesting determination). We overrule Morello's first issue.

Arbitrariness or Bad Faith

Morello next contends that the trial court erred in ruling against him on his arbitrariness and bad faith affirmative defenses. First, he argues that he presented evidence that Seaway arbitrarily delegated its condemnation authority and, in doing so, abused its discretion. Second, he argues that he established that Seaway failed to supervise land-choice decisions and, thus, acted arbitrarily. Third, he

argues that documentary and testimonial evidence established disparate treatment of landowners by Seaway and, with it, bad faith, because Seaway willingly negotiated with other landowners while ignoring his tract-specific requests. He argues that he established his affirmative defenses as a matter of law or, alternatively, that his summary-judgment evidence raised a fact issue to preclude summary judgment in Seaway's favor.

A. Applicable law and standard of review

A condemnor's determination of necessity is treated as conclusive unless the landowner establishes an affirmative defense such as bad faith or arbitrariness. *See FKM P'ship*, 255 S.W.3d at 629 & n.9. The landowner establishes its affirmative defenses "by negating 'any reasonable basis' for determining what and how much land to condemn." *Clear Lake City Water*, 340 S.W.3d at 35 (quoting *Newsom*, 171 S.W.3d at 269); *see Circle X Land & Cattle Co.*, 325 S.W.3d at 864. Whether the necessity determination was in bad faith or arbitrary is a question of law for the court, unless there is a factual dispute regarding the necessity determination. *See Whittington III*, 384 S.W.3d at 777–78. Such a factual dispute will preclude summary-judgment against a landowner on his affirmative defenses. *See Newsom*, 171 S.W.3d at 273–76.

B. No evidence of arbitrariness through delegation of eminent domain power in violation of *Newsom*

Morello relies on *Newsom* to argue that Seaway's delegation of decision-making authority abused its discretion, amounted to arbitrary action, and, as a result, negated the conclusiveness of Seaway's necessity determination. *Newsom* is distinguishable on its facts.

In *Newsom*, two separate subdivisions were being developed near Frank Newsom's land. *Id.* at 261. The Harris County Flood Control District required each development to include drainage management features. One developer was required to expand an existing drainage ditch. The other developer, led by John Santasiero, was required to build a retention pond. Both developers attempted to purchase portions of Newsom's neighboring land to build the necessary drainage management features, but Newsom rejected their offers. *Id.* Both developers asked the District to use its eminent domain power to condemn separate portions of Newsom's property for the developers' benefit. The District did so, the land was condemned, and Newsom sued to set aside the takings.

Newsom presented evidence that the District had not undertaken any effort to determine an appropriate location for the required drainage improvements. Instead of analyzing the issue itself, the District relied on Santasiero's representations on the matter. *See id.* at 272–73. There was no evidence that the District did anything to confirm Santasiero's statement that Newson's land was the

appropriate location for the improvements or to address the conflict between Santasiero's and Newsom's positions related to the dispute. *See id.* at 272.

Newsom attempted to establish his arbitrariness affirmative defense by showing that the condemnor had "completely abdicated its responsibilities in determining whether, what, or how much land to condemn." *Id.* at 270. We concluded that Newsom raised a fact issue on the defense by presenting evidence that the District allowed Santasiero to identify Newsom's land as the appropriate target for condemnation—a decision that directly advanced Santasiero's financial interests at Newsom's expense—without taking steps to verify that Newsom's land was the appropriate location for the needed drainage features. *See id.* at 275–76.

The *Newsom* facts are wholly distinguishable from those surrounding Seaway's pipeline. In *Newsom*, there were several landowners that owned properties closely situated to where drainage was needed, yet the condemnor made no effort to determine if one property was better suited than the others for constructing the necessary drainage pond. *See id.* at 272–73. Instead, the condemnor followed one landowner's wishes and, in doing so, directly and negatively affected an adjacent landowner's interests. *See id.* The delegation of the condemnation decision-making authority to a party with a pecuniary interest in selecting his neighbor's land as the target of condemnation was the controlling aspect of the *Newsom* decision; it is not present here.

There is no evidence that Seaway turned routing decisions over to individuals with competing interests. Morello does not point to evidence that Seaway let those with a conflict of interest decide which property to condemn. Thus, *Newsom* is factually distinguishable.[10] *See Whittington III*, 384 S.W.3d at 783–84 (similarly distinguishing *Newsom*). Morello presented no evidence of arbitrariness through an impermissible delegation of its power of eminent domain.

C. No evidence of arbitrariness through failure to supervise agents' land-choice decisions

Morello's next arbitrariness argument is that Seaway failed to adequately supervise its contractors' land choices. Morello argues that allowing contractors to make unsupervised land choices is evidence that Seaway did not find particular lands to be necessary for its project. He points to statements by Seaway's Chairman that the Management Committee "never made a determination of what land was necessary" and that the Committee merely "gave [its contractors] a general route" and left it to them "to go out there and do the job."

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[10] *Newsom* is further distinguishable based on the type of feature being constructed under the power of eminent domain and the logistical realities of planning for such a project. The *Newsom* developers were constructing discrete land features that would fit within a single tract of land. *See Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257, 261 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). Seaway was endeavoring to build a continuous pipeline that would span the length of the state and cross thousands of properties. Seaway's Consent contained an attachment that illustrated the pathway Seaway had determined was necessary, which generally tracked the path of Seaway's existing pipeline. The constraints inherent in planning a route for hundreds of miles of connected pipes are not analogous to *Newsom*'s stand-alone pond on a single property.

But this argument presumes Seaway had an obligation to make a necessity determination as to each parcel versus an overarching determination that the general route was necessary. Granular necessity determinations are not required. *See Anderson*, 985 S.W.2d at 566 (holding that resolution determining necessity for whole pipeline is sufficient and that resolution determining necessity of individual tracts is not required); *Fisher*, 559 S.W.2d at 686 (holding that board's approval of entire project as necessary was sufficient to demonstrate that specific tract of land along route also was necessary). Evidence that a condemnor failed to determine that each constituent parcel of a state-long pipeline project was necessary is no evidence of arbitrariness. *See Anderson*, 985 S.W.2d at 566. Thus, we conclude that Morello presented no evidence of arbitrariness through lack of supervision of land choices.

D. No evidence of arbitrariness through disparate negotiations

Morello's final arbitrariness argument goes to the heart of his dispute with Seaway, which, according to Morello, "centers on Seaway's refusal to consider repeated requests to make adjustments that would preserve the integrity and future development of the Property." He argues that Seaway failed to consider the specific facts of his land in deciding how large of an easement was necessary and whether to approve his requested concessions, such as installing the pipeline at a greater depth to avoid interference with future rail access and placing the second

pipeline within the first easement. Morello contrasts his treatment with evidence that Seaway negotiated with other landowners and made concessions to their easement-placement requests. He argues that this disparate treatment is evidence of Seaway's arbitrariness.

Whether Seaway acted arbitrarily depends on whether it had a reasoned basis for its decision of what and how much land to condemn. *Clear Lake City Water*, 340 S.W.3d at 35; *see Newsom*, 171 S.W.3d at 269; *Circle X Land & Cattle Co.*, 325 S.W.3d at 864; *see also FKM P'ship*, 255 S.W.3d at 629. Therefore, we begin our analysis of Morello's disparate-treatment argument by considering the reasoned basis asserted by Seaway for its condemnation decisions.

1. Seaway cites safety as its reasoned basis

Seaway management testified that, when Seaway offered to purchase Morello's land—which is the relevant time for determining whether Seaway acted arbitrarily[11]—there were safety concerns inherent in locating operational pipelines less than 50 feet from one another. John Macon, a mechanical engineer with management responsibility over the Seaway project and discretion to determine the pipeline route, testified that a 50-foot easement is the "standard" that Seaway

[11] *Cf. Ludewig v. Houston Pipeline Co.*, 773 S.W.2d 610, 614–15 (Tex. App.—Corpus Christi 1989, writ denied) (holding that condemnor did not act arbitrarily by considering future possible pipeline-related needs when determining necessity, even those properly characterized as "remote" at time of condemnation).

"always starts with" when determining the amount of land to condemn.[12] He further testified that "part of" Seaway's reasoning is to avoid "work anywhere near the existing live line just for pure safety-related issues. We don't want these big tractors on top of it, so we slid the easement over to the side and we do all of our work off the easement and existing line."

In response to Morello's contention that the second pipeline could have been laid within the original easement, Macon testified, "It's not as good of an idea as doing it this way [with separate easements]. It is more difficult to lay it in the same easement. It does have inherent risk with it. The closer you are to that pipeline the less safe it is; that's just the facts of the situation. It will be slower and it will be more expensive." Seaway argues that this safety concern provided a reasoned basis for its decision and disproved arbitrariness as a matter of law, entitling Seaway to summary judgment on Morello's affirmative defenses.

2. Morello argues other evidence negates safety as a deciding factor for rejecting his specific requests

Morello identifies other summary-judgment evidence that he contends raises a fact issue, at a minimum, on whether the safety issue actually influenced

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[12] This 50-foot standard has historical precedent. *See* TEX. NAT. RES. CODE § 111.0194 (a), (d) (providing that pipeline "is presumed to create an easement . . . that extends only a width of 50 feet as to each pipeline laid under the grant or judgment in eminent domain prior to January 1, 1994" and that this presumption "shall apply separately as to each pipeline under a grant or judgment which allows more than one pipeline on the subservient estate"). In his brief, Morello concedes that "a fifty-foot easement is standard."

Seaway's decision-making. He points to testimony from Macon suggesting that Seaway did not consider whether an exception could be safely granted for the Property. And he notes that an internal Seaway standard establishes that, while a 50-foot easement is standard for safe pipeline installation, a lesser distance—as small as 10 feet—may be appropriate for a second line within the same easement.[13] According to Morello, this is some evidence that Seaway had discretion to establish a narrower easement and that it could have done so safely.

Morello also points to testimony from Seaway project managers indicating that they never considered Morello's specific requests, which means that they could not have made a reasoned decision to reject them. Morello points further to testimony from Jan Paradis, Seaway's right-of-way supervisor. Paradis testified that she told management of Morello's request that the second pipeline be placed within the first pipeline's easement and that management told her to simply buy off the surveyor's plat, suggesting that Morello's specific concerns and requests were not considered.

Morello contrasts his treatment by Seaway with evidence that Seaway agreed to at least nine other landowners' requests that it lay its second pipeline in a narrower easement or, in some cases, within the original easement and that Seaway

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[13] The standard appears to address a second pipeline built simultaneously with the first pipeline and as part of one easement. It does not expressly discuss a second pipeline built at a later time.

did not rely on safety concerns to reject those landowners' requests. With one landowner, Seaway agreed to an easement only 25 feet wide. With another landowner, Seaway agreed to lower the existing 1975 pipeline from 36 inches to 60 inches and to lay the new pipeline at a 60-inch depth to accommodate future use of the property. With two other landowners, Seaway agreed to a five-foot nonexclusive easement. There is evidence that Seaway made similar concessions with three other landowners along the pipeline's path.

Morello also points to an internal Seaway memo from Tim Dyk to Rick Blake—one of Dyk's supervisors—regarding the size of easement to be obtained on yet another landowner's property. The memo acknowledged that from "the beginning of the project we have agreed to a 5' permanent" right of way across that particular landowner's property. The memo then stated that Seaway needed to alter its position and insist on a wider, 50-foot right of way on that land because "we were recently at a hearing in the same courts for the Morello tract testifying that we require a 50 [foot] wide" right of way.

But Morello does not attempt to show that the conditions surrounding any of these other tracts were reasonably similar to those for his land. He does not present any details concerning the safety concerns and issues involved in the other properties, their existing and proposed future use or development, the extent to which those landowners had taken steps already to develop their properties, or

whether the concessions occurred under reasonably similar circumstances. We do not know if Morello's requested concessions are comparable to the other landowners' requested concessions.[14]

3. No evidence that Seaway acted arbitrarily or with bad faith

Without proof that concessions granted other landowners were comparable to those denied Morello or that the conditions and safety issues for the other properties were reasonably similar to those for the Property, Seaway's agreements with other landowners is no evidence that it acted arbitrarily in rejecting Morello's requests.

Moreover, Morello's argument fails to take into account that there is no evidence he ever told Seaway why he wanted the second pipeline laid within the first easement. By not explaining the reason he wanted a routing path that would take longer and cost more, Morello lost an opportunity to demonstrate at the time

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[14] For example, Morello has directed us to evidence that Seaway agreed to place its second pipeline within the original easement for Foster Farms Corridor, LLC, which is a concession Morello sought but was denied. But Morello fails to address how that concession fit within the larger negotiated deal between Seaway and Foster Farms. Perhaps the negotiated price was reduced in exchange for the concession. Perhaps it was in exchange for a different concession by Foster Farms. To that possibility, we note that the agreement includes a provision that allows Seaway to install a third pipeline without paying additional easement fees. Without a broader understanding of the Foster Farms negotiations, or those for other landowners, the comparability of their requests and Seaway's concessions are unknown.

that his request was a financially advisable, fact-based routing choice comparable to other landowners' circumstances and requests.

Morello next contends that, regardless of how the properties or requests compared, Seaway pre-determined that it would reject his request because its true intent was to insulate itself from contractual obligations arising out of the 1975 easement. According to Morello, if a new easement were created for a second pipeline, the terms of that easement would have effectively eliminated Morello's ability to enforce his pipeline placement preferences under the 1975 easement agreement. Morello's bad-motive argument is that Seaway was insulating itself from costly future pipeline-related expenses by placing another pipeline along the same route that did not have contractual relocation rights. Morello contends that Seaway's refusal to negotiate the easement width and pipeline placement with regard to the second pipeline, in this context, provides its own evidence of Seaway's bad faith.

But Morello did not present any direct evidence of such a motive. Instead, Morello argues that he established, or at least presented a fact issue, regarding this bad motive through circumstantial evidence and expert testimony.[15]

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[15] In his fourth issue, Morello challenges the trial court's exclusion of his expert, Dale Morris, designated to testify that Seaway's motive was to avoid the costs that would be incurred to comply with the terms of the 1975 easement. We discuss his exclusion below and conclude that the trial court did not abuse its discretion.

We reject Morello's ill-motives argument for two factual reasons and three legal reasons. First, had Seaway placed the second pipeline in the first easement, as Morello wanted, the 1975 agreement still only would have applied to the first pipeline. The 1975 agreement did not obligate Seaway to extend its terms to a second pipeline built on the Property. Second, Morello had a right to seek damages for the remainder. Thus, if he could have demonstrated that a rail-served industrial distribution center was a non-speculative use and was the highest and best use for the Property, he could have recovered mitigation costs and required Seaway to incur the costs that he claims Seaway was trying to save.

There are significant legal grounds for rejecting Morello's bad-faith argument as well. First, even if Seaway was motivated by a desire to save money, that does not dictate that Seaway had the ill motives Morello assigns to it. *See Ludewig*, 773 S.W.2d at 614 (condemnor's decision is not arbitrary when condemnor chooses "least expensive option" or "most economically feasible path for its pipeline"). Based on this record, Morello's improper motive assertion is pure speculation.

Second, Seaway's negotiation obligations are set forth in Section 21.0113 of the Property Code, which requires condemnors to make bona fide offers to voluntarily purchase land that may be subject to condemnation. *See* TEX. PROP. CODE § 21.0113. Section 21.0113 requires compliance with a statutorily-mandated

checklist for a bona fide offer; it does not also require good-faith negotiations.[16] *Cf. Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 185–87 (Tex. 2004) (in case decided before Section 21.0113's "bona fide offer" provision was enacted, holding that statutory requirement that condemnor demonstrate it was "unable to agree" with landowner on damages for voluntary sale of property did not include requirement of "good faith" negotiations). Morello does not dispute that Seaway complied with the Section 21.0113 checklist.

Third, the relevance of Morello's summary-judgment evidence addressing whether Seaway was more willing to consider other landowners' deviation requests than his own depends on whether Seaway had a reasoned basis for its decision on what and how much land to condemn. *See Whittington III*, 384 S.W.3d at 783; *Newsom*, 171 S.W.3d at 269; *Ludewig*, 773 S.W.2d at 614–15. Seaway's decision need not be the only feasible option or the option most advantageous to the landowner. *See Ludewig*, 773 S.W.2d at 614. Condemnors are permitted to reject viable alternative routing choices. *See id.* Evidence that there was a different pipeline route on the Property that was feasible and would have benefitted Morello

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[16] Morello also argues a non-statutory source for a good-faith requirement. He asserts that Seaway's internal Pipeline Design for Onshore Pipeline Standards required it to negotiate with landowners "to select a path that will minimize the potential for future land use conflict and potential damage to the line, and at the same time keep construction costs to a minimum." But failure to adhere to an internal policy manual, to the extent Morello's evidence suggests Seaway failed in this regard, does not show that Seaway violated a legal obligation to Morello.

does not establish arbitrariness in Seaway's routing decisions. *See id.* "Where there is room for two opinions, an action cannot be deemed arbitrary when it is exercised honestly and upon due consideration, regardless of how strongly one believes an erroneous conclusion was reached." *Id.*

Our focus must be on whether Seaway considered safety in determining that the state-long pipeline should generally not be built within 50 feet of an existing pipeline. It is not whether it was actually safer, in the eyes of Morello or his experts,[17] or whether an exception could have been granted for Morello.[18]

Seaway presented a reasoned basis for its pipeline-placement decision: it is generally safer to place pipelines 50 feet apart. Because it is safer and more

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[17] In his fourth issue, Morello challenges the trial court's exclusion of the opinion of his expert, Richard Kuprewics, that the Seaway pipeline could have been placed within the 1975 easement safely. We conclude below that the trial court did not abuse its discretion with regard to that exclusion.

[18] *Cf. Whittington III*, 384 S.W.3d at 781 (stating that "question is whether the condemnor actually considered the taking necessary for the public use—not whether the court believes the taking was actually necessary"); *id.* at 783 (decision on scope of condemnation "does not require the chosen course to be more feasible or better than the alternative," but rather, "forbids decisions not made according to reason or judgment"); *Ludewig*, 773 S.W.2d at 614 (condemnor's decision is not arbitrary when condemnor chooses "least expensive option" or "most economically feasible path for its pipeline"); *id.* (existence of feasible alternatives to condemnor's plan "does not constitute proof of an arbitrary and capricious action"); *id.* at 615 (condemnation of larger easement to address "remote" possibility of additional need constitutes legitimate, reasoned basis for decision); *Krenek v. S. Tex. Elec. Coop., Inc.*, 502 S.W.2d 605, 607–08 (Tex. Civ. App.—Corpus Christi 1973, no writ) (arbitrariness is not shown merely because alternative plan might be better, more convenient, or less expensive than condemnor's plan or because other experts "would have selected a different route or would have arrived at a different conclusion").

economical, Seaway adopted a default approach of using separate, 50-foot easements for its parallel pipelines. That Seaway negotiated other terms with some landowners and agreed to commit itself to constructing the pipeline within a smaller easement on a few tracts of land—an agreement that might well reflect a lower price as part of the negotiation give-and-take or differences between the properties or their safety issues—does not negate the reasoned basis for Seaway's decision. *See Ludewig*, 773 S.W.2d at 614–15 (concluding no arbitrariness given that condemnor stated reasoned basis for size of easement—future maintenance needs—even though there was only "remote" possibility that need would arise in future).

While Morello has presented evidence that placing the second pipeline within the 1975 easement was a feasible alternative, he has not presented evidence that Seaway's general safety standard was arbitrary or adopted in bad faith. Morello presented evidence that Seaway would potentially save future relocation costs by not subjecting the second pipeline to the terms of the 1975 easement, but selecting "the most economically feasible path for its pipeline is not evidence of arbitrary or capricious action." *Id.* at 614. It is not sufficient for Morello to demonstrate that Seaway *could* have placed the second pipeline in the 1975 easement; Morello must raise a fact issue that it is arbitrary not to do so. *Id*.

Seaway's decision not to further engage Morello after providing him with a bona fide offer also is no evidence of bad faith, even if Seaway did negotiate with other landowners. Because Morello did not raise a fact issue on arbitrariness or bad faith, we overrule his second issue.

The absence of evidence of arbitrariness or bad faith does not insulate Seaway from having to pay appropriate compensation to Morello. We address the question of appropriate compensation in Morello's fourth issue, which challenges the exclusion of experts on which he was relying to establish remainder damages.

Motion for Costs

In his third issue, Morello contends that the trial court erred by denying his motion for costs after Seaway amended its condemnation petition to include an agreement to pay future costs of pipe relocation under certain conditions. In his motion, Morello argued, on the one hand, that if Seaway had made a similar concession before it filed its condemnation lawsuit, "it is doubtful there would have been any need for this condemnation proceeding at all," and, on the other hand, that Seaway's purported concessions in the amended petition "may not be feasible."

A. Statutory provision and standard of review

Section 21.019(b) of the Property Code provides a mechanism for a landowner to recoup fees and expenses incurred defending against a condemnation suit that is later dismissed by the condemnor:

> A court that hears and grants a motion to dismiss a condemnation proceeding . . . shall make an allowance to the property owner for reasonable and necessary fees for attorneys, appraisers, and photographers and for the other expenses incurred by the property owner to the date of the hearing.

TEX. PROP. CODE § 21.019(b). This provision is designed "to discourage the commencement and subsequent abandonment of condemnation proceedings" and "to compensate the landowner for expenses incurred" during a condemnation proceeding that is later abandoned. *City of Wharton v. Stavena*, 771 S.W.2d 594, 595–96 (Tex. App.—Corpus Christi 1989, writ denied) (emphasis removed). Statutory construction is a question of law that we review de novo. *Colorado Cty. v. Staff*, 510 S.W.3d 435, 444 (Tex. 2017).

B. Case law

The Texas Supreme Court has held that Section 21.019(b) does not require a formal motion to dismiss or an order granting a motion to dismiss for a landowner to be entitled to fees and expenses related to an abandoned condemnation proceeding. *FKM P'ship*, 255 S.W.3d at 637. If an amended petition "functionally abandons the original condemnation claim and asserts a different claim," the

amendment may invoke the fee provision without a formal motion to dismiss. *Id.* at 636. We have located two cases in which an amendment was held to be a functional abandonment of a condemnation claim to invoke this fee provision.

In *FKM Partnership*, a university sought to acquire 47,008 square feet of land from a landowner, who refused to sell. *Id.* at 624. The condemnor filed a condemnation petition and obtained possession of the land. It later revised its plans, amended its petition to reduce the size of the condemnation to only 1,260 square feet, and returned the remaining land to the landowner. *Id.* at 624–25. The Court held that the amended petition functionally abandoned the original condemnation claim and entitled the landowner to recover fees and costs. *See id.* at 637.

The Court noted that there is "no bright line that can be drawn" regarding when an amendment reducing the size of a condemnation functionally abandons the original condemnation claim. *Id.* It identified three relevant factors though: (1) how much the condemnation claim has been reduced; (2) "whether the planned use of the smaller tract sought by amendment differs significantly from the tract originally sought"; and (3) "whether the potential future uses of the different tracts are similar." *Id.* Even though the university's identified uses for the different-sized tracts were similar, the Court held that the reduction of the taking by 97% was, as a

matter of law, a functional abandonment of the original claim, which entitled the landowner to recover Section 21.019(b) fees and expenses. *Id.*

In the second case, a functional abandonment of the original claim occurred when a condemnor filed three suits against a landowner to condemn three separate tracts of land, the three suits were consolidated, and the condemnor amended its petition to delete one of the three tracts from its suit. *State v. Tamminga*, 928 S.W.2d 737, 739–40 (Tex. App.—Waco 1996, no writ). Because the amendment "was not designed to reduce the amount of land to be taken at a single location or to clarify the interest to be taken," but, instead, to abandon a right to condemn a distinct tract of land while continuing to seek condemnation of the other two, the amendment was held to be equivalent to a dismissal of a condemnation suit. *Id.* at 740.

By contrast, fees and expenses were not recoverable in a case in which a condemnor amended its pleadings to alter the "configuration" of the taking and, with it, property "access," without changing the size of the tract to be condemned. *State v. Brown*, 262 S.W.3d 365, 366–70 (Tex. 2008). The Court held that the amendment was not a functional abandonment equivalent to a dismissal. *Id.* at 370.

C. Trial court did not err in concluding Seaway's amendment was not a functional abandonment equivalent to a condemnation-claim dismissal

Morello argues that the changes in Seaway's second amended petition amounted to a "material reduction in property rights taken" and qualified as a

"functional dismissal of the original proceeding . . . ." Morello describes the amendment as causing a "sea change in the core compensation facts," but does not explain how the pleading changes were equivalent to a functional abandonment of Seaway's initial condemnation claim.

1. The concession in Seaway's second amended petition

Seaway's second amended petition granted Morello the right to cross the pipelines for construction of various structures but prohibited him from endangering, obstructing, injuring, or interfering with access to the easement. It further provided—for the first time—that Seaway would, at its "sole cost and expense," lower or encase its second pipeline in the future as it deemed "necessary to permit Morello to construct" roads and railroad tracks across the easement.

Seaway's offer to pay these costs was contingent on Morello first providing it with (1) an agreement from a railroad company to provide rail service to the Property, (2) engineering design plans, (3) government permits and approvals for the planned construction, and (4) proof of funding for a rail-served industrial distribution center. The second amended petition stated that Seaway would complete the modification within 180 days after Morello or his successors provided proof of the four conditions. Seaway describes this as an effort to "accommodate" Morello's concerns about the depth of the pipeline placement, not an abandonment of its claim to condemn a 50-foot easement for its pipeline.

2. Morello's experts on impact of Seaway's concession

Morello designated three experts to testify concerning the significance of the changes to the amended petition in support of his motion for costs.

a) Mark Sikes

One of Morello's designated experts, Mark Sikes, is a real estate appraiser. Before Seaway amended its petition, Sikes opined that the Property's highest and best use ("best use"), both before and after the second pipeline, was a rail-served industrial distribution center. The best use could be "restored" after the second pipeline by incurring $2.16 million to lower the pipeline, more than $600,000 in other modification costs, and more than $300,000 in other development costs.[19] Thus, Sikes opined that the total cost to restore to best use is $3,112,500.

Sikes opined that Seaway's concession that it would pay these expenses "effectively prevent[s] industrial development of the land" west of the second pipeline. According to Sikes, the amended petition changed the best use for the remainder of the Property west of the pipelines to agricultural use because modifications could no longer restore the Property to its pre-existing best use. In other words, Sikes did not assert that Seaway's concession was worthless because the conditions were unrealistic or onerous and therefore Morello would still have

[19] Sikes stated that the second pipeline would require Morello to "incur additional development costs to cross the easement that did not exist before the taking." He utilized the development costs prepared by experts, Jack Carter and Dale Morris.

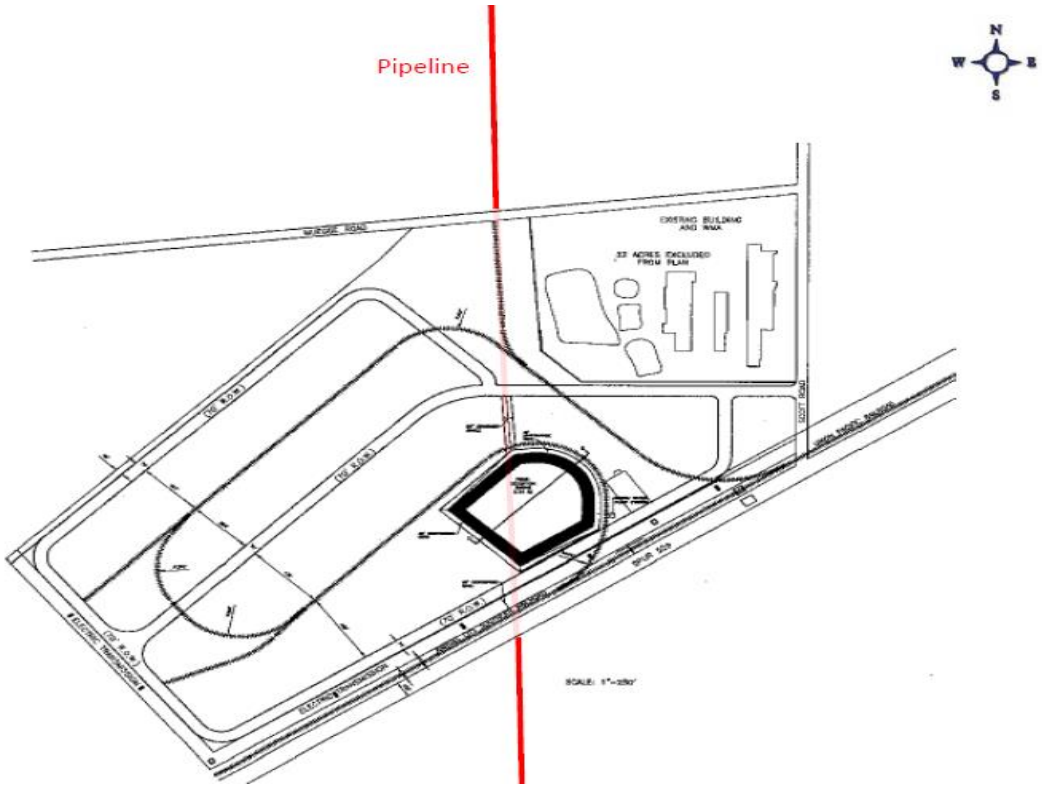
to pay the same costs to modify his land, leaving his damages unchanged. Instead, he asserted, without explanation, that the amended petition somehow affirmatively bars or precludes Morello from building a rail-served industrial distribution center and therefore a different measure of damages now applied.

As a result, Sikes no longer included in his second report the modification costs. Sikes, instead, conducted a study of four comparable tracts sold for agricultural use and concluded that the western remainder—the largest portion of the Property—had decreased in market value from $30,000 an acre as an industrial site to only $5,000 an acre as an agricultural site. The eastern remainder of just 64 acres "remains relatively unchanged and retains most of the same characteristics after the taking," so it did not suffer any change in damages valuation. Thus, even though the second amended petition declared that Seaway would pay the costs to lower or encase the second pipeline, Sikes's damage model for the remainder increased from $3.1 million to almost $3.3 million. So, the amended petition, according to Sikes, did not decrease Morello's damages; it actually increased them. Under that interpretation, the amended petition did not reduce or dismiss Seaway's condemnation.

b) Jack Carter

Before the second amended petition, another of Morello's designated experts, Jack Carter, who is an engineer and site planner, prepared a plan for the

tract to be developed as a rail-served industrial distribution center. His plan included new roads and rail spur lines that would connect future buildings on the Property to existing rail lines. The new rail spurs, in Carter's plan, involved multiple loops and crossed over two existing pipeline easements and an existing high voltage easement in three different places. In his plan, the three existing metal buildings in the TCEQ compliance area would "likely be removed," but that area would not be part of the development. His plan drawing is below.



Before the amendment, Carter opined on the cost to modify the remainder tract (apart from the TCEQ compliance area) so it could still be used for a rail-accessed industrial warehouse. The cost included constructing "expensive pipeline adjustments for road and rail crossing" as well as additional, necessary drainage

costs for a detention basin and a connection culvert. In his initial report, Carter stated that construction costs of $2.8 million would need to be expended "to offset the impacts of the new pipeline" on the Property development, of which $2.16 million was the cost to lower the pipeline.

Carter's second report opined that, as a result of Seaway's concession in its second amended petition that it would pay the cost to lower or encase the pipeline upon receipt of actual development plans, the $2.16 million cost would no longer need to be spent by Morello; Carter therefore removed that cost from his analysis. After adding one more cost that was not included in his first report, Carter stated that the development costs would be almost $2 million less than he had stated in his first report.[20] He offered no criticism of Seaway's concession nor any suggestion that it would prevent the implementation of his plan. Carter's second report does not suggest that Seaway was changing the easement it was taking; it instead reduced the current damages based on Seaway's concession that it would pay some rerouting costs, if necessary, in the future.

Carter's amended report does not support a characterization of Seaway's second amended petition as a dismissal of its condemnation suit, which continued

[20] Carter's second report removed $2.16 million for the cost to lower the pipeline but added $160,000 in new costs.

to seek the same land while, in Carter's opinion, causing less damages because Seaway would pay some costs itself.

c) Chris Farrar

Morello's third designated expert, Chris Farrar, a commercial real estate financial expert with expertise in capitalizing commercial real estate projects, was designated after Seaway filed its second amended petition. Farrar, as explained by Morello, would testify that the conditions in Seaway's second amended petition were "extremely onerous." More specifically, he would testify that the fourth condition—that Seaway would pay for the costs to lower the second pipeline only if Morello provided "proof that sufficient funding for construction" had been obtained—would "make it highly unlikely, if not impossible" for Morello "to obtain funding through investment or economic financing from any source." Farrar opined that Seaway's concession was, in effect, worthless for this reason. His opinion could have supported an analysis that neither the land to be condemned nor Morello's damages changed with the amendment.

d) Experts opinions do not support conclusion of functional abandonment equivalent to a dismissal

If the second amended petition increased damages, as Sikes opined when he essentially adopted the first model that was part of his initial report, it did not dismiss Seaway's condemnation. If the amendment decreased damages, as Carter opined, it did not harm Morello because Seaway would pay the mitigation costs

directly rather than indirectly through an award of damages and Morello was pursuing a litigation-based resolution either way. Finally, if the second amended petition created an impossible condition for development and therefore was essentially worthless, as Farrar indicates, it changed nothing and in no event works as a dismissal. Regardless, the parties' damages dispute does not change what Seaway has always sought in the litigation—to construct and operate a pipeline and to pay Morello the compensation required by the Texas Constitution for the taking. The second amended petition at most changed how a portion of the costs associated with putting the land to its best use, post-taking, would be divided.

None of these experts' opinions support the conclusion that the amendment to Seaway's condemnation claim was a functional abandonment equivalent to a dismissal of its claim.

3. Amendment not a functional dismissal

The only two cases in which courts have concluded that an amendment to a condemnation petition was equivalent to a functional dismissal are readily distinguishable and do not support the conclusion that Seaway's amendment functionally abandoned its condemnation claim similar to a dismissal. The amount of land subject to condemnation did not change when Seaway amended its condemnation petition. A distinct tract was not removed from the claim. The use of the property did not change. And Seaway's explanation of how that use qualified

as a public necessity did not change. Instead, the added provisions stated that Seaway would pay the costs to re-configure the pipeline in the future to accommodate a rail-accessed industrial distribution center, should Morello actually undertake such a project. Further, none of the *FKM Partnership* factors apply: Seaway's planned easement use remained the same, which was to allow for the installation and operation of a common-carrier pipeline. *See* 255 S.W.3d at 637.

We are not persuaded that Seaway's conditional offer to pay a portion of the expenses that Morello sought to recover constitutes a dismissal of its original condemnation proceeding.

We overrule Morello's third issue.

Striking of Experts

In his fourth and final issue, Morello contends that the trial court erred in striking some of his experts and limiting the testimony of others. Morello intended to rely on several of these experts to establish (1) that the Property's best use is as a rail-served industrial distribution center, (2) the appropriate compensation for the taking based on this best use, and (3) the amount of compensable damages for the remainder's lost market value.

A. Applicable law and standard of review

To evaluate whether the trial court erred by restricting expert evidence on these issues, we first address the appropriate standard for evaluating market value

damages, for designating the best use of property, and for the exclusion of expert witnesses.

1. Market value damages

Landowners must be compensated for property taken. U.S. CONST. amend. V; TEX. CONST. art. I, § 17(a). Landowners are entitled to the fair market value of the taken land. *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 627 (Tex. 2002). Market value is "the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying." *Estate of Sharboneau*, 48 S.W.3d at 182 (quoting *State v. Carpenter*, 89 S.W.2d 979, 980 (Tex. 1936)).

The market value of property in a condemnation proceeding is determined as of the date of the taking. *Sw. Bell Tel. Co. v. Radler Pavillion Ltd. P'ship*, 77 S.W.3d 482, 485 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). A property's current market value, though, includes consideration of "the market for its possible future use." *Enbridge Pipelines (E. Tex.) L.P. v. Avinger Timber, LLC*, 386 S.W.3d 256, 264 (Tex. 2012) (quoting *Estate of Sharboneau*, 48 S.W.3d at 185); *see Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 611 (Tex. 2016) (factfinder may "consider all of the uses to which the property is reasonably adaptable and for which it is, or in all reasonable probability will become, available within the foreseeable future" (quoting *State v. Windham*, 837 S.W.2d 73, 77 (Tex.

1992)). Current market value may take into account the option to hold property as an investment for future development. *Crosstex*, 505 S.W.3d at 611; *In re State*, 355 S.W.3d 611, 617 (Tex. 2011) (orig. proceeding).

When a governmental entity condemns only part of a tract, as occurred here, it must pay adequate compensation for the part taken and for any resulting damage to the remainder.[21] *See* TEX. CONST. art. 1, § 17(a); *see* TEX. PROP. CODE § 21.042(c) (providing that "damage to the property owner" includes "the effect of the condemnation on the value of the property owner's remaining property."). "Damages to remainder property are generally calculated by the difference between the market value of the remainder property immediately before and after the condemnation, considering the nature of any improvements and the use of the land taken." *Cty. of Bexar v. Santikos*, 144 S.W.3d 455, 459 (Tex. 2004); *see Coble v. City of Mansfield*, 134 S.W.3d 449, 454 (Tex. App.—Fort Worth 2004, no pet.).

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[21] In addition to damages to the property's fair market value, damages due to "required modifications to the remainder as a result of the condemnation" may be compensable in some circumstances. *State v. Centennial Mortg. Corp.*, 867 S.W.3d 783, 784 (Tex. 1993) (per curiam); *see Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001) (stating "modifications to the remainder or loss of improvements on the remainder due to condemnation are . . . compensable"). There are limitations though, and not all damages to remainder property are compensable. *Id.* at 459. "Whether damages can be recovered depends on what kind of damage is involved." *Id.* For example, costs for modifications necessary for future uses of the remainder are not recoverable if the identified future uses are remote, speculative, and conjectural. *Coble*, 134 S.W.3d at 455. These "purely speculative uses" are not relevant or admissible. *Id.* at 456 (quoting *City of Austin v. Cannizzo*, 267 S.W.2d 808, 814 (Tex. 1954)).

Courts should admit as remainder-market-value evidence such matters as suitability, adaptability, surroundings, conditions before and after, and all circumstances that tend to increase or diminish the remainder's market value. *Coble*, 134 S.W.3d at 454. The goal is to determine how the market actually would value the property, without enhancement. *City of Fort Worth v. Corbin*, 504 S.W.2d 828, 830–31 (Tex. 1974) ("The objective of the judicial process . . . is to make the landowner whole and to award him only what he could have obtained for his land in a free market.").

2. Highest and best use

In determining a property's fair market value, the factfinder is not limited by the current use of the property; "the factfinder may consider the highest and best use to which the land taken can be adapted." *Zwahr*, 88 S.W.3d at 628; *see Enbridge Pipelines*, 386 S.W.3d at 261 (same). "Highest and best use" is "the reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible and that results in the highest value." *Enbridge G&P (E. Tex.) L.P. v. Samford*, 470 S.W.3d 848, 857 (Tex. App.—Tyler 2015, no pet.) ("*Enbridge II*") (quoting *City of Sugar Land v. Home & Hearth Sugarland, L.P.*, 215 S.W.3d 503, 511 (Tex. App.—Eastland 2007, pet. denied)).

A tract's existing use "is its presumed" best use, "but the landowner can rebut this presumption." *Zwahr*, 88 S.W.3d at 628. To rebut the presumption and to base damages on a property use "other than that to which it is being put at the time," a landowner has to show that the property was (1) "adaptable" to the hypothetical future use at the time of the taking, (2) such use was "reasonably probable within the immediate future, or a reasonable time," and (3) "the market value of the land has been enhanced thereby." *Radler Pavillion*, 77 S.W.3d at 486; s*ee Cannizzo*, 267 S.W.2d at 815 (stating that market value takes "into consideration all of the uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future"). If the landowner does not rebut the presumption that the current use is the best use by meeting these three *Radler Pavillion* factors, it would be speculative to base damages on the landowner's identified future use, and evidence regarding this future use is inadmissible. 77 S.W.3d at 486.

In condemnation cases involving raw acreage—similar to the Property at the time of the taking[22]—evidence of hypothetical future uses is generally inadmissible. *See Boswell v. Brazos Elec. Power Coop., Inc.*, 910 S.W.2d 593, 601 (Tex. App.—Fort Worth 1995, writ denied). The rationale for this rule is that

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22 The only structures on the land at the time were vacant, and the land was dedicated to agricultural use under Morello's agreement with Rosenberg.

evidence of a hypothetical but speculative use tends to cause juries to overstate a property's value without a solid evidentiary basis. *See id.*

"Compensability is a question of law for the court, and subject to de novo review." *Santikos*, 144 S.W.3d at 459. Numerous courts have concluded that a landowner's intended future use for property is inadmissible as too speculative and uncertain for purposes of determining fair market value. For example, in *State v. Harrison*, the landowner stated an intent to build a commercial development on raw property but had never taken "any steps" to do so. *See* 97 S.W.3d 810, 814 (Tex. App.—Texarkana 2003, no pet.), The court stated that "evidence of a landowner's subjective intent concerning the future use of the property is inadmissible because it is too speculative and uncertain." *Id*. In the absence of any evidence that the owner took any action to implement his intentions, his testimony about commercial development was inadmissible. *Id*. Other courts have reached similar results. *See Estate of Sharboneau*, 48 S.W.3d at 184–85 (holding that expert testimony on future development was speculative because it was based on "best possible outcome" after making numerous "assumptions and estimates" without addressing "basic marketplace realities" or development risks); *Coble*, 134 S.W.3d at 456–57 (stating that appraiser's remainder damages opinion—which included cost to comply, post-taking, with city ordinance applicable to residentially platted land—was speculative in that it was based on assumption that land would

be developed as residential subdivision even though it was unimproved, no such development had been proposed, and ordinance would not apply if more likely commercial development occurred); *Radler Pavilion*, 77 S.W.3d at 486–87 (holding that expert opinion that property's best use was as high-density multi-use development was speculative because opinion was based on layered assumptions, ignored problems with plan, and assumed best possible outcome).

3. Exclusion of expert damage valuation as conclusory or speculative

An expert's opinion is conclusory when it is without a reliable predicate. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006); *Burrow v. Arce*, 997 S.W.2d 229, 236 (Tex. 1999). "And testimony is speculative if it is based on guesswork or conjecture." *Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 156 (Tex. 2012). "Opinion testimony that is conclusory or speculative is not relevant evidence, because it does not tend to make the existence of a material fact 'more probable or less probable.'" *Coastal Transp. Co., Inc. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004). Likewise, expert testimony that would not help the trier of fact to understand the evidence or to determine a fact in issue is not relevant. *See* TEX. R. EVID. 702.

The admission or exclusion of expert witnesses is reviewed for an abuse of discretion. *Mack Trucks*, 206 S.W.3d at 578.

B. The trial court did not err in excluding Morello's damage experts

Morello challenges the trial court's orders striking all or parts of the opinions of six of his experts. The stricken experts were to opine on the Property's best use and post-taking adaptability costs for the remainder. We consider each expert separately.

1. Jack Carter

Morello's first stricken expert is Jack Carter. Eighteen months after the Seaway taking, Carter prepared, at Morello's request, a plan for building a rail-served industrial development center on the Property. Carter's plan was prepared for this litigation and based on Morello's statement that he intends to develop the Property, either by himself or with investor partners, as a rail-served industrial development center within the next fifteen years.[23]

Carter's report did not state that his plan was the Property's best use but did state that he was told by the two railroad companies that "this line is one of their busiest lines and connects to Mexico" and that a "large, rail served, distribution center" was feasible. Carter further stated that Seaway's pipeline "effectively severs the site into two tracts," a western and eastern tract, and that modifications

[23] Morello had no firm intentions to develop the Property as a rail-served industrial center at the time of the taking; he testified, "I may develop it within 15 years."

in his plan would be necessary to "mitigate the impacts to the development" of the Property so that it still could be put to Morello's identified future use.

Carter conceded in his deposition that he does not know the cost to develop the plan or whether there is any market demand for his plan. Nor could he identify entities that would use the rail lines or products that would be transported by them.

The trial court granted Seaway's motion to strike Carter's opinion on the Property's future use as a rail-served industrial center as speculative and held that his opinion on necessary modification costs was not relevant because it was based on a speculative future use. We agree that Carter's opinion was properly stricken.

To rebut the presumption that the Property's current use at the time of the taking was its best use and to show that a different use should be considered in calculating damages, Morello had to show that the Property was (1) "adaptable" to the hypothetical future use—here, a rail-served industrial distribution center—at the time of the taking, (2) such use was "reasonably probable within the immediate future, or a reasonable time," and (3) "the market value of the land has been enhanced thereby." *Radler Pavillion*, 77 S.W.3d at 486; *see Cannizzo*, 267 S.W.2d at 815 (stating that market value takes "into consideration all of the uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future").

Seaway argues that Carter failed to satisfy any of the *Radler Pavillion* requirements, and therefore the trial court did not abuse its discretion in excluding his testimony or the other expert testimony regarding damage to the remainder that was predicated on the Property's use as a rail-served industrial distribution center.

It is unnecessary for us to determine whether Morello satisfied the first *Radler Pavillion* prong—adaptability—through Carter's development plans because we conclude that Morello has not satisfied the second prong of that test. Regarding the second prong—whether Morello presented evidence that the Property could, in reasonable probability, be adapted to such use within the immediate future or a reasonable time—Morello did not offer any evidence that the Property was adaptable for such use in the immediate or reasonable future. There was no evidence of how long it might take to adapt the Property. And there was no evidence that Morello has taken any concrete steps to implement Carter's plans. Morello has not built any new facilities on the Property or worked with the railroads to build rail spur lines to connect to existing rail lines. Morello and his experts did not identify any potential developers, investors, or buyers for the Property who would pursue the future use identified by Carter. Nor did Morello's

experts address or even acknowledge obstacles that might limit the feasibility of the plan.[24]

Morello concedes that he had not sought any approvals at the time of the taking. When asked whether he had taken any action "to move the construction or development forward" for a rail-accessed industrial site on the Property, Morello

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[24] The evidence suggests that there were numerous obstacles that could delay implementation of Carter's plan. The first is whether the necessary approval could be obtained from the railway owners to connect warehouses on the Property to existing rail lines and any delay that would result waiting for such approvals. One of Morello's experts testified that these approvals are "very hard to get."

The second potential obstacle is whether the necessary approval could be obtained from the owners of the electric distribution lines and associated easement to build in that area and any delay that would result waiting for such approval. The easement prohibits the construction of any structure except fences within its area. Morello conceded that he has not sought consent for any construction from these owners. Carter acknowledged that it is very likely that the electrical easement owner would not approve his plan without modifications. Additionally, Morello has not identified any evidence concerning the delay this approval process would cause.

The third obstacle is whether approval could be obtained from the City of Rosenberg and any delay that would result waiting for the approval described in the Development Agreement. Morello contends that there would be no delay, but he cites no evidence to support this contention. Instead, he relies on a provision in the Development Agreement that provides that, if Morello develops the Property without the City's consent, the City may construe such development as "a petition for voluntary annexation." But the Development Agreement also states that the City Council retains discretion to deny an annexation request and that the City's right to annex the Property is "in addition to the City's other remedies."

The fourth obstacle is whether the necessary approval could be obtained from TCEQ and any delay that would result waiting for such approval. In oral argument, Morello conceded that such approval would be necessary for his intended development. Morello has not sought TCEQ's consent.

testified he had not because of "market. You have to have a market. People just don't go out and develop things. You have to have—the marketplace has to be there. It's market driven." Another of Morello's experts, Sikes, conceded in his deposition that it could take years before Carter's plan could be developed because of the need to obtain financing, approvals, and permits. Absent evidence that it was reasonably probable that such approvals could be obtained within a reasonable time, Carter's plan was speculative and not relevant.[25] *See Estate of Sharboneau*, 48 S.W.3d at 186.

In conclusion, there was no evidence that the identified future use as a rail-served industrial distribution center was reasonably probable within a reasonable time. Morello argues that "reasonable time" presents a fact issue, but evidence of hypothetical uses is inadmissible unless a landowner presents some evidence that this *Radler Pavillion* factor is satisfied. 77 S.W.3d at 486. In the absence of such evidence, the trial court did not abuse its discretion in concluding that a factfinder cannot be left to speculate regarding how long it would take to develop a rail-accessed industrial distribution center. Without any evidence on the second *Radler Pavillion* factor, the identified future use was speculative and inadmissible, and the trial court did not abuse its discretion by excluding Carter's testimony.

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[25] Given our resolution of this issue, it is unnecessary to address the trial court's conclusion that Carter's opinion should be struck as untimely.

2. Mike Sikes

a) Sikes's opinion on best use before the taking

Morello's second stricken expert, Mike Sikes, is a certified real estate appraiser. He concluded that the Property's best use before the taking was "industrial development utilizing the rail access." Seaway argued that this use was impermissibly speculative as of the date of the taking.

In his initial report written before Seaway's concession, Sikes stated that the installation of Seaway's second pipeline changed the best use for the Property's western portion from industrial development to agricultural/rural/residential use but that the best use could be restored to industrial development by making certain modifications to the Property. Sikes presented two damages models and adopted the least costly of the two. [26] In his second report written after Seaway's concession, Sikes abandoned the earlier damages model and presented a third model.[27] Thus, Sikes has offered three different approaches for calculating the

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[26] In the first model, Sikes opined that the 130 acres on the west side of the pipeline had a value of $30,000 per acre if used for rail-accessed industrial development. In contrast, it was worth only $5,000 per acre if used for agricultural and residential. The damages therefore were roughly $3.2 million. In the second model, Sikes opined that the damages to the remainder were $3.1 million based on mitigation costs to restore the 130 acres to their best use. This would require the expenditures identified by Carter and Morris ($2.8 million), plus an entrepreneurial incentive of almost $300,000, resulting in a total of $3.1 million in mitigation costs. Because his $3.1 million model was less, Sikes adopted the second model.

damage to the remainder.

Following the same reasoning it used for striking Carter's testimony, the trial court struck Sikes's expert damages opinions as speculative. Regardless of which of the three damages models he used, Sikes's opinions were based on the same underlying premise: the Property's best use was as a rail-served industrial distribution center.

For the same reasons that such a development was speculative for Carter, we hold that the trial court did not abuse its discretion in concluding that it is likewise speculative for Sikes based on this record. Morello owned the Property for over 13 years and yet has not taken any concrete steps to implement his plan. Even if he were to begin today, Sikes conceded that it "could take years" before the permits, financing, and construction could be completed and the Property could be operational as a rail-served industrial distribution center, even if all obstacles to the plan were adequately identified and addressed timely—an issue without any expert evidence.

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[27] In his second report, after Seaway's second amended petition, Sikes discarded the mitigation costs model. Instead, he relied on his comparative sales analysis model. Morello argues that Sikes did so because "development was no longer financially feasible," the conditions imposed by Seaway's second amended petition were "cumbersome and impractical," and, therefore, the second pipeline "could not be crossed." Sikes's report does not, however, include these explanations for discarding his second model.

Sikes's best-use opinion also fails *Radler Pavillion*'s third admissibility prong by failing to present reliable expert testimony that the land's market value would be "enhanced" by building a rail-served industrial distribution center. 77 S.W.3d at 486. To show enhancement, Sikes had to address how the market value would be impacted by the costs and benefits of such a project. He also had to address the four obstacles to development—each requiring consent of a third party and a risk that consent would be delayed, if not withheld—and how those obstacles would impact the Property's value.[28]

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[28] *See* n.24 *supra*. First, the market would have to consider the risk that a prospective buyer would not obtain approval from the two railway owners to build new rail lines on the Property to connect warehouses to the existing rail line, and if the buyer could, the market would have taken into account the cost and time delay caused by obtaining such approvals as well as the cost of the rail spurs themselves. The market would consider the impact of these issues in accessing the Property's market value.

Second, the market would have to consider the risk that a prospective buyer would not obtain consent from the electric distribution line owners to develop in their easement, as well as the cost and time delay caused by obtaining consent.

Third, the market would have to consider the risk that a prospective buyer would not obtain development approval from the City of Rosenberg and the cost and time delay caused by obtaining approval. Morello does not identify any evidence regarding how the market would view the impact of the Development Agreement on the remainder's value.

Finally, the market would have to consider the risk that a prospective buyer would not obtain development approval from TCEQ and the cost and time delay caused by obtaining approval of development, as well as any lingering regulatory obligations or liabilities.

Neither Morello nor Sikes identified any evidence concerning the likelihood, cost, or time delays to overcome these obstacles or how the market would account for them. But a willing buyer of the Property who wanted to develop it as a rail-served industrial distribution center would have to assess the risk that the necessary approvals might not be obtained, and this risk would impact the Property's market value. Sikes assumes, without evidence, that all such approvals could be readily obtained. Because Sikes has not provided a reliable basis for concluding that the market would "enhance" the value of the Property based on its proposed use as a rail-served industrial distribution center, the trial court, for this additional reason, did not abuse its discretion in determining that his opinion was inadmissible.

Finally, evidence of an alternative best use different from the current use requires consideration of the alternative's economic feasibility. *Enbridge II*, 470 S.W.3d at 857. But Morello did not present any evidence that he or his experts conducted a marketability, financial feasibility, or economic feasibility study. Indeed, his experts conceded that no such studies had been conducted, though Sikes's expert report conclusorily states that "financially feasible, and maximally productive uses" were considered to "estimate" the Property's best use.

b) Sikes's opinion on best use after Seaway's concession

Sikes opined in his second report that the best use of the western remainder of the Property changed to agricultural as a result of Seaway's second amended

petition. Seaway argued that this opinion was unreliable and without any support (i.e., conclusory). Sikes offered no explanation for his opinion. Therefore it was conclusory and inadmissible. *See Elizondo v. Krist*, 415 S.W.3d 259, 264–66 (Tex. 2013); *Burrow*, 997 S.W.2d at 236; *see also City of San Antonio v. Pollock*, 284 S.W.3d 809, 816, 819–20 (Tex. 2009); HARVEY BROWN & MELISSA DAVIS, EIGHT GATES FOR EXPERT WITNESSES: FIFTEEN YEARS LATER, 52 Hous. L. Rev. 1, 67 (2014) (stating that expert testimony is conclusory or speculative when "the expert fails to provide any explanation or predicate for her opinion").

The trial court did not err by excluding this expert.

3. Chris Farrar

On July 15, 2016, the last day of the discovery period,[29] Morello designated Chris Farrar, a financial expert, to testify that the conditions in Seaway's second amended petition made it highly unlikely or impossible for Morello to obtain financing for a rail-served industrial distribution center. The trial court struck his testimony as untimely and irrelevant. Morello's brief contains only three sentences

[29] The trial court, with the agreement of the parties, had extended the discovery deadline to July 15, 2016. Two months before the deadline, Seaway filed its Second Amended Petition offering for the first time to move the second pipeline in the future if Morello actually undertook development of the Property in line with his litigation theory and expert development plans. On the discovery deadline, which was one year after the July 2015 expert-designation deadline, Morello produced two revised expert reports and designated for the first time Farrar as a real-estate-finance expert.

discussing Farrar, only one of which discusses in summary manner the purported relevance of his opinion. Morello's brief does not address any of the specific issues regarding the timing of Farrar's designation.

Rule 38.1 of the Texas Rules of Appellate Procedure requires an appellant's brief to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). A brief that fails to comply with these requirements waives the complained-of error on appeal. *See Izen v. Comm'n for Lawyer Discipline*, 322 S.W.3d 308, 322 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). We conclude Morello waived error on this expert's exclusion.

Even if we were not to find waiver, we would still reject Morello's contention that the trial court erred in striking Farrar. When Morello designated Farrar, he failed to provide an expert report as required by the trial court's April 2015 agreed docket control order, an issue that Morello does not address in his brief. Moreover, Morello offered no explanation for taking two months after the second amended petition was filed before designating Farrar.[30] Under these circumstances, we cannot conclude that the trial court abused its discretion in

[30] Two months may have been reasonable, but Morello offered no evidence on this issue.

striking Farrar and concluding that Morello had not demonstrated good cause for the delay in designating Farrar and for failing to provide an expert report.[31]

4. Dale Morris

Morello designated R. Dale Morris to testify regarding the cost to lower the second pipeline as part of a modification to the Property to enable it to retain its best use as an industrial distribution center.[32] For the same reasons that Carter's cost opinion was speculative and inadmissible, Morris's restorative damages opinion is as well.

Morris also opined regarding the cost Seaway would incur to reroute the first pipeline under the 1975 agreement. Morello argues, that Morris's opinion "is relevant to the motivation of Seaway in refusing to consider Morello's request" that the second pipeline be placed in the area of the 1975 easement. The trial court held that Seaway's cost to relocate the first pipeline under the 1975 easement was

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31 That Farrar's expert designation did not occur until after the July 2015 expert-designation deadline (as set forth in the April 2015 agreed docket control order) did not make his designation untimely. Good cause existed for the late designation because Morello did not need any expert testimony regarding the conditions set forth in Seaway's second amended petition until after Seaway filed that pleading. Instead, Farrar's designation was untimely because he was not designated for two additional months, and there was no explanation for the length of the delay, particularly in the absence of an expert report.

32 As Morello's brief states, Carter "is not a pipeline constructability expert" and therefore he relied on Morris for the cost to lower the pipeline.

not relevant because the jury charge would not include it as an element of Morello's claims.

The absence of such costs from the jury charge does not necessarily mean the costs are not relevant to Seaway's motives. But before the 1975 agreement could be relevant to Seaway's motives, Seaway's decision-makers at the time of the taking had to know its terms. Morello has not identified any evidence that Seaway's decision-makers knew its terms.

Even assuming Morris's opinion would be admissible on the issue of Seaway's motives, Morello offers no explanation for how Morris's opinion, if it had not been struck, would have created a fact issue on Morello's arbitrariness affirmative defense. Indeed, Morris's opinion could not have raised a fact issue because it was not attached to Morello's pleadings concerning the arbitrariness issue—either through an affidavit or deposition.

5. David Heslep

David Heslep, an environmental engineer, opined regarding the pre-existing environmental problems on roughly 17 acres of the Property and the cost to monitor the Property's remediation efforts, possible future changes to remediation procedures should TCEQ agree to them, and future plans for the Property in light of those possibilities. Morello argues, without citation to the record, that Heslep's testimony is relevant "to the issue of post-condemnation market value (damage to

the remainder) of the property." But Morello's appraiser, Sikes, does not purport to rely on Heslep for this damage calculation in either of his reports. Therefore, the trial court's exclusion of his opinion was in any event harmless.

6. Richard Kuprewics

Morello also challenges the trial court's exclusion of Richard Kuprewics, who was designated to testify that the Seaway pipeline could have been placed within the 1975 easement safely. But Seaway did not dispute that it could be done safely; the relevant issue is whether it made a reasoned determination that 50-foot easements were a safe approach.

Even if the court erred in striking Kuprewics's opinion as irrelevant, any error was harmless because we have already concluded that Morello did not present any evidence that Seaway's safety determination was arbitrary. Other feasible alternatives do not prove that Seaway acted arbitrarily. *See Whittington III*, 384 S.W.3d at 783 (decision on scope of condemnation "does not require the chosen course to be more feasible or better than the alternative," but rather "forbids decisions not made according to reason or judgment"); *Ludewig*, 773 S.W.2d at 614 (condemnor's decision is not arbitrary when condemnor chooses "least expensive option" or "most economically feasible path for its pipeline"). Indeed, Kuprewics's opinion could not have raised a fact issue because it was never

attached to Morello's pleadings on the arbitrariness issue—either through an affidavit or deposition.

Finally, Morello globally asserts that his experts' opinions remained relevant, even if the stated future uses were considered speculative, because they addressed appropriate "compensation for the cost of curing or mitigating damage" resulting from the partial condemnation. But his experts did not offer opinions on the "cost to cure" the impact of the taking so that the land could continue with its current agricultural use, or even a reasonably likely different use within a reasonable time from the taking. Instead, they opined on the cost to cure the Property so that it could be used in the future as a rail-served industrial site—a use that was remote and speculative. *See State v. Schmidt*, 867 S.W.2d 769, 773 (Tex. 1993) (holding that speculative uses not reflected in land's current market value should be excluded); *Coble*, 134 S.W.3d at 455–56.

We overrule Morello's last issue.

Conclusion

We affirm.

Harvey Brown
Justice

Panel consists of Justices Keyes, Brown, and Lloyd.