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The Condemnor Has the Right to Show the Reasonably Foreseeable and Probable Uses of the Tract Condemned So That the Jury May Consider This Factor with All Other Matters in Reaching a Market Value Determination Respecting the Remainder Tract.

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CASE NOTES

EMINENT DOMAIN—PARTIAL TAKING—SEVERANCE DAMAGES—THE CONDEMNOR HAS THE RIGHT TO SHOW THE REASONABLY FORESEEABLE AND PROBABLE USES OF THE TRACT CONDEMNED SO THAT THE JURY MAY CONSIDER THIS FACTOR WITH ALL OTHER MATTERS IN REACHING A MARKET VALUE DETERMINATION RESPECTING THE REMAINDER TRACT. *City of Pearland v. Alexander*, 483 S.W. 2d 244 (Tex. Sup. 1972).

Petitioner, exercising its right of eminent domain, appropriated ten acres out of the Alexander tract, containing some 822 acres, as a site for a sewage disposal plant. The landowners, by means of a motion in limine, obtained a court order restricting the City of Pearland (the City) from introducing evidence of the actual uses of the 10-acre site. The City, in perfecting its appeal to the court of civil appeals, questioned the manner in which the severance damages to the remainder tract were determined. It was the City's contention that it did have the right to show the reasonably foreseeable and probable uses that the 10-acre site would be subjected to in that this evidence was a factor to be included in the market value determination of the remainder tract.

The trial court judgment was affirmed by the court of civil appeals[1] and the Texas Supreme Court granted the City's application for writ of error to resolve the problem of whether these trial procedures conformed to the established willing seller, willing buyer method of determining market value in the assessment of severance damages. Held—*Reversed and remanded.* The City had the right to show the reasonably foreseeable and probable uses of the 10-acre site which at the time of the taking would be required to accomplish the municipal purposes for which it was taken.[2]

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1 City of Pearland v. Alexander, 468 S.W.2d 917 (Tex. Civ. App.—Houston [1st Dist.] 1971). The court of civil appeals also held that the trial court, in its submission of the case to the jury, did not err, as contended by the petitioner, in not allowing the City's instructions allegedly directed at providing the reasonably foreseeable and probable uses of the tract condemned and overruling the City's objection to this special instruction given to the jury:

> You are instructed that the surface estate of the ten (10) acre tract of land condemned by the City of Pearland in this case and described as Tract One in the evidence before you will be used by the City of Pearland as a site for a sewerage [sic] disposal plant and you are to presume that the City of Pearland will exercise its rights and use and enjoy this property to the full extent for such a sewerage [sic] disposal plant.

Id. at 922.

2 City of Pearland v. Alexander, 483 S.W.2d 244, 249 (Tex. Sup. 1972). In addressing the city's exception to the special instruction given by the trial court, the supreme court held that the instruction was clearly erroneous as a comment on the weight of the evidence in

One of the inherent powers of both federal and state governments is that of eminent domain.[3] Initially, the state's condemnation power and that delegated to its political subdivisions is limited by the fifth amendment to the United States Constitution.[4] The requirements of this amendment are extended to the states and their political subdivisions by virtue of the due process clause of the fourteenth amendment.[5] Additionally, all state constitutions have provisions which embody much of the same language and are construed to mean the same as the federal constitutional provisions.[6] Because the power of eminent domain is inherent in the sovereign, these constitutional provisions are considered as limitations of the power of eminent domain and not grants thereof.[7] These limitations then, require that before private property can be appropriated it must be taken for a public use, and the owner of the property appropriated must be afforded adequate compensation.[8]

The public use limitation of the power of eminent domain has been applied in Texas with a rather liberal view as to what is or is not a public use.[9] The Texas courts, however, "have refused to accept the definition adopted by some authorities which makes the phrase mean nothing more than public welfare or good."[10] Another principle arising out of the public use limitation is that no more property may be taken than the public use requires.[11] This limitation of necessity operates under the presumption that no more property, either in amount, interest, or estate, than is required for the particular public improvement will be taken.[12] Moreover, this decision is discretionary on the part of

that it could only be understood by the jury as a mandate to presume a full use of the entire ten acres rather than that portion reasonably required. *Id.* at 249.

3 James v. Dravo Contracting Co., 302 U.S. 134, 148, 58 S. Ct. 208, 215, 82 L. Ed. 155, 165 (1937); City of San Antonio v. Grandjean, 91 Tex. 430, 432, 41 S.W. 477, 478 (1897).

4 The language used in the fifth amendment reads, "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

5 West v. Chesapeake & Potomac Tel. Co., 295 U.S. 662, 671, 55 S. Ct. 894, 897, 79 L. Ed. 1640, 1646 (1935); Chicago, B. & Q.R.R. v. City of Chicago, 166 U.S. 226, 233, 17 S. Ct. 582, 583, 41 L. Ed. 979, 983 (1897).

6 *See* 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 4.1 (3d rev. ed. 1964). Article I, section 17, of the Texas Constitution provides: "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation . . . ."

7 *See* 1 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 1.14[2] (3d rev. ed. 1964).

8 Benbow, *Public Use as a Limitation on the Power of Eminent Domain in Texas*, 44 TEXAS L. REV. 1499 (1966).

9 Coastal States Gas Producing Co. v. Pate, 158 Tex. 171, 178, 309 S.W.2d 828, 833 (1958); Housing Authority v. Higginbotham, 135 Tex. 158, 167, 143 S.W.2d 79, 85 (1940); *see* M. RAYBURN, TEXAS LAW OF CONDEMNATION § 39 (1960). *See generally* Benbow, *Public Use as a Limitation on the Power of Eminent Domain in Texas*, 44 TEXAS L. REV. 1499 (1966).

10 Coastal States Gas Producing Co. v. Pate, 158 Tex. 171, 178, 309 S.W.2d 828, 833 (1958); Housing Authority v. Higginbotham, 135 Tex. 158, 167, 143 S.W.2d 79, 85 (1940).

11 Housing Authority v. Higginbotham, 135 Tex. 158, 174, 143 S.W.2d 79, 88 (1940); Houston N. Shore Ry. v. Tyrrell, 128 Tex. 248, 258, 98 S.W.2d 787, 792 (1936).

12 Housing Authority v. Higginbotham, 135 Tex. 158, 174, 143 S.W.2d 79, 88 (1940); Stone v. City of Wylie, 34 S.W.2d 842, 843 (Tex. Comm'n App. 1931, jdgmt adopted);

the condemning authority and is not subject to review by the courts in the absence of fraud, bad faith, or clear abuse of authority.[18]

The limitations of the power of eminent domain requiring adequate compensation to the landowner and the assignment of a measure of damages resulting from an appropriation, although arising out of the constitution and the statutes,[14] are areas more open to dispute than it would seem and are the source from which the majority of the substantive law of condemnation arises.[15] Much of the Texas law regarding the measure of damages in a condemnation suit was established in the case of *State v. Carpenter*,[16] particularly the troublesome area of measuring damages in a partial taking.[17] The court in *Carpenter*, in addressing this problem, stated that "damages are to be determined by ascertaining the difference between the market value of the remainder of the tract immediately before the taking and the market value of the remainder of the tract immediately after the appropriation, taking into consideration the nature of the improvement, and the use to which the land is to be put."[18]

In determining what the market value of a particular piece of property is, the willing seller, willing buyer test is to be applied.[19] This includes considering all factors which would reasonably be given weight in negotiations between a seller and a buyer.[20] Included are "all such matters as suitability and adaptability, surroundings, conditions before and after, and all circumstances which tend to increase or

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Bradford v. Magnolia Pipe Line Co., 262 S.W.2d 242, 246 (Tex. Civ. App.—Eastland 1953, no writ); Webb v. Dameron, 219 S.W.2d 581, 584 (Tex. Civ. App.—Amarillo 1949, writ ref'd n.r.e.); McInnis v. Brown County Water Improv. Dist. No. 1, 41 S.W.2d 741, 745 (Tex. Civ. App.—Austin 1931, writ ref'd); *see* 29A C.J.S. *Eminent Domain* § 89(2) (1965).

13 Housing Authority v. Higginbotham, 135 Tex. 158, 174, 143 S.W.2d 79, 88 (1940); Stone v. City of Wylie, 34 S.W.2d 842, 843 (Tex. Comm'n App. 1931, jdgmt adopted); Bradford v. Magnolia Pipe Line Co., 262 S.W.2d 242, 246 (Tex. Civ. App.—Eastland 1953, no writ); Webb v. Dameron, 219 S.W.2d 581, 584 (Tex. Civ. App.—Amarillo 1949, writ ref'd n.r.e.); McInnis v. Brown County Water Improv. Dist. No. 1, 41 S.W.2d 741, 745 (Tex. Civ. App.—Austin 1931, writ ref'd); *see* 1 P NICHOLS, THE LAW OF EMINENT DOMAIN § 3.1[2] (3d rev. ed. 1964); 29A C.J.S. *Eminent Domain* § 89(2) (1965).

14 TEX. REV. CIV. STAT. ANN. art. 3265 (1968).

15 M. RAYBURN, TEXAS LAW OF CONDEMNATION § 92, at 321 (1960).

16 126 Tex. 604, 89 S.W.2d 194, *motion for rehearing overruled*, 89 S.W.2d 979 (1936); *see* Comment, *Eminent Domain—Benefits vs. Money as Compensation in a Partial Taking*, 4 ST. MARY'S L.J. 64 (1972).

17 Diamond, *New Tools for the Carpenter Case*, 11 BAYLOR L. REV. 1, 3 (1959); M. RAYBURN, TEXAS LAW OF CONDEMNATION § 92, at 321 (1960). Texas courts have held that the Texas Constitution and statutes are to be construed as allowing recovery of compensation not only for property actually taken under the power of eminent domain, but for injury to the remaining portion caused by reason of the condemnation. Chicago, R.I. & G. Ry. v. Water Control & Improv. Dist. No. 1, 123 Tex. 432, 445, 73 S.W.2d 55, 63 (1934); City of Lubbock v. Thiel, 352 S.W.2d 799, 800 (Tex. Civ. App.—Amarillo 1961, writ ref'd n.r.e.); Kennedy v. City of Dallas, 201 S.W.2d 840, 841 (Tex. Civ. App.—Dallas 1947, writ ref'd n.r.e.); *see* 4A P. NICHOLS, THE LAW OF EMINENT DOMAIN § 14.2 (3d rev. ed. 1971).

18 State v. Carpenter, 126 Tex. 604, 610, 89 S.W.2d 194, 197 (1936).

19 City of Austin v. Cannizzo, 153 Tex. 324, 332, 267 S.W.2d 808, 813 (1954).

20 *Id.* at 332, 267 S.W.2d at 814.

diminish the present market value."[21] Evidence should be excluded, however, that relates to "remote, speculative and conjectural uses, as well as injuries, which are not reflected in the present market value of the property."[22] It must be remembered, however, that the landowner is required to recover all his compensation for damages upon the trial of the condemnation suit.[23] The landowner cannot recover in a subsequent proceeding for condemnation damages to the remainder tract that he ought to reasonably have foreseen and presented.[24] Therefore, estimation of the diminution of the value of the remainder tract does not depend solely on causes of damage actually operating at the time of the trial.[25]

In introducing evidence as to the severance damages, the landowner may rely on the presumption that the condemnor will fully exercise his rights to use and enjoy the property taken where there is nothing to prevent a full exercise of such rights.[26] If damages may be avoided, however, by a waiver or stipulation that is definite and certain, which will protect the rights of the parties concerned, the court will allow its introduction to rebut the presumption of the full use.[27] This limitation of the condemnation cannot be acquired through promissory

21 State v. Carpenter, 126 Tex. 604, 615, 89 S.W.2d 194, 200 (1936).

22 *Id.* at 615, 89 S.W.2d at 200.

23 City of La Grange v. Pieratt, 142 Tex. 23, 27, 175 S.W.2d 243, 246 (1943); Brunson v. State, 410 S.W.2d 9, 13 (Tex. Civ. App.—Corpus Christi 1966), *aff'd in part, rev'd in part,* 418 S.W.2d 504 (Tex. Sup. 1967).

24 City of La Grange v. Pieratt, 142 Tex. 23, 27, 175 S.W.2d 243, 246 (1943); City of Corpus Christi v. Polasek, 404 S.W.2d 826, 831 (Tex. Civ. App.—Corpus Christi 1966, no writ); *see* M. RAYBURN, TEXAS LAW OF CONDEMNATION § 69 (1960).

25 City of La Grange v. Pieratt, 142 Tex. 23, 27, 175 S.W.2d 243, 246 (1943).

26 People v. Renaud, 17 Cal. Rptr. 674, 678 (Dist. Ct. App. 1961); People *ex rel.* Dept. of Public Works v. Schultz Co., 268 P.2d 117, 124 (Cal. Ct. App. 1954); Carolina Cent. Gas Co. v. Hyder, 86 S.E.2d 458, 460 (N.C. 1955); Wolfe v. State, 292 N.Y.S.2d 635, 638 (1968); Spinner v. State, 167 N.Y.S.2d 731, 733 (Sup. Ct. 1957); State v. Frost, 456 S.W.2d 245, 254 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.); Willcockson v. Colorado River Mun. Water Dist., 436 S.W.2d 203, 206 (Tex. Civ. App.—Austin 1968, writ ref'd n.r.e.); Brunson v. State, 410 S.W.2d 9, 13 (Tex. Civ. App.—Corpus Christi 1966), *aff'd in part, rev'd in part,* 418 S.W.2d 504 (Tex. Sup. 1967); Wiseman v. State, 406 S.W.2d 253, 255 (Tex. Civ. App.—San Antonio 1966, writ ref'd n.r.e.); City of Corpus Christi v. Polasek, 404 S.W.2d 826, 832 (Tex. Civ. App.—Corpus Christi 1966, no writ); Creighton v. State, 366 S.W.2d 840, 843 (Tex. Civ. App.—Eastland 1963, writ ref'd n.r.e.); Perkins v. State, 150 S.W.2d 157, 159 (Tex. Civ. App.—San Antonio 1941, writ dism'd); *see* 4A P. NICHOLS, THE LAW OF EMINENT DOMAIN § 14.241[3] (3d rev. ed. 1971); M. RAYBURN, TEXAS LAW OF CONDEMNATION § 228 (1960); 29A C.J.S. *Eminent Domain* § 155 (1965); 27 AM. JUR. 2d *Eminent Domain* § 272 (1966).

27 Texas Power & Light Co. v. Cole, 158 Tex. 495, 506, 313 S.W.2d 524, 531 (1958); Thompson v. Janes, 151 Tex. 495, 499, 251 S.W.2d 953, 954 (1952); State v. Frost, 456 S.W.2d 245, 255 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.); Southwestern Bell Tel. Co. v. West, 417 S.W.2d 297 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.); Tacoma E.R.R. v. Smithgall, 108 P. 1091, 1094 (Wash. 1910); Board of Educ. v. Shafer, 124 S.E.2d 334, 338 (W. Va. 1962); *see* M. RAYBURN, TEXAS LAW OF CONDEMNATION § 70 (1960). As the court in Wair v. State, 349 S.W.2d 637, 638 (Tex. Civ. App.—Texarkana 1961, writ ref'd n.r.e.) said, "It is well established that in condemnation proceedings, the use, and plans and specifications of structures or changes to be made of the portion of the tract that is taken are relevant and proper to be considered in assessing the damages to that untaken." *See* 30 C.J.S. *Eminent Domain* § 449, at 625 (1965).

statements, unaccepted promises, or declarations of future intentions of what will be done or not done with respect to the property condemned.[28] Any such effort by the condemnor to minimize its damages by such proof has been denied by the courts.[29]

The Supreme Court of Texas in the instant case outlined the beginnings of the fair market value criterion in the determination of severance damages and the application of the willing seller, willing buyer evidence rule.[30] The court stressed that "the question of the competency of evidence bearing on the issue of market value at the time of the taking rests on those factors of reasonable weight in the factual determination of what a willing seller would sell for and what a willing buyer would pay."[31] In defining "those factors of reasonable weight," the court relies on the rule that everything which affects the market value of the land itself, having due regard for past, probable and future injuries, may properly be submitted to the jury.[32] In applying this rule, the court in *Pearland* stated, "[T]he public authority should not be required to pay severance damages on the basis of uses of the tract taken which are not at the time of the taking so reasonably probable as to be reflected in present market value and the jury should be permitted to give such weight to this factor as a prospective purchaser of the remainder tract would give."[33] This is exactly, the court contends, what was not allowed to be considered by the jury due to the procedures of the trial court.[34]

The court rejects the landowner's contention that *Perkins v. State*,[35] where the holding was that promissory statements of the condemnor are ineffective to reduce or mitigate damages and should be excluded, is controlling in the instant case.[36] That decision, the court declared, has not been construed "as prescribing the rules or procedures for determining the measure of severance damages."[37]

28 Willcockson v. Colorado River Mun. Water Dist., 436 S.W.2d 203, 206 (Tex. Civ. App. —Austin 1968, writ ref'd n.r.e.).

29 Henderson v. Iowa State Hwy. Comm'n, 151 N.W.2d 473, 476 (Iowa 1967); White v. Natural Gas Pipeline Co. of Am., 444 S.W.2d 298, 300 (Tex. Sup. 1969); Willcockson v. Colorado River Mun. Water Dist., 436 S.W.2d 203, 206 (Tex. Civ. App.—Austin 1968, writ ref'd n.r.e.); Perkins v. State, 150 S.W.2d 157, 159 (Tex. Civ. App.—San Antonio 1941, writ dism'd); Board of Educ. v. Shafer, 124 S.E.2d 334, 337 (W. Va. 1962); *see* Annot., 7 A.L.R.2d 364 (1949).

30 City of Pearland v. Alexander, 483 S.W.2d 244, 247 (Tex. Sup. 1972).

31 *Id.* at 247.

32 State v. Carpenter, 126 Tex. 604, 611, 89 S.W.2d 194, 197 (1936).

33 City of Pearland v. Alexander, 483 S.W.2d 244, 248 (Tex. Sup. 1972).

34 *Id.* at 248. The majority opinion goes on to say that the special instruction of the trial court was clearly erroneous and required the jury to presume full use of the entire ten acres regardless of any evidence to the contrary such as whether or not the full use by the city was reasonably probable at the time of the taking or whether such fact would be reflected in the market value of the remainder tract at such time. *Id.* at 249.

35 150 S.W.2d 157 (Tex. Civ. App.—San Antonio 1941, writ dism'd).

36 City of Pearland v. Alexander, 483 S.W.2d 244, 249 (Tex. Sup. 1972).

37 *Id.* at 249.

Judge McGee, in his dissent,[38] contends that the condemning authority as evidenced by its requested instruction,[39] did in fact intend to introduce promissory statements and that the trial court properly prevented such an occurrence by sustaining the landowner's motion in limine.[40] In support of its position, the dissent cites a long line of Texas cases, several leading treatises on eminent domain and two legal encyclopedias.[41] The dissent goes on to argue that the City, by its pleadings, had never limited or restricted its right to use the entire surface estate for construction of a sewage plant and therefore cannot contend it has the right to offer evidence to show, in all reasonable probability, that it would not exercise its full rights in the reasonably foreseeable future.[42]

As stated in *Carpenter*, "Fair and just compensation to the owner for the land condemned and for damages to the remainder is the end sought to be attained."[43] As evidenced by the instant case, this result is often not easily attained due to the difficulty in determining just what will be the type and extent of the public improvement that is to be constructed, and how it will affect the remainder tract. This problem arises from the interface of the two rules for computing severance damages that arose in *Pearland*. The first rule being that a landowner must recover in a condemnation proceeding all the damages that are reasonably foreseeable at that time.[44] This rule gave rise to the holding of the instant case that allows the condemning authority to introduce

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38 Calvert, C.J., and Greenhill, J., joined in this dissent.

39 City of Pearland v. Alexander, 483 S.W.2d 244, 250 (Tex. Sup. 1972).

> In answering Special Issue No. 6, you are instructed that the term "uses to which the condemned parcels are to be subjected" means use of the ten acres of land as a site for a sewage disposal plant . . . . Use for a sewage disposal plant includes erection and maintenance of structures for the disposal of sewage and all uses which are reasonably incidental thereto, such as *open spaces for light, air, and appropriate ornamentation, landscaping, drives for vehicles and walks for pedestrians*, automobile parking areas, areas for repair and replacement, storage facilities, and *recreational areas for employees*. (Court's emphasis.)

40 City of Pearland v. Alexander, 483 S.W.2d 244, 250 (Tex. Sup. 1972). The dissent also argues that the special instruction given by the trial court and its order in response to the landowner's motion in limine concerning the presumption of full use of the 10-acre tract by the City were appropriate in light of the general rule that it is presumed the State will exercise its rights to use and enjoy the property taken to the full legal extent. *Id.* at 251.

41 *Id.* at 251.

42 *Id.* at 251.

43 126 Tex. 604, 620, 89 S.W.2d 979, 981 (1936). As the court in Brewster v. City of Forney, 223 S.W. 175, 176 (Tex. Comm'n App. 1920, jdgmt adopted) stated:

> The Constitution of Texas and the decisions of her courts reveal a zealous regard for the rights of the individual citizen. Not only will they not permit his property to be "taken" for a public use without compensation, but will not permit it to be damaged unless the citizen is compensated to the extent of such damage. To hold otherwise would be to put upon one citizen a burden which should rest upon the aggregate citizenship, as the direct beneficiary of the public work, the construction and operation of which has damaged the property of one citizen.

44 City of Pearland v. Alexander, 483 S.W.2d 244, 247 (Tex. Sup. 1972); City of La Grange v. Pieratt, 142 Tex. 23, 27, 175 S.W.2d 243, 246 (1943).

into evidence the reasonably foreseeable and probable uses of the condemned tract.[45] Evidence of this nature, coupled with the requirement that the landowner must recover all of his claims for damages upon the trial of the condemnation suit and not later on,[46] place a difficult burden on the landowner.

The unfortunate results which can arise from this burden were well illustrated in *State v. Brewer*.[47] The landowner in that suit conveyed land to the State for the purpose of widening a state highway that ran in front of his house. He was told by the state engineer that the present road bed, on the same level as the abutting property, would possibly be regraded 3 or 4 feet lower during the widening process, but no more. Subsequently during the widening of the highway, new State Highway Department regulations were promulgated requiring grades over hills to be reduced. As a result, a grade cut about 600 feet in length and 14 to 16 feet in depth was made directly in front of the Brewer residence. The view of the Brewer house from the road was thereby obscured and other serious inconveniences resulted for which the Brewers sought damages. The court denied recovery, holding in effect that these results were foreseeable.[48]

The second rule of arriving at a determination of severance damages that arose in *Pearland* is the presumption that the State will exercise its rights to use and enjoy the property taken to the full extent where there is nothing to prevent a full exercise of such rights.[49] The fact

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45 City of Pearland v. Alexander, 483 S.W.2d 244, 249 (Tex. Sup. 1972).

46 City of La Grange v. Pieratt, 142 Tex. 23, 27, 175 S.W.2d 243, 246 (1943); Brunson v. State, 410 S.W.2d 9, 13 (Tex. Civ. App.—Corpus Christi 1966), *aff'd in part, rev'd in part*, 418 S.W.2d 504 (Tex. Sup. 1967). The right to recover is predicated upon the principle that in order to avoid a multiplicity of suits, the condemnee must assert all his damages arising by reason of future uses of the tract condemned at the original condemnation proceeding. *See* 4A P. NICHOLS, THE LAW OF EMINENT DOMAIN § 14.24 (3d rev. ed. 1971).

47 141 Tex. 1, 169 S.W.2d 468 (1943).

48 *Id.* at 6, 169 S.W.2d at 471. The court in denying recovery stated:

> The conveyance of land for a public purpose will ordinarily vest in the grantee the same rights as though the land had been acquired by condemnation proceedings. . . . [The] [g]rantors cannot recover for any damages to the remainder of the land, the land not conveyed, which result from a proper construction, use, and operation of the highway on such property conveyed.

Another example is found in City of La Grange v. Pieratt, 142 Tex. 23, 175 S.W.2d 243 (1943), in which the City of La Grange condemned land in front of the landowner's gasoline station for the purpose of widening a road. Mr. Pieratt accepted the condemnation award, however, when the road was closed for some months for construction work, Mr. Pieratt brought suit seeking recovery of lost profits. The supreme court, in denying recovery, held that it could have been reasonably foreseen that construction would have necessitated the closing of the highway and that Mr. Pieratt, by not claiming these damages in the condemnation proceeding, had waived them. *Accord,* Howard v. County of Nolan, 319 S.W.2d 947 (Tex. Civ. App.—Eastland 1959, no writ); Olive v. Sabine & E.T. Ry., 33 S.W. 139 (Tex. Civ. App. 1895, writ ref'd).

49 State v. Frost, 456 S.W.2d 245, 254 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.); Willcockson v. Colorado Mun. Water Dist., 436 S.W.2d 203, 206 (Tex. Civ. App.—Austin 1968, writ ref'd n.r.e.); Wiseman v. State, 406 S.W.2d 253, 255 (Tex. Civ. App. —San Antonio 1966, writ ref'd n.r.e.); Creighton v. State, 366 S.W.2d 840, 843 (Tex. Civ. App.—Eastland 1963, writ ref'd n.r.e.); Perkins v. State, 150 S.W.2d 157, 158 (Tex. Civ.

that the condemnor would never or very seldom use a part of the tract condemned would certainly be a factor to be considered which would reasonably be given weight in negotiations between a willing seller and a willing buyer of the remainder tract. This fact, however, could not be introduced into evidence in the condemnation suit under the holding of *Perkins v. State*[50] in which the court announced that the full use presumption by the State was to be controlling.[51]

The majority opinion in *Pearland* held that *Perkins* did not prescribe the rules and procedures for determining the measure of severance damages but only recognized the ineffectiveness of promissory statements by the condemnor to reduce or mitigate damages.[52] The court goes on to say that the City of Pearland only claimed, "the right to show the reasonably foreseeable and probable uses of the ten acre site which at the time of taking would be required in accomplishing the municipal purposes for which it was taken . . ."[53] and that this was not the problem in *Perkins*.[54] It is submitted that the language of *Perkins* and its rationale cannot be harmonized with the holding of the court in *Pearland*:

> Appellants [landowners] objected to [the] testimony . . . on the . . . grounds . . . that it was immaterial; that the State was taking complete control and right of possession of the property, leaving none to [the] appellants; and [the] *appellants were entitled to compensation measured by the value of the property taken and injury to that left, unaffected by the purely speculative consideration that the State may not at once deprive appellants of the use and enjoyment of the land and improvements included within the condemnation*; that the testimony was highly prejudicial to appellants. We sustain appellants' contentions.[55]

App.—San Antonio 1941, writ dism'd). The number of n.r.e. decisions here need not necessarily be taken as a sign of the lack of support by the supreme court of this rule. *See* Wilson, *Hints on Precedent Evaluation*, 24 TEX. B.J. 1037 (1961).

50 150 S.W.2d 157 (Tex. Civ. App.—San Antonio 1941, writ dism'd).

51 *Id.* at 158.

52 City of Pearland v. Alexander, 483 S.W.2d 244, 249 (Tex. Sup. 1972).

53 *Id.* at 249.

54 *Id.* at 249. In *Perkins*, the State was widening a road and sought a part of the needed land from Perkins. On the condemned part of Perkins' land there were trees and shrubs which he considered of value to his remaining property and therefore he claimed that the severance damages should include the fact that the trees and shrubs would be removed. A highway engineer was permitted to testify that the general and present policy of the highway commission was not to remove trees and shrubs unless they proved hazardous to traffic. In other words, while the State had the right to remove the trees and shrubs without permission from the adjacent landowner, the commission's policy was not to remove them. The court said that such testimony was elicited for consideration of the jury in measuring the compensation to be awarded and was designed to minimize the award of damages to the remainder as if the improvements were being left for Perkins' use and enjoyment. Introduction of such testimony was held to constitute reversible error in that the State did not affirmatively limit its taking in conjunction with such testimony.

55 Perkins v. State, 150 S.W.2d 157, 159 (Tex. Civ. App.—San Antonio 1941, writ dism'd) (emphasis added).

In *Pearland*, as in *Perkins*, the condemnor did not limit its right in the tract condemned. The condemnor had the title to and right of possession of the land and everything on or under it that could affect its use for the public improvement to be placed upon it. The evidence sought to be introduced by the City in *Pearland* and the evidence that was introduced by the State Highway Commission in *Perkins* did not involve any actual reservation of the rights of the condemnor nor was there any contractual or consensual stipulation, binding on both parties, that occurred with respect to the evidence in either case. The evidence sought to be introduced by the City of Pearland could only be considered as mere representations or promissory statements as to what use the City might make or intend to make of the tract condemned and therefore *Perkins* would be applicable.[56]

From the *Pearland* decision we have other questions which arise when the condemning authority attempts to limit its taking without actually binding itself to stay within the limits of use that it has represented to the jury. The landowners will not be able to recover for any later expansion of the sewage disposal plant because the City will only be exercising those rights which it legally obtained under the present condemnation.[57] Also, how can the City urge that it does not plan to use the entire 10-acre tract it has condemned? Will this support the presumption that the extent of the tract condemned was reasonably necessary to carry out the public purposes for which the land was appropriated? Anything beyond this is not the taking of private property for public use, but the taking of private property for private use.[58]

Should the introduction of evidence by the condemning authority, the effect of which would defeat the landowner's right to recover in one condemnation proceeding for all the damages that tend to depreciate the value of the remainder tract be permitted? Should the condemnor be required to pay severance damages on the basis of uses of the tract taken which might not be so reasonably probable as to be a factor that a prospective purchaser of the remainder tract would consider? Neither of these situations need be the case. As the Washington Court in *Tacoma E.R.R. v. Smithgall*[59] said, "[t]he law does not

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[56] Texas Power & Light Co. v. Cole, 158 Tex. 495, 501, 313 S.W.2d 524, 528 (1958); M. RAYBURN, TEXAS LAW OF CONDEMNATION § 95, at 341 (1960) states:

> The case of *Perkins v. State* . . . stands for the proposition, that the state, or other condemnor will be permitted to take the greatest estate, that it is possible for them to take, under the pleading and/or evidence. That unless the matter is limited by amended pleading, or by stipulation, that will be included in the judgment rendered, *evidence is not admissible to try to lessen the amount of the use, to be made of the land* . . . . (Emphasis added.)

[57] City of La Grange v. Pieratt, 142 Tex. 23, 27, 175 S.W.2d 243, 246 (1943).

[58] McInnis v. Brown County Water Improv. Dist. No. 1, 41 S.W.2d 741, 745 (Tex. Civ. App.—Austin 1931, writ ref'd).

[59] 108 P. 1091 (Wash. 1910).

favor the taking or damaging of property for a public use beyond the necessities of the case, and if damages may be avoided by a waiver or stipulation definite and certain in its terms, which will fully protect the rights of all parties concerned, there is no reason why such a stipulation should not be received and acted upon."[60]

The right of the condemning authority to dismiss a portion of the land sought to be condemned or to relinquish rights originally sought by appropriate amendment or binding stipulation at the condemnation trial has long been recognized in Texas.[61] Therefore, the City of Pearland need not pay severance damages based on any uses greater than they presently deem necessary to accomplish the public purpose for which the 10-acre tract was condemned. The requirement of affirmatively limiting the taking by the City could be met by delineating the types of buildings, foundations, sizes, etc. to be constructed on the tract and including this information in a proper amendment at the trial.[62] The landowner then does receive his constitutionally protected right of adequate compensation, for if the use of the tract, as shown by the plans and specifications is subsequently exceeded, he may recover damages for such activity.[63]

By adhering to the rule that the condemning authority will exercise its right to use and enjoy the property taken to the full legal extent, except where the taking is modified by appropriate amendment or binding stipulation at trial, the interests of both parties are protected and justice is accomplished. By this approach the jury can be properly enlightened as to the real amount of damages which will be sustained and the landowner can be properly protected against future damages, occasioned by a change of plans or construction in a manner not anticipated at the time of the assessment of damages.

Stephen Bond Paxson

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60 *Id.* at 1094. In Jacksonville & S.R.R. v. Kidder, 21 Ill. 131, 134 (1859), a leading case on point in Illinois, the court said:

> [T]he plan upon which the road was to be built, and the mode of construction, were of the utmost importance to enable the jury to come to a correct conclusion, and that it was not only the right but it was the duty of the railroad company to furnish full plans, profiles and estimates of that part of the road . . . .

Accord, State *ex rel.* State Hwy. Comm'n v. Grenko, 460 P.2d 56, 58 (N.M. 1969); Spinner v. State, 167 N.Y.S.2d 731, 733 (Sup. Ct. 1957); State v. Basin Dev. & Sales Co., 332 P.2d 245, 247 (Wash. 1958); *see* Stubbs, *How to Maximize Compensation for the Landowner,* in INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN, 123, 159 (1972); 30 C.J.S. *Eminent Domain* § 449 (1965).

61 White v. Natural Gas Pipeline Co. of Am., 444 S.W.2d 298, 300 (Tex. Sup. 1969); Texas Power & Light Co. v. Cole, 158 Tex. 495, 504, 313 S.W.2d 524, 530 (1958); Thompson v. Janes, 151 Tex. 495, 499, 251 S.W.2d 953, 954 (1952); State v. Frost, 456 S.W.2d 245, 255 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.); Southwestern Bell Tel. Co. v. West, 417 S.W.2d 297, 299 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.).

62 White v. Natural Gas Pipeline Co. of Am., 444 S.W.2d 298, 302 (Tex. Sup. 1969).

63 Texas Power & Light Co. v. Cole, 158 Tex. 495, 501, 313 S.W.2d 524, 528 (1958); Feuerborn v. State, 367 P.2d 143, 145 (Wash. 1961).