Opinion issued June 18, 2020.

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00092-CV

TERRANCE J. HLAVINKA, KENNETH HLAVINKA, TRES BAYOU FARMS, L.P., AND TERRANCE HLAVINKA CATTLE COMPANY, Appellants

V.

HSC PIPELINE PARTNERSHIP, LLC, Appellee

On Appeal from County Court at Law No. 2
Brazoria County, Texas
Trial Court Case Nos. C154928

O P I N I O N

This appeal arises from a condemnation proceeding initiated by appellee, HSC Pipeline Partnership, LLC (HSC), to obtain the right to a pipeline easement across

the property of Terrance Hlavinka (Terry), Kenneth Hlavinka (Kenneth), Terrance Hlavinka Cattle Company (THCC), and Tres Bayou Farms, L.P. (TBF) (collectively, the Hlavinkas). In four issues, the Hlavinkas argue that: (1) the trial court erred by granting summary judgment in HSC's favor; (2) the trial court erred by denying the Hlavinkas's plea to the jurisdiction; (3) the trial court abused its discretion by admitting the affidavits of HSC's witness; and (4) the trial court abused its discretion in excluding the testimony of Terry Hlavinka as to the market value of the condemned easement.

We affirm in part and reverse and remand in part.

Background

The Hlavinkas own 15,000-16,000 acres in Brazoria County, Texas. They purchased these four tracts of land in 2002-2003 for the primary purpose of generating income by acquiring additional pipeline easements. When the Hlavinkas purchased the tracts, there were already more than twenty-five pipelines traversing the properties.

HSC owns pipeline systems in Texas for the transportation of various products, including polymer grade propylene (PGP).

In April 2016, HSC's sole manager, Enterprise Products OLPGP, Inc. (Enterprise), applied to the Texas Railroad Commission (RRC) for a permit to operate a new forty-four-mile-long pipeline known as the Oyster Creek Lateral

Project (the Pipeline). Enterprise would operate the Pipeline on behalf of HSC. The Pipeline, which originates at an interconnection at Texas City, traverses Galveston and Brazoria County, and ends at a plant in Brazoria County that is owned and operated by Braskem America, Inc., an Enterprise customer.

In July 20, 2016, HSC contacted the Hlavinkas and attempted to acquire a 30-foot-wide permanent right-of-way and easement and temporary workspace easement across the four tracts of land (collectively, the Easement). The Hlavinkas and HSC were unable to reach an agreement for the Easement. As a result, HSC filed three condemnation proceedings involving the four tracts which were later consolidated into a single cause number.

The Hlavinkas filed a plea to the jurisdiction challenging HSC's eminent domain power. In their plea, the Hlavinkas argued that the trial court did not have jurisdiction over this matter because HSC was not a common carrier and, therefore, HSC did not have authority to condemn their property. *See* TEX. PROP. CODE § 21.012 (stating that only entity with eminent domain authority may condemn real property); *see also* TEX. PROP. CODE § 21.001 ("District courts and county courts at law have concurrent jurisdiction in eminent domain cases."). Specifically, the Hlavinkas argued that propylene, the product being transported by the Pipeline, was neither crude petroleum under the Texas Natural Resources Code, nor an oil product or liquefied mineral under the Texas Business Organizations Code. They further

argued that even if a pipeline transporting propylene was covered under either statute, HSC was not a common carrier because the Pipeline was not for "public use." Among other things, the Hlavinkas attached excerpts from the deposition of Roger Herrscher, HSC's corporate representative.

HSC subsequently filed a traditional motion for partial summary judgment addressing some of the same issues and seeking to establish its right to condemn as a matter of law. HSC alleged that it was a common carrier because the Pipeline would carry "propylene" that is "obtained from crude petroleum . . . for purposes of § 111.002(1) of the Texas Natural Resources Code. . . ." It further asserted that propylene is an "oil product" or "liquefied mineral" under section 2.104 of the TBOC, a provision HSC claimed provided an "independent grant of eminent domain rights." HSC also alleged that the Pipeline was available to all shippers who desired to use the line, and that it had a contract with Braskem, an unaffiliated third party.

HSC attached the following documents to its motion for summary judgment: (1) a certified copy of a T-4 Permit to operate the Pipeline; (2) the October 17, 2017 affidavit from Roger Herrscher, the Senior Vice President of Enterprise; (3) the pipeline tariff it filed with the RRC; and (4) a redacted copy of the Transportation Service Agreement between Braskem and HSC. The T-4 Permit states that the pipeline is a "Common Carrier" and that the commodity being transported by the pipeline will be "products."

HSC filed a supplement to its traditional motion for partial summary judgment, to which is attached a November 21, 2017 affidavit from Herrscher that it submitted to replace Herrscher's October 17, 2017 affidavit.

The Hlavinkas responded to HSC's summary judgment and asserted some of the same arguments they had raised in their plea, namely, that HSC is not a common carrier because its pipeline is transporting propylene, and not crude petroleum, oil, an oil product, or a liquefied mineral, and that its one customer—Braskem—is not sufficient to satisfy the "public use" requirement.

The Hlavinkas challenged Herrscher's affidavits in their response to HSC's summary judgment motion and in their reply to HSC's response to the Hlavinkas' plea to the jurisdiction.

On May 8, 2018, the trial court issued an order denying the Hlavinkas' plea to the jurisdiction and granting HSC's motion for partial summary judgment. The court's order acknowledged that the only remaining issue for the trier of fact was the amount of "just compensation" to the Hlavinkas.

HSC moved to exclude the testimony of Terrance Hlavinka related to damages and valuation of the Easement, based on his use of improper methodologies and failure to use the before-and-after methodology that has long been held to be the

proper methodology in condemnation proceedings.[1] In their response, the Hlavinkas argued that Terry was qualified to testify as the property owner and as the family member who regularly handles various easement and property sales for the property, including similar pipeline easement sales. Terry's testimony as to the market value of the taking was presented as a per rod as well as a per acre calculation. The trial court granted HSC's motion and ordered that Terrance was "excluded from testifying that Defendants are entitled to compensation based on a per rod methodology" and "about the alleged comparable pipeline easement sales he relies on in support of his analysis."

After the trial court granted HSC's summary judgment motion, denied the Hlavinkas' jurisdictional plea, and excluded Terrance Hlavinka's valuation testimony, the parties entered into a Rule 11 agreement that recited certain stipulations between the parties, including the issues the Hlavinkas could challenge on appeal. Specifically, the parties agreed that the Hlavinkas could appeal, among other things: (1) HSC's right to take and whether HSC qualifies as a common carrier; (2) the order granting HSC's summary judgment; (3) the denial of the Hlavinkas' plea to the jurisdiction; and (4) the trial court's exclusion of Terry's damages testimony.

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[1] HSC also filed a motion to exclude or limit the testimony of Kenneth Hlavinka on crop and surface damage evidence.

On November 29, 2018, the trial court signed a final judgment awarding HSC the permanent thirty-foot wide easements it sought for its pipeline, as well as a temporary workspace easement(s) and use of roads. HSC was also given the right to assign the easements, the right of ingress and egress, the right to remove fences, the right to mow or cut down trees or shrubbery, and the right to construct, maintain, and change slopes to ensure support and drainage for the pipeline. The judgment awarded the Hlavinkas $132,293.36, representing $108,967.36 for crop and surface damages and $23,326 for the easements.

The Hlavinkas filed a motion for new trial and a request for findings of fact and conclusions of law. The trial court denied the motion for new trial. The trial court issued its findings of fact and conclusions of law on January 22, 2019. This appeal followed.

Standard of Review

We review a trial court's grant of summary judgment de novo. *SeaBright Ins. Co. v. Lopez*, 465 S.W.3d 637, 641 (Tex. 2015). The moving party must prove no genuine issue of material fact exists, and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We review the evidence "in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence

unless reasonable jurors could not." *Fielding*, 289 S.W.3d at 848 (citing *City of Keller v. Wilson*, 168 SW.3d 802, 827 (Tex. 2005); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 208 (Tex. 2002)). If a movant produces evidence entitling it to summary judgment, the burden shifts to the nonmovant to present evidence raising a genuine issue of material fact. *See Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996).

If a plea to the jurisdiction challenges jurisdictional facts, the appellate court considers relevant evidence the parties submitted to resolve jurisdictional issues and takes as true all evidence favorable to the non-movant. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226–28 (Tex. 2004) (recognizing that if plea to jurisdiction challenges jurisdictional facts, applicable standard "generally mirrors that of a summary judgment. . ."). "[I]n a case in which the jurisdictional challenge implicates the merits of the plaintiffs' cause of action and the plea to the jurisdiction includes evidence, the trial court reviews the relevant evidence to determine if a fact issue exists." *Id.* at 227. "If the evidence creates a fact question regarding the jurisdictional issue, then the trial court cannot grant the plea to the jurisdiction, and the fact issue will be resolved by the fact finder." *Id.* at 227–28.

The Hlavinkas' plea to the jurisdiction and HSC's summary judgment motion were effectively cross-dispositive motions, which we review under the de novo standard that applies to cross-motions for summary judgment; therefore, we review

both motions de novo and render the judgment that the trial court should have rendered. *See Morello v. Seaway Crude Pipeline Co., LLC*, 585 S.W.3d 1, 15 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). Additionally, statutory interpretation is a question of law that we review de novo. *Sw. Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 404 (Tex. 2016).

Common Carrier Status

In Texas, "[c]ommon carriers have the right and power of eminent domain." TEX. NAT. RES. CODE § 111.019(a); *see also* TEX. BUS. ORGS. CODE § 2.105 (stating common carrier "has all the rights and powers conferred on a common carrier by Sections 111.019-111.022, Natural Resources Code"). In the exercise of that power, "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(b); *see also* TEX. PROP. CODE § 21.012 (stating that only entity with eminent domain authority may condemn real property). Thus, HSC's right of eminent domain depends on its status as a common carrier under Texas law.

HSC asserts that the evidence conclusively establishes that it is a common carrier with the right of eminent domain under both section 2.105 of the Business Organizations Code and section 111.002(1)[2] of the Natural Resources Code.

A. Business Organizations Code § 2.105

HSC argues that Business Organizations Code section 2.105 provides an independent grant of eminent domain authority for common carriers. The Hlavinkas, however, argue that section 2.105 incorporates the Natural Resources Code by reference and does not extend the power of eminent domain beyond that conferred by the Natural Resources Code because an entity must still meet Chapter 111's common carrier requirement.

Section 2.105 states:

> In addition to the powers provided by the other sections of this subchapter, a corporation, general partnership, limited partnership, limited liability company, or other combination of those entities engaged as a common carrier in the pipeline business for the purpose of transporting oil, oil products, gas, carbon dioxide, salt brine, fuller's earth, sand, clay, liquefied minerals, or other mineral solutions has all

[2] Section 111.002(1) states that, "A person is a common carrier subject to the provisions of this chapter if it . . . owns, operates, or manages a pipeline or any part of a pipeline in the State of Texas for the transportation of crude petroleum to or for the public for hire, or engages in the business of transporting crude petroleum by pipeline." TEX. NAT. RES. CODE § 111.002(1). Section 111.002 also defines common carriers as, inter alia, persons who own, operate, or manage pipelines for transportation of crude petroleum, coal in whatever form, carbon dioxide or hydrogen in whatever form, and feedstock for carbon gasification, the products of carbon gasification, or the derivative products of carbon gasification. *See id.* § 111.002(1)–(7).

> the rights and powers conferred on a common carrier by Sections 111.019-111.022, Natural Resources Code.

TEX. BUS. ORGS. CODE § 2.105. As relevant here, section 111.019 states:

> (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).[3]

This court has previously held that section 2.105's predecessor, article 2.01(B)(3)(b) of the Texas Business Corporations Act, provides an independent grant of eminent domain authority. *See ExxonMobil Pipeline Co. v. Bell*, 84 S.W.3d 800, 803–04 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) ("ExxonMobil, as a common carrier, is accorded the power of eminent domain. *See* TEX. BUS. CORP. ACT art. 2.01(B)(3)(b)"); *accord Crosstex NGL Pipeline, L.P. v. Reins Rd. Farms–1, Ltd.*, 404 S.W.3d 754, 760 (Tex. App.—Beaumont 2013, no pet.) (treating section 2.105 as independent grant of eminent domain authority); *Phillips Pipeline Co. v. Woods*, 610 S.W.2d 204, 206 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd

[3] Sections 111.020 to .022 authorize common carriers to lay, maintain, and operate a pipeline or telegraph line along, across, or under a public road or highway, or under a railroad, subject to conditions being met. Common carriers must receive express permission and be under the direction of the governing body of an incorporated city in order to lay its pipelines along and under a street or alley in that city. *See* TEX. NAT. RES. CODE §§ 111.020-22.

n.r.e.) (rejecting argument that only pipelines transporting crude petroleum are common carriers, holding pipeline transporting ethane-propane mixture was common carrier, citing to article 2.01B(b)(3), and stating, "Therefore, a pipeline may be a common carrier even though it carries oil products rather than crude."). The Texas Attorney General's Office has also weighed in on this issue and concluded that a pipeline can exercise eminent domain power pursuant to section 2.105's predecessor, article 2.01(B)(3)(b). Op. Tex. Att'y Gen. JM-988 (1988).

The Beaumont Court of Appeals is the only court that has held that section 2.105 does not provide an independent grant of eminent domain authority. *See Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 457 S.W.3d 115, 119 (Tex. App.—Beaumont 2015), *rev'd on other grounds*, 510 S.W.3d 909 (Tex. 2017). The Texas Supreme Court, however, expressly declined to decide whether section 2.105 provided an independent grant of eminent domain authority in that case because it held that the pipeline was a common carrier under Chapter 111. *Denbury Green Pipeline-Tex., LLC v. Tex. Rice Land Partners, Ltd.*, 510 S.W.3d 909, 914 n.6 (Tex. 2017) (*Texas Rice II*). The lower court's opinion is not binding upon us and, in light of the procedural history, we do not consider the court's opinion to be persuasive. *See generally Tex. Dep't of Transp. v. Ramming*, 861 S.W.2d 460, 467 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (stating court of appeals opinion that had been reversed by Texas Supreme Court on other grounds "has

suspect precedential value, and courts have declined to follow it"); *see also Rosenzweig v. Dall. Area Rapid Transit*, 841 S.W.2d 897, 898 (Tex. App.—Dallas 1992, writ denied); *Harris Cty. v. White*, 823 S.W.2d 385, 387–88 (Tex. App.—Texarkana 1992, no writ).

Article 2.01(B)(3)(b) is substantially similar to section 2.105[4] and we see no reason to depart from our prior opinion in *Bell*. Accordingly, we reaffirm *Bell* and hold that section 2.105 provides an independent grant of eminent domain authority. *See* 84 S.W.3d at 803–04.

1. Common Carrier Products under Section 2.105

HSC argues that it is a common carrier under section 2.105 because propylene is an "oil product" and a "liquified mineral." The term "oil product" is not defined in Business Organizations Code section 2.105. Related terms, however, are defined in the Natural Resources Code, the Texas Administrative Code, and industry sources, and we consider these definitions to be instructive.

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[4] Article 2.01B(b), as originally enacted in 1955, stated:

> [A]ny corporation engaged as a common carrier in the pipe line business for transporting oil, oil products, gas, salt brine, fuller's earth, sand, clay, liquefied minerals or other mineral solutions, shall have all of the rights and powers conferred by Articles 6020 and 6022, Revised Civil Statutes.

Act approved Apr. 15, 1955, 54th Leg., R.S., ch. 64 (H.B. 16), Art. 1.01, 1955 Tex. Gen Laws 64.

The Natural Resources Code defines "oil" as "crude petroleum oil." TEX. NAT. RES. CODE § 115.001(5).[5] The term "petroleum product" includes, among other things, "any other liquid petroleum product or byproduct derived from crude petroleum oil or gas." *Id.* § 115.001(7)(x). The RRC also defines the term "product" to include:

> [R]efined crude oil, crude tops, topped crude, processed crude petroleum, residue from crude petroleum, cracking stock, uncracked fuel oil, fuel oil, treated crude oil, residuum, casinghead gasoline, natural gas gasoline, gas oil, naphtha, distillate, gasoline, kerosene, benzene, wash oil, waste oil, blended gasoline, lubricating oil, blends or mixtures of petroleum, and/or any and all liquid products or by-products derived from crude petroleum oil or gas, whether hereinabove enumerated or not.

16 TEX. ADMIN. CODE § 3.79(21). These terms are also consistent with industry terminology. One industry source defines "crude oil" as "a general term for unrefined petroleum or liquid petroleum," and "petroleum" is defined as "[a] complex mixture of naturally occurring hydrocarbon compounds found in rock. Petroleum can range from solid to gas, but the term is generally used to refer to liquid crude oil." Schlumberger's Oilfield Glossary, https://www.glossary.oilfield.slb.com/Terms (last visited June 5, 2020); *cf. Crosstex NGL Pipeline*, 404 S.W.3d at 758 (stating that Webster's Dictionary defines "crude petroleum" as "petroleum as it occurs naturally, as it comes from an oil well, or after

[5] Neither "crude petroleum" nor "crude oil" is defined.

extraneous substances (as entrained water, gas, and minerals) have been removed [.]"). Similarly, the U.S. Energy Information Administration (EIA) defines "crude oil," in part, as "a mixture of hydrocarbons that exists in liquid phase in natural underground reservoirs and remains liquid at atmospheric pressure after passing through surface separating facilities." According to the EIA, crude oil is refined to produce a wide array of petroleum products, including propane, which is a liquefied petroleum gas, and "petrochemical feedstocks." "Propylene" "is an important petrochemical feedstock." EIA, https://www.eia.gov/tools/glossary/ (last visited June 5, 2020).

Herrscher testified during his deposition that Enterprise purchases refinery grade propylene (RGP) from various refineries and then uses the RGP to produce PGP and propane at its Mont Belview facility. Enterprise also uses the propane generated from the RGP to produce additional PGP through a separate process at the same location. The PGP produced at Mont Belview is the commodity transported in the Pipeline from Texas City to the Braskem facility. According to Herrscher, the RGP from which the PGP is transported in the Pipeline was produced from crude petroleum. Herrscher also testified that propylene is produced from propane and propane is a "component of crude petroleum."

Based on the record before us, we conclude that the propylene that HSC transports in the Pipeline is an "oil product" for purposes of section 2.105.[6]

2. Public Use

Article I, Section 17 of the Texas Constitution prohibits the taking of private property by eminent domain except for a "public use." As the Texas Supreme Court stated in *Texas Rice I*,

> Even when the Legislature grants certain private entities "the right and power of eminent domain," the overarching constitutional rule controls: no taking of property for private use. Accordingly, the Natural Resources Code requires so-called "common carrier" pipeline companies to transport carbon dioxide "to or for the public for hire." In other words, a CO2 pipeline company cannot wield eminent domain to build a private pipeline, one "limited in [its] use to the wells, stations, plants, and refineries of the owner." A common carrier transporting gas for hire implies a customer other than the pipeline owner itself.

Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 363 S.W.3d 192, 194–95 (Tex. 2012) (footnotes omitted). The court further stated:

> While these provisions plainly give private pipeline companies the power of eminent domain, that authority is subject to special scrutiny by the courts. The power of eminent domain is substantial but constitutionally circumscribed. Article 1, Section 17 of the Texas Constitution provides, "No person's property shall be taken . . . for or applied to public use without adequate compensation. . . ." This provision not only requires just compensation to the property owner, but also "prohibits the taking of property for *private* use."

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[6] Although it is not dispositive on the issue, we note that the T-4 Permit issued by the RRC identifies the Pipeline as a "Common Carrier" and states that the commodity being transported by the Pipeline will be "products."

Id. at 197. Furthermore,

> Pipeline development is indisputably important given our State's fast-growing energy needs, but economic dynamism—and more fundamentally, freedom, itself—also demand strong protections for individual property rights. Locke deemed the preservation of property rights "[t]he great and chief end" of government, a view this Court echoed almost 300 years later, calling it "one of the most important purposes of government." Indeed, our Constitution and laws enshrine land ownership as a keystone right, rather than one "relegated to the status of a poor relation."

Id. at 204. Therefore, regardless of the source from which HSC's right of eminent domain is derived, HSC cannot take the Hlavinkas' property unless it is for a public use. *See id.* at 194–95, 197. The Texas Constitution demands no less. The Texas Supreme Court reaffirmed the importance of private property rights and the constitutional protections sheltering those rights:

> This Court has repeatedly, recently, and unanimously recognized that strong judicial protection for individual property rights is essential to "freedom itself." . . . Individual property rights are "a foundational liberty, not a contingent privilege." They are, we affirm today, "fundamental, natural, inherent, inalienable, [and] not derived from the legislature," and "preexist[] even constitutions."

Harris Cty. Flood Control Dist. v. Kerr, 499 S.W.3d 793, 804 (Tex. 2016) (internal citations omitted).

"[T]he ultimate question of whether a particular use is a public use is a judicial question to be decided by the courts." *Tex. Rice I*, 363 S.W.3d at 198. If, however, there are questions of fact underlying that judicial question, then those factual disputes should be submitted to a jury to resolve. *City of Austin v. Whittington*, 384

S.W.3d 766, 778 (Tex. 2012) ("The trial court should only submit the issue [of public use] to a jury if the underlying facts are in dispute."); *see also Tex. Rice II*, 510 S.W.3d at 916 (implicitly acknowledging factfinder's role in public use analysis when evidence is in dispute).

In *Texas Rice I*, the Texas Supreme Court held that a pipeline owner is "not entitled to common-carrier status simply because it obtained a common-carrier permit, filed a tariff, and agreed to make the pipeline available to any third party wishing to transport its gas in the pipeline and willing to pay the tariff." *Tex. Rice I*, 363 S.W.3d at 202. The Court then articulated a test for purposes of determining whether a CO_2 pipeline met the constitutionally mandated public use requirement for common carriers exercising the right of eminent domain. The court held that to qualify as a common carrier under section 111.002(6) of the Natural Resources Code, "a reasonable probability must exist that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier." *Id.* (footnotes omitted). For purposes of this test, "a reasonable probability is one that is more likely than not." *Id.* n.29. Additionally, once a landowner challenges common-carrier status, "the burden falls upon the pipeline company to establish its common-carrier bona fides if it wishes to exercise the power of eminent domain." *Id.* at 202.

In *Texas Rice I*, Denbury Green Pipeline owned a naturally occurring CO_2 reserve in Mississippi and wanted to build a pipeline to deliver CO_2 from its Mississippi facility to Texas oil wells in order to facilitate tertiary operation on the wells. *See id.* at 195. Denbury submitted summary judgment evidence that it had obtained a common carrier permit for the pipeline, filed a tariff, and agreed to make the pipeline available for public use. The court determined that Denbury was not entitled to summary judgment on its common-carrier status because the evidence before the court established only a possibility, and not a reasonable probability, that the pipeline "at some point after construction [would] serve the public." *Id.* at 202–03. Among other things, the evidence did not indicate whether Denbury intended to use the gas for its own operations, and it failed to identify any potential customers. *See* id. at 203. The Supreme Court remanded the case to the trial court for further proceedings. *See id.*at 204. On remand, Denbury produced additional evidence that the Supreme Court subsequently determined conclusively established the pipeline's common carrier status. *See Tex. Rice II*, 510 S.W.3d at 916. Specifically, Denbury provided evidence that it had entered into transportation contracts with Airgas Carbonic and Air Products, both of whom are manufacturers and distributers of liquid CO_2 and are not affiliated with Denbury. *See id.* The court held that although the Air Products contract, standing alone, would not satisfy the reasonable probability test because title to the CO_2 transfers to Denbury at the end of its

transport, the evidence as a whole "conclusively establishe[d] that it was 'more likely than not' that, 'at some point after construction,'" the pipeline would serve the public. *Id.* at 917–18.

Although the Supreme Court in *Texas Rice I* stated that its holding was limited to CO_2 pipelines that derived their eminent domain authority from section 111.002(6) of the Natural Resources Code,[7] three lower appellate courts subsequently determined that the higher court's reasoning was nevertheless applicable to other types of pipelines and applied the "reasonable probability" test to crude petroleum and natural gas pipelines governed by other subsections of the Natural Resources Code. *See Saner v. BridgeTex Pipeline Co., LLC*, 530 S.W.3d 196, 199 (Tex. App.—Eastland 2016, pet. denied) (stating there was no "distinction between crude petroleum common carriers under Section 111.002(1) and carbon dioxide common carriers under Section 111.002(6) that would justify a departure from [*Texas*] *Rice I*'s reasonable probability test" and applying reasonable probability test to crude petroleum pipeline); *Crosstex NGL Pipeline*, 404 S.W.3d at 761 (stating "we are not persuaded the Court's reasoning concerning the process of obtaining a T–4 permit applies only to carbon dioxide lines" and applying test to

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[7] *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 202 n.28 (Tex. 2012) ("Our decision today is limited to persons seeking common-carrier pipeline status under Section 111.002(6). We express no opinion on pipelines where common-carrier status is at issue under other provisions of the Natural Resources Code or elsewhere.").

natural gas pipelines); *see also Crawford Family Farm P'ship v. TransCanada Keystone Pipeline, L.P.*, 409 S.W.3d 908, 922 (Tex. App.—Texarkana 2013, pet. denied) (citing *Crosstex* and applying reasonable probability test to crude petroleum pipeline).

The "public use" requirement is grounded in the Texas Constitution, not in a particular legislative grant of eminent domain authority. *See* TEX. CONST. art. 1, § 14; *Texas Rice I*, 363 S.W.3d at 194–95 (stating that, in eminent domain cases, "overarching constitutional rule [that] controls" is "no taking of property for private use"). In the words of the Texas Supreme Court, this "test balances the property rights of Texas landowners with our state's robust public policy interest in pipeline development, while also respecting the constitutional limitations placed on the oil and gas industry." *Tex. Rice II*, 510 S.W.3d at 915 (citing *Texas Rice I*, 363 S.W.3d at 197, 204). We can discern no meaningful distinction between crude petroleum pipelines and natural gas pipelines governed by the Natural Resources Code, and oil product pipelines governed by the Business Organizations Code, and given that the "public use" requirement is constitutionally mandated and applies to all common carrier pipelines, we conclude that the reasonable probability test is equally applicable to oil product pipelines, such as the one in this appeal. Accordingly, the next question we must answer is whether the evidence demonstrates that HSC satisfied the reasonable probability test.

In this case, HSC established that the RRC had issued a T-4 Permit to Enterprise to operate the Pipeline on behalf of HSC, HSC filed a tariff with the RRC in which it agreed to offer its transportation services to other parties, and it agreed to be bound by the rules of Chapter 111. A pipeline "is not entitled to common-carrier status simply because it obtained a common-carrier permit, filed a tariff, and agreed to make the pipeline available to any third party wishing to transport its [product] in the pipeline and willing to pay the tariff." *Tex. Rice I*, 363 S.W.3d at 202. The court reached this decision based, in part, on the fact that, "[a]pparently, in order to receive a common-carrier permit, the applicant need only place an 'x' in a box indicating that the pipeline will be operated as a common carrier, and to agree under Section 111.002(6) to subject itself to 'duties and obligations conferred or imposed' by Chapter 111." *Id.* at 199.

The judiciary has a fundamental obligation to facilitate a landowner's right to meaningfully contest the exercise of eminent domain under the facts and circumstances of the individual case. *See Texas Rice I*, 363 S.W.3d at 204 ("Pipeline development is indisputably important given our State's fast-growing energy needs, but economic dynamism—and more fundamentally, freedom, itself—also demand strong protections for individual property rights."); *see also Kerr*, 499 S.W.3d at 804 ("Individual property rights are 'a foundational liberty, not a contingent privilege.' They are, we reaffirm today, 'fundamental, natural, inherent, inalienable, [and] not

derived from the legislature,' and 'preexist[] even constitutions.'") (quoting *Texas Rice I*, 363 S.W.3d at 204 n.34). We recognize that the process for obtaining a T-4 permit is more substantial after the *Texas Rice* opinions and does not involve merely "checking the box." One thing that has not changed, however, is the RRC's inability to determine property rights or conclusively establish that a pipeline is a common carrier. *See Tex. Rice I*, 363 S.W.3d at 198; *see also Amarillo Oil Co. v. Energy–Agri Prods., Inc.*, 794 S.W.2d 20, 26 (Tex. 1990) ("The cause is properly within the jurisdiction of the courts because the Railroad Commission has no authority to determine title to land or property rights."); *R.R. Comm'n v. City of Austin*, 524 S.W.2d 262, 267–68 (Tex. 1975) ("This Court has also held on several occasions that the Commission does not have power to determine title to land or property rights."). Furthermore, the RRC acknowledges on its website that the T-4 permitting process does not, and is not intended to, determine whether a pipeline is a common carrier.

> A T-4 Permit is a permit to operate a pipeline in Texas; it is not a determination of whether a pipeline is or is not a common carrier. A T-4 Permit is essentially a registration process to provide the Railroad Commission (RRC) with information about a pipeline, such as the material it is carrying and whether the pipeline is jurisdictional to the RRC.
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> . . .
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> The Supreme Court opinion in *Texas Rice Partners, Ltd. v. Denbury Green Pipeline*, 363 S.W.3d 192 (Tex. 2012) accurately described the Commission's T-4 Permit process as one of registration, not of

> application, and that in accepting an entity's paperwork, the Commission performs a clerical rather than judicial-type act. The Court held that the T-4 Permit granted to Denbury by the Commission, standing alone, did not conclusively establish Denbury's status as a common carrier and confer the power of eminent domain. Further, the Court stated, "the parties point to no regulation or enabling legislation directing the Commission to investigate and determine whether a pipeline will in fact serve the public."

https://rrc.state.tx.us/about-us/resource-center/faqs/pipeline-safety-faqs/faq-pipeline-eminent-domain-and-condemnation/ (last visited June 8, 2020). Therefore, the T-4 permit may be some evidence of HSC's common carrier status, but it is far from conclusive.

HSC argues that it satisfies *Texas Rice I*'s reasonable-probability test because it also provided evidence establishing that it entered into a TSA with Braskem, an unaffiliated third-party shipper, Braskem retains title to its PGP at all times while in the Pipeline, and Braskem receives its PGP at its plant. According to HSC, this "is all that is required under the reasonable-probability test." While it may be some evidence of future public use, HSC's TSA with Braskem refers to a product whose title is transferred from a manufacturer to a customer/end user before it enters a pipeline managed by the same manufacturer to be shipped to the same customer/end user, and that is not conclusive evidence of public use. *See Tex. Rice II*, 510 S.W.3d at 916 ("Contracts with unaffiliated entities that show non-pipeline-owned gas being transported for the benefit of the unaffiliated entity can be relevant to showing reasonable probability of future public use.").

Furthermore, while the question of when title to a product is transferred is ultimately left to the discretion of the contracting parties, there is, at least, a question of fact with regard to common carrier status. By giving conclusive effect to a private contract, we would be doing the very thing the Texas Supreme Court has warned against—allowing a pipeline owner to decide whether it should be treated as a common carrier for eminent domain purposes. We can discern no meaningful distinction between a pipeline owner declaring itself a common carrier in the course of registering with RRC for a T-4 Permit, which is not conclusive evidence of common carrier status, and two private parties deciding whether to confer common carrier status as a part of their contract negotiations. The result is the same—the decision is effectively taken out of the hands of the courts and placed in the hands of private, interested parties. Under such circumstances, landowners would have little, if any, ability to challenge whether a pipeline will actually serve the public, as opposed to a device to seize their property by eminent domain. *See generally Tex. Rice I*, 363 S.W.3d at 200; *see also id.* at 202 ("The oil company should not be able to seize power over the farmer's property simply by applying for a crude oil pipeline permit with the Commission, agreeing to subject itself to the jurisdiction of the Commission and all requirements of Chapter 111, and offering the use of the pipeline to non-existent takers.").

We note that the Texas Supreme Court has not identified any evidence that, standing alone, conclusively establishes a pipeline's common carrier status. *See Texas Rice II*, 510 S.W.3d at 917–18 (holding that evidence as whole "conclusively establishe[d] that it was "more likely than not" that, "at some point after construction," the [pipeline] would serve the public). We note that the evidence in this case is distinguishable from other pipelines that appellate courts have determined met the public use requirement. Specifically, in *Saner*, the pipeline would be connected to seven to ten refineries and the pipeline company was negotiating with twelve to fourteen third-party shippers and had received five applications from spot shippers. 530 S.W.3d at 198. In *Crawford Family Farm Partnership*, the pipeline company agreed to binding transportation agreements for 200,000 barrels per day, and it held an "open season" to attract potential customers. 409 S.W.3d at 923.

Here, the Pipeline connects to a single facility, a plant owned by Braskem, Enterprise's customer. Herrscher also testified in his deposition that the Pipeline was built to provide PGP to Braskem. There are no current interconnections and there are no plans to add any interconnections at the present time. Aside from issuing a press release announcing the Pipeline and filing a tariff with the RRC, there is no evidence that HSC is actively marketing the Pipeline's resources to other suppliers of PGP in the vicinity. There is no evidence of the Pipeline's capacity. HSC has not

spoken with, or identified, any other potential customer about transporting the customer's PGP using the Pipeline, aside from Braskem. HSC has also not produced evidence of any other PGP sellers or manufacturers in the vicinity of the Pipeline who are in a position to transport their PGP using the Pipeline, aside from INOES, and Herrscher admitted that the negotiations were unsuccessful and that it was no longer in talks with INEOS.

Citing to *Texas Rice II*, HSC argues that the agreement establishes that the Pipeline is for a public use because Braskem owns the PGP at all times it is transported in the Pipeline to Braskem's plant—there is no transfer of title to HSC or any affiliate of HSC at the end of the PGP's transport. The record also reflects, however, that HSC or its affiliate Enterprise is selling all of the PGP transported by the pipeline to Braskem and that, pursuant to the terms of sale, title to the PGP is transferred from HSC to Braskem at or before the time the PGP enters the Pipeline. A change in ownership, before or after the product entered the pipeline, cannot change the fact that the product manufacturer, Enterprise, is shipping a product through a pipeline it controls to its customer, the sole end user of the product, Braskem. We further note that there is a significant difference between the transportation service agreements produced in *Texas Rice II* and the TSA in this case. In *Texas Rice II*, the CO_2 pipeline provided agreements that it had entered into with Airgas Carbonic and Air Products, both of whom are manufactures and

distributors of liquid CO_2. Although the Air Products contract, standing alone, would not satisfy the *Texas Rice I* test because title to the CO_2 transferred to Denbury at the end of its transport, the Airgas Carbonic contract was not burdened by the same problem because title to the CO_2 was not transferred to the pipeline at any time. Under those circumstances, the pipeline was simply a conduit for Airgas Carbonic's transportation of its product for its use. *See generally Crawford Family Farm P'ship*, 409 S.W.3d at 924 ("Keystone [Pipeline] itself neither owns any refineries nor does it produce any crude petroleum").

We conclude that HSC did not conclusively establish that it was a common carrier with the power of eminent domain because there is evidence which establishes that the Pipeline will serve only HSC's private interest in selling its PGP to Braskem and transporting the sold product in the most expeditious and least expensive way, by a pipeline traversing seized property. At most, HSC's evidence establishes that there is a possibility that the Pipeline will serve the public "at some point after construction," not a reasonable probability. *Tex. Rice II*, 510 S.W.3d at 917–18.

We hold that the trial court erred by granting summary judgment in HSC's favor because HSC did not conclusively establish that it was a common carrier with the power of eminent domain. HSC's evidence, however, is enough to create a fact question that would prohibit the trial court from granting the Hlavinkas' plea on the

same issue. *See Morello*, 585 S.W.3d at 29–30 (stating appellate court should review cross motions *de novo* and render judgment that trial court should have rendered); *see also Miranda*, 133 S.W.3d at 227–28.

Accordingly, we sustain the Hlavinkas' first issue challenging the grant of summary judgment in HSC's favor and overrule the Hlavinkas' second issue challenging the denial of their plea to the jurisdiction.

Admission of Herrscher's Affidavits

In their third issue, the Hlavinkas argue that the trial court abused its discretion by admitting Herrscher's affidavits because the affidavits included conclusory statements, hearsay, lacked foundation, and were "sham affidavits" directly contradicted by his deposition testimony. HSC argues that the Hlavinkas waived their challenge to Herrscher's affidavits by failing to include it among the issues on which they expressly agreed to limit their appeal, and by failing to timely seek a ruling on their objections. In their Rule 11 Agreement, the parties agreed that the Hlavinkas could appeal, among other things, the trial court's order excluding Terry's testimony on damages. Had the Hlavinkas also intended to appeal adverse rulings to their challenges to Herrscher's affidavits, they certainly could have done so. Because they did not, we conclude that the Hlavinkas' challenges to Herrscher's affidavits are not before us on appeal. We overrule the Hlavinkas' third issue.

Exclusion of Terry Hlavinka's Testimony on Damages

In their fourth issue, the Hlavinkas argue that the trial court abused its discretion by excluding the testimony of Terry Hlavinka as to the market value of the condemned easement. Because this issue is capable of being raised again in the trial court on remand, we will address the Hlavinkas' evidentiary challenge. *See Discover Prop. & Cas. Ins. Co. v. Tate*, 298 S.W.3d 249, 258 (Tex. App.—San Antonio 2009, pet. denied).

A. Standard of Review

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

B. Applicable Law

Compensation for land taken by eminent domain is measured by the market value of the land at the time of the taking. *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 627 (Tex. 2002); *see also* TEX. CONST. art. I, § 17 (guaranteeing "adequate compensation" to landowners whose property is condemned). A property's fair 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." *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 182 (Tex. 2001) (quoting *State v. Carpenter*, 89 S.W.2d 979, 980 (Tex. 1936)); *see also State v. Windham*, 837 S.W.2d 73, 77 (Tex. 1992).

Although market value is typically established through expert testimony, expert testimony is not required. *See Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 155 (Tex. 2012) ("A property owner may testify to the value of his property."); *Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 851–52 (Tex. 2011). Texas's Property Owner Rule provides that "[a] property owner may testify to the value of his property," and his testimony "fulfills the same role that expert testimony does." *Nat. Gas Pipeline Co.*, 397 S.W.3d at 155, 157. The Rule is "an exception to the requirement that a witness must otherwise establish his qualifications to express an opinion on land values." *Id.* at 157. The owner's testimony is subject to the "same requirements as any other opinion evidence." *Id.* at 156 (citation omitted). Testimony of a witness who uses an unauthorized and improper valuation method should be excluded. *See Enbridge G & P (E. Tex.) L.P. v. Samford*, 470 S.W.3d 848, 857 (Tex. App.—Tyler 2015, no pet.) (citing *State v. Meyer*, 403 S.W.2d 366, 375–76 (Tex. 1966) and *Tex. Fruit Palace v. City of Palestine*, 842 S.W.2d 319, 323 (Tex. App.—Tyler 1992, writ denied)); *see also WesTTex 66 Pipeline Co. v. Bulanek*, 213 S.W.3d 353, 357–59 (Tex. App.—Houston [1st Dist.] 2003), *aff'd as modified*, 209 S.W.3d 98 (Tex.

2006) (holding expert testimony based on flawed methodology was "irrelevant to determining the value of [the subject taking] and was therefore inadmissible").

"The three traditional approaches to determining market value are the comparable sales method, the cost method, and the income method." *Sharboneau*, 48 S.W.3d at 182 (citing *Religious of Sacred Heart of Tex. v. City of Hous.*, 836 S.W.2d 606, 615–17 & n.14 (Tex. 1992)). Texas courts have long favored the comparable sales approach when determining the market value of real property. *Sharboneau*, 48 S.W.3d at 182. In an easement condemnation case, comparable sales of easements must be voluntary, and should take place near in time to the condemnation, occur in the vicinity of the condemned property, and involve land with similar characteristics. *Sharboneau*, 48 S.W.3d at 182 (addressing comparable sales method in condemnation case).

Regardless of the appraisal method used, the object of the inquiry is always to find the fair market value of the property; an appraisal method is valid only if it produces an amount that a willing buyer would actually pay a willing seller. *Sharboneau*, 48 S.W.3d at 183. "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." *City of Fort Worth v. Corbin*, 504 S.W.2d 828, 831 (Tex. 1974).

In determining the market value of the property, the factfinder may consider the highest and best use to which the land is adapted. *Zwahr*, 88 S.W.3d at 628. "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." *City of Sugar Land v. Home and Hearth Sugarland, L.P.*, 215 S.W.3d 503, 511 (Tex. App.—Eastland 2007, pet. denied). The existing use of the land is its presumed highest and best use. *Zwahr*, 88 S.W.3d at 628. However, the landowner can rebut this presumption by showing "a reasonable probability that when the taking occurred, the property was adaptable and needed or would likely be needed in the near future for another use." *Id.*; *see also United States v. 8.41 Acres of Land*, 680 F.2d 388, 394–95 (5th Cir. 1982). In determining market value, the jury may consider all 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. *Windham*, 837 S.W.2d at 77.

An economic unit is that portion of the property that is sufficient standing alone to support the highest and best use, independent of the remaining portions of the whole property. *Zwahr*, 88 S.W.3d at 628. Three factors aid in determining whether the part taken is part of a single larger tract: physical contiguity, unity of ownership, and unity of use. *8.41 Acres*, 680 F.2d at 393. "When an owner actually uses parts of what would otherwise constitute a unified tract for different or separate

purposes, . . . the parts may be held to be functionally 'separate' tracts [or economic units], though they are not physically separate." *Id.* "Integrated use is the key test for unity of a tract." *Id.*

C. Analysis

HSC argues that the trial court was correct to exclude Terry's testimony regarding the value of the condemned property because Terry used improper valuation methodologies based on his flawed opinion that he had established a pipeline corridor or separate economic unit. According to HSC, Terry did not establish a before-and-after valuation; he determined valuation using a "per rod" methodology, which although common in pipeline easement negotiations, is improper in condemnation proceedings, he did not use comparable sales, and his opinions violated the project enhancement rule.

Texas law permits landowners to introduce testimony that the condemned land is a self-sufficient separate economic unit, independent from the remainder of the parent tract with a different highest and best use and different value from the remaining land.[8] *See Zwahr*, 88 S.W.3d at 628; *Windham*, 837 S.W.2d at 76; *Bauer*

[8] The parties spend a great deal of time discussing whether Terry's testimony is sufficient to establish a "pipeline corridor." The caselaw reflects that a pipeline corridor is nothing more than a specialized type of separate economic unit. Thus, the dispositive issue is not whether there is evidence of a "pipeline corridor"; the question presented is whether Terry's testimony would have established the existence of a separate economic unit.

v. Lavaca-Navidad Rover Auth., 704 S.W.2d 107, 109 (Tex. App.—Corpus Christi—Edinburg 1985, writ ref'd n.r.e.). In this situation, the market value of the severed land can be determined without reference to the remaining land. *See Zwahr*, 88 S.W.3d 623, 628; *Windham*, 837 S.W.2d at 76; *Bauer*, 704 S.W.2d at 109. But when the portion of the land taken by eminent domain cannot be considered as a separate economic unit, the before-and-after method requires determining market value by evaluating the taken land as a proportionate part of the remaining land. *See Windham*, 837 S.W.2d at 76.

An economic unit is that portion of the property that is sufficient standing alone to support the highest and best use, independent of the remaining portions of the whole property. *Zwahr*, 88 S.W.3d at 628. When only a part of the tract is taken, the "just compensation" to which the owner is entitled consists of two elements: (1) the market value of the part taken, and (2) the diminution in value of the remainder due to the taking and construction of the improvement for which it was taken. *See Windham*, 837 S.W.2d at 75–76. In the case of a partial taking, the part taken for the easement is to be considered as "severed land," but it is to be valued as a proportionate part of the parent tract or economic unit to which it belongs. *Zwahr*, 88 S.W.3d at 628; *Windham*, 837 S.W.2d at 76. However, where the part taken is a self-sufficient economic unit, its value should be determined by considering the part

taken alone, and not as a portion of the entire tract of which it was a part. *Meyer*, 403 S.W.2d at 375.

Here, Terry would have testified that he sells pipeline easements over ten-foot wide tracts of land that run parallel to existing pipelines on the property, and that he did so well before HSC condemned the thirty-foot-wide easement. These smaller well-defined units are functionally separate from the larger 15,000-16,000-acre property because Terry can sell easements over these smaller units to pipeline companies, whereas he cannot sell the larger property as a whole for the same, more valuable, purpose. If he establishes the existence of a separate economic unit, Terry could then use that unit to calculate the fair market value of the Easement based on its value before and after the taking.

In determining the market value of the property, the factfinder may consider the highest and best use to which the land is adapted. *Zwahr*, 88 S.W.3d at 628. In this case, the parties disagree as to the highest and best use of the land. According to HSC's experts, the highest and best use of the whole property, including the portion encumbered by the Easement, is agricultural/recreational and/or rural residential uses. Terry, however, would have testified that while the property is generally for agricultural use, the "highest and best usage" for return on the Hlavinkas' investment has been for pipeline development.

Although the Hlavinkas regularly use the property as a whole for gas exploration and production, renewable energy development, hunting, and fishing, most of the income generated from the property comes from pipelines. Specifically, Terry would have testified that he bought and sold property and negotiated pipeline easements and oil and gas leases for over thirty years, and that the "main driver" behind the Hlavinkas' purchasing the land in 2001-2002 was the opportunity for pipeline development to generate income. According to Terry, the income derived from pipeline development far exceeds the income derived from any other use of the property. Terry would also have testified that there were at least twenty-five pipelines located on the property before HSC expressed an interest in acquiring an easement, and that he relied on this fact when determining that the highest and best use of the property is "pipeline development."

Terry testified that the property burdened by HSC's pipeline had a fair market value of $3,383,160. He explained that he arrived at that value by considering comparable sales, including the Dow and Praxair pipeline easements he sold in 2014 and 2015. Terry provided his opinions as to the market value of the easements on a "per rod" and "per acre" basis. Specifically, Terry testified that he bought and sold property and negotiated pipeline easements and oil and gas leases for over thirty years. He explained that he had negotiated a deal with Praxair in 2015 for two pipelines in a twenty-foot easement, for which Praxair paid the Hlavinkas $1,000

per rod per pipeline. Praxair also paid $175,000 to build a road and $800,000 for crop damages, for a total of $3.4 million. Dow agreed to pay the Hlavinkas $750.00 per rod per line for a total of $2 million. "[A] 'rod' consists of a linear measurement, void of width, and which is 16.5 feet in length." *Exxon Pipeline Co. v. LeBlanc*, 763 So. 2d 128, 134 n.7 (La. Ct. App. 2000). Thus, a rod only represents the length of the easement. It is commonly used in the industry to calculate the price a pipeline owner will pay for a pipeline easement.

Terry used the same figures that Praxair paid for the ten-foot easements (multiplied by three for HSC's thirty-foot easements), and, applying a reasonable amount for inflation, he arrived at his estimate for the HSC easement. In reaching his opinions, he also considered that Praxair and Dow built roads and bridges and paid for gates, but HSC did not do so. Further, he considered that HSC obtained the right to assign its easement, whereas the Dow and Praxair easements did not include the unlimited right. This issue played a role in his assessment of value because he could profit from the ability to re-sell the pipeline easement. The record reflects that HSC's pipeline runs alongside the Dow and Praxair pipelines "for a good amount of distance and breaks off and goes diagonally" across these pipelines and then runs parallel to the Solutia Ascend pipeline. The center of the Pipeline is not five feet from the adjacent pipeline, nor does it run parallel to the Dow and Praxair lines for the entire length of the property, as the Hlavinkas wished.

Terry also performed a "per acre" calculation to arrive at roughly the same figure. He calculated the per acre value to be $528,000, and with a total taking of 6.41 acres, he determined the value to be $3,384,480. Terry arrived at the per acre value of $528,000 by dividing $3,384,480 by the number of acres (6.41 acres).

Based on these factors, Terry opined that the Easement had a fair market value of $3,383,160 prior to the taking. He further opined that the property burdened by the easement had no value after the taking because he could not sell pipeline easements covering any of the three separate economic units encumbered by the Easement to another pipeline company.

HSC argues that the trial court properly excluded Terry's testimony because his use of a "per rod" calculation in measuring the Hlavinkas' damages was improper. In *Samford*, the landowners' witness testified that the "going price" was $850 per rod. 470 S.W.3d at 853. He "made no effort to separately assess the diminution of the market value of the part taken, the easement strip, and the reduction in fair market value of the remainder of the entire tract . . . ." *Id.* at 856. He also "brought no comparable sales of pipeline easements or other data to support his opinion." *Id.* at 853. The court held that the trial court abused its discretion in failing to exclude his testimony:

> It should be evident that it is impossible for a jury to separately assess the before and after values of two areas, the part taken and the remainder, given only an amount of damages per linear rod of pipeline.

> Nor can the per rod damage amount translate into information the jury can use in deciding the two issues.
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> . . .
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> We are aware that a compensation expressed per rod is common in pipeline easement negotiations. But, in partial taking cases, such a methodology is plainly unsuitable and contrary to long established case law. While a per rod valuation method may be a useful and common shorthand in pipeline easement negotiations, in a case of partial taking, it is inapposite to the jury's task and therefore unacceptable.

Id. at 860–61; *accord Exxon Pipeline Co. v. Hill*, 788 So. 2d 1154, 1164 (La. 2001) ("Rods standing alone fail to consider many important attributes which insure proper valuation of land. . . . Attempting to derive a system to value pipeline servitudes by rods would lead to higher and unfair valuation of property.").

This caselaw indicates that a market value calculated based exclusively upon a "per rod" value is improper because it excludes other relevant factors and does not translate into information that a factfinder can use. Unlike the expert in *Samford*, however, Terry relied on additional information to support his valuation opinion, including the experience of neighboring property owners and his experience with Dow's former land agent. Terry also testified that the market value of the easement is not necessarily determined by the price per rod because other factors influence the ultimate value. He used the price per rod as the basis for his analysis and then adjusted that figure based on other considerations, including the type of easement and location of the easement. Terry would have testified that the price per rod that

Dow and Praxair paid for their respective pipeline easements was only part of the consideration. As previously discussed, Dow and Praxair also agreed to build roads and bridges, and install gates, and they also agreed to locate their pipelines in accord with the Hlavinkas' wishes. HSC also obtained the right to assign its easement, whereas the Dow and Praxair easements did not grant them the right to assign the easement.

HSC argues that the Dow and Praxair transactions are not comparable because those are negotiated easements for private pipelines, as opposed to eminent domain seizures by common carriers. However, the goal of an easement condemnation case is to determine the fair market value of the seized land. In order to find that value in an easement condemnation case, comparable sales of easements must be voluntary, and should take place near in time to the condemnation, occur in the vicinity of the condemned property, and involve land with similar characteristics. *Sharboneau*, 48 S.W.3d at 182 (addressing comparable sales method in condemnation case). The forced sale of an easement to a common carrier is not a "voluntary" transaction, but evidence of voluntary sales is relevant for purposes of establishing fair market value. *See generally id.* (stating that comparable sales must be voluntary and 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"). The sale of easements to private pipelines who are not

common carriers and, therefore, do not have the power to acquire property by eminent domain are necessarily voluntary.

We conclude that, under the circumstances of this case, Terry's use of the price per rod factor in determining the value of the easement was not improper.

HSC argues that Terry's testimony was properly excluded because his methodology violated the project-enhancement rule.

The project-enhancement rule provides "that the factfinder may not consider any enhancement to the value of the landowner's property that results from the taking itself." *Zwahr*, 88 S.W.3d at 627. The purpose of damages in condemnation cases is to make the landowner whole, and compensating a landowner for value enhanced by the condemnation "would place the landowner in a better position than he would have enjoyed had there been no condemnation." *Id.* at 628.

According to HSC, Terry's testimony demonstrates that "he relied on the condemnation to establish and value a separate economic unit that did not previously exist." The opinions HSC relies upon, however, are distinguishable from the present case. *See Zwahr*, 88 S.W.3d at 627; *Bulanek*, 213 S.W.3d at 357–59; *Westtex 66 Pipeline Co. v. Baltzell*, No. 01-01-00826-CV, 2003 WL 21665312 (Tex. App.—Houston [1st Dist.] Oct. 17, 2003, pet. denied) (mem. op., not designated for publication).

In *Zwahr*, the Court rejected the Zwahrs' expert's testimony because he improperly used the pipeline easement that was at issue as the basis for his opinion that a separate economic unit exists. 88 S.W.3d 630–31. In *Baltzell*, the condemnation itself improperly created the economic unit used by the experts for determining the highest and best use of the property. 2003 WL 21665312, at *5. Similarly, in *Bulanek*, this court relied on its earlier decision in *Baltzell*, and likewise concluded that expert opinions were improperly based on the condemnation itself. 213 S.W.3d at 356.

In *Zwahr*, Exxon condemned a pipeline easement on the Zwahrs' forty-nine-acre tract which the Zwahrs used for cotton farming. 88 S.W.3d at 625. The easement had a total acreage of 1.01 acres and was parallel to an existing pipeline for most of its route. *Id.* at 626. The Zwahrs' expert opined that Exxon's 1.01-acre easement was a "self-contained, separate economic unit, which had a value independent from that of the surface acreage, with a highest and best use as a pipeline easement," as opposed to the remainder of the parent tract which was best suited for agricultural purposes. *Id.* He testified that the "1.01 acre [economic unit] did not exist until after the condemnation." *Id.* at 630.

Unlike in those cases, Terry would have testified at trial that the separate economic units in question were the ten-foot wide tracts of land running parallel to other pipelines on the property that he sells to pipeline owners for easements. Terry

testified in his deposition that he sells pipeline easements in ten-foot strips because he wants the pipelines on the property to be spaced five feet apart, measured from the center of the pipeline. According to Terry, HSC's thirty-foot-wide easement spans three separate units. Terry also would have testified that he sold Dow two ten-foot strip easements in 2014-2015. This is at least some evidence that separate economic units existed prior to HSC's expression of interest in acquiring an easement over the Hlavinkas' property in 2016, and that it had defined parameters which pre-existed and were different from the condemnation project itself. *See Bauer*, 704 S.W.2d at 109 (holding testimony establishing separate economic unit was admissible when separate unit existed before condemnation and had defined parameters different from, and not dependent upon, condemnation project). This evidence also establishes that these units were valuable as tracts for future pipeline development, separate and apart from HSC's pipeline project. *Cf. Zwahr*, 88 S.W.3d at 630 (summarizing expert's testimony and stating, "In other words, had the Exxon project never come along, the .82 acres would have continued to have no value to the Zwahrs.").

We conclude that Terry's valuation testimony is relevant because he used comparable sales to support his opinions regarding the fair market value of the easement based on its value as a separate economic unit, his analysis was based on the pre-existing ten-foot-wide units, not the Easement itself, and, although his

methodology included per rod figures, he adjusted these values based on other relevant factors.[9] Therefore, we hold that the trial court abused its discretion by excluding Terry's testimony.

We sustain the Hlavinkas' fourth issue.

Conclusion

We affirm the portions of the trial court's judgment denying the Hlavinkas' plea to the jurisdiction and admitting Herrscher's affidavits. We reverse the portions of the trial court's judgment granting HSC's motion for partial summary judgment and excluding Terry Hlavinka's testimony as to the market value of the condemned easement, and we remand the case for further proceedings consistent with this opinion.

Russell Lloyd
Justice

Panel consists of Justices Keyes, Lloyd, and Hightower.

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[9] We further note that even if Terry's valuation testimony was properly excluded based on his use of a flawed methodology, he should nevertheless have been allowed to testify regarding factors that tend to affect the value of the land or that would tend to make it more or less valuable, including the highest and best use of the property. *See State v. Carpenter*, 89 S.W.2d 194, 199 (Tex. 1936); *City of Sugarland v. Home and Hearth Sugarland, L.P.*, 215 S.W.3d 503, 515 (Tex. App.—Eastland 2007, pet. denied). The evidence is introduced "not as constituting a measure of damages, but as elements to enable the jury to arrive at the correct measures of damages" which is just and adequate compensation. *Carpenter*, 89 S.W.2d at 199; *see Home and Hearth*, 215 S.W.3d at 515.