IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CITY OF ALBUQUERQUE,
a municipal corporation,

Petitioner-Appellee,
v. **No. S-1-SC-37343**

SMP PROPERTIES, LLC AND R. MICHAEL PACK,

Respondents-Appellants,
and

MODERN WOODMEN OF AMERICA;
SAIA MOTOR FREIGHT LINE, LLC;
UNITED PARCEL SERVICE, INC.;
COUNTY OF BERNALILLO;
TAXATION AND REVENUE DEPARTMENT FOR THE STATE OF NEW MEXICO AND ANY AND ALL UNKNOWN CLAIMANTS FOR THE PROPERTY INVOLVED,

Respondents.

CITY OF ALBUQUERQUE'S BRIEF IN CHIEF

CITY OF ALBUQUERQUE
Esteban A. Aguilar Jr., City Attorney
Adam Leuschel, Assistant City Attorney
John E. DuBois, Assistant City Attorney
P.O. Box 2248
Albuquerque, New Mexico 87103
Telephone: (505) 768-4500
Facsimile: (505) 768-4525
Attorneys for Petitioner-Appellee

ORAL ARGUMENT REQUESTED

STATEMENT OF COMPLIANCE

Undersigned counsel states that this Petition for Writ of Certiorari complies with Rule 12-213(F) NMRA in that the body of the brief is prepared in Times New Roman typeface and contains 5212 words. This word count was obtained using Microsoft Office Word 2016 software.

RECORDATION OF PROCEEDINGS AND CITATION TO THE RECORD

When citing to the record proper and the supplemental record proper, counsel for Petitioner uses the numbers assigned by the clerk to the trial court in preparing the record for transmission to the Court of Appeals, e.g., RP.

Table of Contents

Statement of Compliance i
Recordation of Proceedings and Citation to the Record i
Table of Contents ii
Table of Authorities iii
I. SUMMARY OF PROCEEDINGS 1
A. Nature of the Case 1
B. Course of Proceeding and Summary of Relevant Facts 3
II. STANDARD OF REVIEW 7
III. ARGUMENT 8
A. The Court of Appeals Erred in Holding that the City's Actions Rose to the Level of Substantial Interference 8
1. Making "Reasonable and Diligent Efforts" to acquire property is not "Substantial Interference" With Its Use 8
2. Considering "Reasonable and Diligent Efforts" To Be "Substantial Interference" Places a Tremendous Burdon on Municipalities 13
B. The Court of Appeals Erred in Holding that Compensation for a Partial Taking Includes Damages for the Loss of an Alleged Tenant 16
C. The Court of Appeals Erred in Holding That the Date of Taking is a Jury Question 21
IV. REQUEST FOR RELIEF 22
V. REQUEST FOR ORAL ARGUMENT 22

Table of Authorities

New Mexico Cases

City of Albuquerque v. SMP Properties, LLC, No. A-1-CA-35261, 2018 WL 4625803 7,14,15,19,21
Electro-Jet Tool and Mfg. Co. v. City of Albuquerque, 1992-NMSC-060, 114 N.M. 676, 845 P.2d 770 9
Environmental Control, Inc. v. City of Santa Fe, 2002-NMCA-003, 131 N.M. 450, 38 P.3d 891 21
Galbadon v. Erisa Mortgage Co., 1999-NMSC-039, 128 N.M. 84, 990 P.2d 197.. 7
Public Service Co. of New Mexico v. Catron, 1982-NMSC-050, 98 N.M. 134, 646 P.2d 561 9
Santa Fe Pacific Trust Inc. v. City of Albuquerque, 2014-NMCA-093, 335 P.3d 232 ..... 1, 2, 6, 9, 10, 11, 14, 15, 22
Self v. United Parcel Serv., Inc., 1998–NMSC–046, 126 N.M. 396, 970 P.2d 582. 7
State ex rel. State Highway Commission v. Gray. 1970-NMSC-059, 81 N.M. 399, 467 P.2d 725 ..... 16, 17
Townsend v. State ex rel. State Highway Dept., 1994-NMSC-014, ¶6, 117 N.M. 302, 871 P.2d 958 9
Walker v. United States, 2007-NMSC-038, 142 N.M. 45, 162 P.3d 18

Statutes

NMSA 1978 § 14-2-1 14
NMSA 1978 § 19-3-13 18
NMSA 1978 § 42A-1-26 6
NMSA 1978 § 42A-1-4 ..... 8, 10, 12, 13
NMSA 1978 § 42A-1-4(A) 8
NMSA 1978 § 42A-1-4, -6(A) 10
NMSA 1978 § 42A-1-6(A) 8
NMSA 1978 § 42A-1-7 9

Other Jurisdictions

Chicago Housing Auth. v. Lamar, 172 N.E.2d 790 (Ill. 1961) 13
City and Cty. of Honolulu v. Chun, 506 P.2d 770 (Haw. 1973) 13
City of Buffalo, 299 N.Y.S.2d 19, 20
City of Colorado Springs v. Andersen Mahon Enterprises, LLP, 260 P.3d 29 (Colo. App. 2010) 13
City of Lewiston v. Lindsey, 853 P.2d 596 (Idaho App. 1993) 13
Gardner v. City of Cape Girardeau, 880 S.W.2d 652 (Mo. App. 1994) 13
Niagara Frontier Bldg. Corp. v. State, 305 N.Y.S.2d 549, 552 (N.Y. 1969) 20

Rules

NMRA 12-214 22

Petitioner, the City of Albuquerque, by and through the Office of the City Attorney, for its Brief in Chief states:

I. SUMMARY OF PROCEEDINGS

A. Nature of the Case

Petitioner City of Albuquerque ("Petitioner" or "City") commenced a partial condemnation action on July 10, 2013 for the purpose of acquiring a 30-foot strip of land on property located at 3700 Hawkins Street N.E., Albuquerque ("Hawkins Property"). [Record Proper 11]. The property was owned SMP Properties and R. Michael Pack ("Respondents"). [RP 1]. The extent of the condemnation was limited to a small strip of land amounting to only four percent of Respondents' property and was necessary to connect Hawkins Street to a new road being constructed along the North Diversion Channel. [*Id.*] Respondents filed a claim for inverse condemnation, alleging that the loss of its tenant, SAIA Motor Freight Line, LLC ("SAIA"), should have been calculated as part of the City's condemnation proceedings. [RP 138]. The district court granted summary judgment on this matter in Petitioner's favor, and Respondents appealed the decision to the New Mexico Court of Appeals. [RP 603].

The court of appeals reversed in favor of Respondents in direct conflict with prior inverse condemnation case law. The court of appeals' holding contradicts the principles of the two-part inverse condemnation test established in *Santa Fe Pacific Trust v. City of Albuquerque* and goes against previous holdings that expectancy of

a lease renewal is not a property interest that can be considered in a condemnation action. The holding also states that a property owner is "constitutionally entitled" to early market valuation fair market damages, implicating the New Mexico constitution and thereby precluding a statute change to clarify the scope of what is allowable in an inverse condemnation proceeding. This creates a nebulous landscape where governmental entities and landowners alike are unsure of how to proceed in condemnation filings given the contradiction with *Santa Fe Pacific Trust*.

The issues before this Court on appeal are:

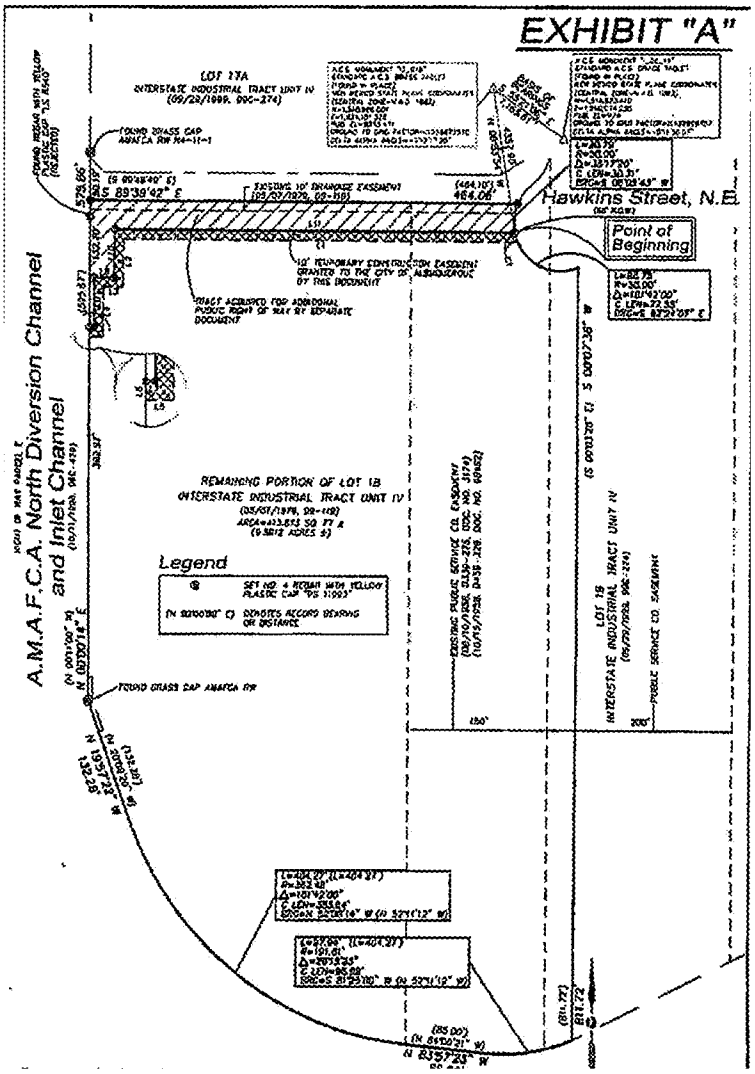
Question One: Did the court of appeals err in holding that the City's contact with a property owner's tenant, which was pursuant to and consistent with the requirements of the state condemnation statute, constitutes substantial interference with Respondents' property under *Santa Fe Pacific Trust v. City of Albuquerque*?

Question Two: Did the court of appeals err in holding that the property owner's tenant's lease payments should be considered in calculating just compensation even though the lease had already concluded?

Question Three: Did the court of appeals err in holding that determining whether a taking occurred is a jury question, when all previous New Mexico cases say that it is not?

B. Course of Proceedings and Summary of Relevant Facts

On July 10, 2013, Petitioner commenced a partial condemnation action to acquire a 30-foot strip of land on property located at 3700 Hawkins Street N.E., Albuquerque belonging to Respondents"). [RP 1, 11]. On August 6, 2013, the district court issued a preliminary order of entry and on November 15, 2013, it issued a permanent order of entry. [RP 41, 84]. Petitioner needed to acquire this property to connect Hawkins Street to a new road being constructed along the North Diversion Channel. [RP 1]. The total amount of land actually taken from Respondents' property amounts to an area of approximately 15,588 square feet, or approximately .3568 acres. After condemnation, Respondents' parcel of land consists of an area of approximately 413,873 square feet, or approximately 9.5012 acres. Therefore, Petitioner's condemnation resulted in an acquisition of approximately 4% of Respondents' property:



[RP 9] (area to be condemned represented by shading). On November 5, 2013, Respondents filed an answer to the City's complaint for condemnation asserting an affirmative defense of inverse condemnation. [RP 76]. Respondents asserted that the loss of the lease of one tenant, SAIA Motor Freight Line, LLC ("SAIA"), should be factored into the damages due as just compensation for the City's taking. [RP 138]. Respondents' argument relies upon a pre-condemnation visit by a City employee in

December 2011 that they assert caused SAIA not to renew its lease with Respondents. [RP 77; 138].

In 2003, SAIA began leasing space at the Hawkins Property under a three-year lease agreement with two three-year extension options. [RP 203]. SAIA exercised both of the extension options, making the lease's final expiration date February 28, 2012 [*Id.*]. SAIA and Respondents were engaged in negotiating a new lease for the Hawkins Property around December of 2011. [RP 204]. At the time, the SAIA terminal manager had been "pushing to try to move" to a different location due to the lack of door space at the Hawkins Property and having to share the space with another tenant. [RP 298-300].

During the time period in which the lease negotiations took place, a City employee entered the Hawkins Property to obtain information in preparation for negotiations to purchase the 30-foot strip of land described above. [RP 204]. The employee entered the property to speak with the tenants to obtain contact information for the owner; the owner did not live in New Mexico and did not have a phone or email address listed at which he could be contacted directly. [RP 294]. While at the Hawkins Property, the City employee discussed the general nature of the condemnation and the portion of the property the City desired to purchase with SAIA employees. [RP 204]. SAIA remained as a holdover tenant at the Hawkins Property for two months after its lease expired and vacated the premises on April

30, 2012. [*Id.*]. As a result, Respondents asserted a defense of inverse condemnation against the Petitioner, claiming that they should have been compensated to the tune of three years lost rent from SAIA and the estimated cost of a realtor to obtain a new tenant. [RP 235]. Respondents specifically argued that the loss of the use of the fuel tanks affected the ability to rent the Hawkins Property, despite the fact that SAIA both installed and removed the fuel tanks for its own use at its own cost.

On July 24, 2015, the City moved for partial summary judgment on the issue of inverse condemnation, seeking an order establishing that the loss of the SAIA tenancy was not an element of damages for a partial taking under NMSA 1978 § 42A-1-26. [RP 200]. On May 2, 2015, the district court granted partial summary judgment for the City, finding that Respondents failed to meet the second part of the two-part inverse condemnation test established in *Santa Fe Pacific Trust Inc. v. City of Albuquerque*, 2014-NMCA-093, 335 P.3d 232. [RP 595]. The district court also held that under NMSA 1978 § 42-A-1-26 the measure of just compensation to which Respondents are entitled in a partial condemnation action is the difference in the value of the whole of the real property immediately before the taking and the remaining property immediately after the taking. [*Id.*]. Respondents appealed the decision to the New Mexico Court of Appeals. [RP 603].

The court of appeals reversed in favor of Respondents on September 26, 2018. *City of Albuquerque v. SMP Properties, LLC*, No. A-1-CA-35261, 2018 WL

4625803 (Sept. 26, 2018). In reversing the district court's grant of summary judgment, the court of appeals held (1) that the City's actions resulted in the loss of the SAIA lease, which constituted a taking and gave rise to a claim for inverse condemnation; and (2) that a tenant's lease payments should be considered in computing just compensation where the lease term had ended, but the tenant's awareness of the City's intent to condemn caused the tenant not to renew the lease. *Id.* at *9. Further, the court of appeals ruled that the jury should decide the date of the taking to determine the value of the lease payments owed to the property owner. *Id.* at *7. As a result, the court of appeals created precedent that contradicts previous inverse condemnation case law, requiring resolution by this Court.

II. STANDARD OF REVIEW

The questions presented to this Honorable Court for review stem from a grant of partial summary judgment and are questions of law. "All questions of law are reviewed de novo." *Galbadon v. Erisa Mortgage Co.*, 1999-NMSC-039, ¶7, 128 N.M. 84, 990 P.2d 197 (citation omitted). "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc.*, 1998–NMSC–046, ¶6, 126 N.M. 396, 970 P.2d 582.

III. ARGUMENT

A. The court of appeals erred in holding that the City's actions rose to the level of substantial interference.

1. Making "reasonable and diligent efforts" to acquire property is not "substantial interference" with its use.

New Mexico law requires governmental entities to "make reasonable and diligent efforts to acquire property by negotiation" when contemplating property acquisition via condemnation. NMSA 1978 § 42A-1-4. The City was doing its due diligence and complying with the statutory condemnation process when its agent originally made contact with SAIA. This does not constitute "substantial interference" with Respondents' use of the property.

Before a governmental entity can begin a condemnation action, it must locate and contact the owner of the property to be condemned so that it can attempt to acquire the property via negotiation. NMSA 1978 § 42A-1-4(A). Governmental entities are prohibited by law from condemning property over an owner's objection unless they have made a good faith effort to negotiate with the property owner prior to filing the condemnation action. NMSA 1978 § 42A-1-6(A). Governmental entities may only forgo the statutorily-required negotiations if both parties mutually agree to waive negotiation; if the owner of the property is unknown and cannot be located or contacted, either personally or through a representative; if there are outside forces that create a compelling need for condemnation that cannot be

delayed; the owner fails to provide any appraisals of the property; or a jointly appointed appraiser fails to submit appraisals to the parties within thirty days from the date of his appointment. NMSA 1978 § 42A-1-7.

Inverse condemnation is the exclusive remedy for a property owner when "property is taken or damaged for public use by a condemnor without paying compensation or initiating condemnation proceedings." *Townsend v. State ex rel. State Highway Dept.*, 1994-NMSC-014, ¶6, 117 N.M. 302, 871 P.2d 958. To recover damages in an inverse condemnation proceeding, a plaintiff must show that the condemnor acted intentionally and that the depreciation in the property's value is "the result of the public entity's deliberate taking or damaging of the property in order to accomplish the public purpose." *Santa Fe Pacific Trust v. City of Albuquerque*, 2014-NMCA-093, ¶34, 335 P.3d 232; *Electro-Jet Tool and Mfg. Co. v. City of Albuquerque*, 1992-NMSC-060, 19, 114 N.M. 676, 845 P.2d 770. "Merely rendering private property less desirable for certain purposes … will not constitute [] damage … but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable, by reason of the public use." *Public Service Co. of New Mexico v. Catron*, 1982-NMSC-050, ¶7, 98 N.M. 134, 646 P.2d 561.

Santa Fe Pacific Trust v. City of Albuquerque (*SFPT*), 2014-NMCA-093, 335 P.3d 232 established a two-part test for determining when an inverse condemnation occurred and discussed what sort of governmental activity is substantial enough to

lead to a claim for inverse condemnation. In *SFPT*, the owner of a downtown commercial rental property brought a claim for inverse condemnation against the City of Albuquerque following plans made by the City to condemn said property. *Id.* at ¶12. The City originally identified the property as a site for an events arena, two City mayors publically announced that the City intended to acquire the property, and the local news published several articles about the project over a span of eight years. *Id.* ¶5, ¶10. The City and the owner also entered into an exchange agreement regarding an adjacent property he owned as well. *Id.* ¶5. The City went as far as to begin performing feasibility studies on the project and conducting preliminary negotiations as required by New Mexico law. *Id.* ¶6; *see* NMSA 1978 § 42A-1-4, -6(A). However, the City could not successfully obtain funding for the project and so declined to acquire the owner's property. *Id.* ¶7, ¶10. The owner brought suit alleging that the concrete steps taken by the City as well as the publicity surrounding the project caused a loss of potential sales and leases of the property in question. *Id.* ¶11. The district court granted summary judgment in the City's favor on the inverse condemnation claim. *Id.* ¶14.

The court of appeals affirmed, adopting a two-part test to determine whether pre-condemnation activities of a governmental entity give rise to a claim for inverse condemnation when said activities allegedly reduce the value of a specific property. *Id.* ¶37 (the *SFPT/Jakovich* test). This test was developed to analyze claims of

inverse condemnation resulting from pre-condemnation activities of a governmental entity. *Id.* To establish a governmental entity's liability for inverse condemnation, there must be (1) a present intention to condemn specific property and (2) an action that substantially interferes with the use and enjoyment of the potential condemnee's property. *Id.* ¶40. General knowledge of a project created by a municipality's "public airing and exploration of possible development plans" do not give rise to a valid inverse condemnation claim. *Id.* ¶40.

In *SFPT*, the court of appeals first determined that the City had expressed a concrete intention to condemn the property due to the publicity, planning, and discussions that took place, thereby satisfying the first part of the *SFPT/Jakovich* test. *Id.* Next, in evaluating the City's actions under the second part, the court of appeals determined that "the publicity, the planning, the RFI, the MOU, and the RFP did not substantially interfere with SFPT's use and enjoyment of the [p]roperty." *Id.* ¶41. In assessing the City's actions, the Court held that the City's actions did not prevent the owner from possessing the property or using it; the City did not take physical control of the property, it did not contact existing or prospective tenants, it never denied any use permits related to the property, and it did not enact any legislation that changed the use of the property. *Id.* Therefore, the City's actions failed the second prong of the test and its actions were determined not to constitute an inverse condemnation. *Id.* ¶42.

In the matter that is presently before this Court, in preparation for the negotiations required by New Mexico law, a City employee entered the Hawkins Property and discussed the potential land acquisition with a SAIA employee. [RP 405, 407, 526]. The discussion was no more specific than expressing a present intention to condemn; the City employee did not tell SAIA that it could not continue to use the 30-foot strip of land prior to acquisition, nor did it place any restrictions on the use of the land by SAIA, Respondents, or any prospective tenants. *Id.* Importantly, given *SFPT*, at no time did the City express interest in acquiring the remainder of Respondent's property or place any restrictions on the use of the property as a whole. [RP 407, 409]. In this instance, the City took significantly less action than it did in *SFPT*. It did not enter any agreements with the owner of the Hawkins Property nor did it publicly announce its intent to condemn the property. If the City's actions in *SFPT* did not rise to the level of substantial interference, its actions regarding the Hawkins Property certainly do not as well.

Respondents argue that mere entry onto the Hawkins property and initial discussion is the "substantial interference" committed by the City. This argument ignored the fact that the City is required to take such steps. NMSA 1978 § 42A-1-4 is explicit that governmental entities must make "reasonable and diligent efforts to acquire property by negotiation" when contemplating acquiring property via condemnation. Making "reasonable and diligent efforts to acquire property by

negotiation" cannot itself be a condemnation, or NMSA 1978 § 42A-1-4 and the entire statutory condemnation process has no purpose or meaning. Other State courts have found no taking occurred when analyzing similar issues. *See City of Colorado Springs v. Andersen Mahon Enterprises, LLP*, 260 P.3d 29 (Colo. App. 2010) (pre-condemnation publicity that affected landlord's ability to rent property for several years prior to condemnation was not a taking); *Gardner v. City of Cape Girardeau*, 880 S.W.2d 652 (Mo. App. 1994) (pre-condemnation survey work that made a property "unrentable" prior to condemnation was not a taking); *City of Lewiston v. Lindsey*, 853 P.2d 596 (Idaho App. 1993) (pre-condemnation notice and negotiations resulting in loss of tenant prior to condemnations was not a taking); *City and Cty. of Honolulu v. Chun*, 506 P.2d 770 (Haw. 1973) (engaging in negotiations to purchase property is not a taking or damage to property); *Chicago Housing Auth. v. Lamar*, 172 N.E.2d 790 (Ill. 1961) (entering into negotiations prior to condemnation was not "damage" to property as a matter of law).

2. Considering "reasonable and diligent efforts" to be "substantial interference" places a tremendous burden on municipalities.

Viewing the City's actions as "substantial interference" as opposed to complying with statutorily required condemnation process penalizes governmental entities for following the law and being truthful in their dealings with landowners and tenants. It also infers that following the law and attempting good faith negotiations can give rise to a claim for inverse condemnation, regardless of the

outcome of that negotiation or the entity's final decision on whether to condemn the property. Since the City's records are subject to the Inspection of Public Records Act (IPRA), NMSA 1978, §§ 14-2-1, *et seq*. and the open democratic process of requiring legislative approval and funding for land condemnation, the court of appeals holding has far-reaching implications given New Mexico's commitment to transparency and open governance.

This holding raises two major concerns. First, as a result of this holding, there will be property owners that file an inverse condemnation action as soon as they learn that a governmental entity intends to acquire property, even before that entity has had a chance to perform the due diligence required by statute. Due to the wide scope and prevalence of IPRA, it is highly likely that an individual (property owner or tenant) could obtain documents through IPRA that contain preliminary discussions about a possible condemnation action. Traditionally, mere knowledge of a condemnation has not been enough to give rise to a claim, but the court of appeals' holding makes knowledge of a potential condemnation sufficient enough to bring an inverse condemnation action. *Compare SFPT*, ¶40, *with SMP Properties*, 2018 WL 4625803 at *7. If left in place, the court of appeals' holding, in conjunction with IPRA, will lead to savvy property owners manufacturing inverse condemnation actions. This will result in municipalities needlessly wasting considerable time and resources defending inverse condemnation actions that would otherwise be

considered premature. Second, since the holding is an interpretation of the New Mexico constitution, it cannot be reformed or clarified by amending state condemnation law. *See SMP Properties*, 2018 WL 4625803 at *7. Given that the court of appeals' holding directly conflicts its prior holding in *SFPT*, it is now uncertain what actions give rise to an inverse condemnation claim and what actions do not. *Compare SFPT*, ¶40, *with SMP Properties*, 2018 WL 4625803 at *7. This adds additional stress on governmental entities: not only will they face a multitude of inverse condemnation actions, they will have to endure multiple rounds of litigation to determine at what point a taking occurs, wasting years of public time and resources in the process. Amending existing condemnation law would be a simpler, quicker method to clarify when a taking occurs, but the court of appeals' holding below precludes that option due to the implication of the New Mexico constitution.

"Governmental entities, like the City, must be encouraged to air their planning ideas in public so that they can be fully vetted, challenged, improved, or rejected." *SFPT*, 2014-NMCA-093, ¶42. The court of appeals' holding does the exact opposite: it discourages governmental entities from announcing potential developments due to the fear of premature and wasteful litigation. Ultimately, this holding will be used to create adjunct inverse condemnation claims in the simplest condemnation cases and hamper transparency in government by creating fear of such claims.

B. The court of appeals erred in holding that compensation for a partial taking includes damages for the loss of an alleged tenant.

Not all consequential damages are compensable in an inverse condemnation case. "In order to be compensable, a taking of or damage to property must invade some substantive or intrinsic aspect of a landowner's right to the use and enjoyment of its property. An incidental economic loss is not sufficient." *SFPT*, 2014-NMCA-093, ¶30. Respondents' injury here, the loss of its holdover tenant, is such "incidental economic loss," and the court of appeals erred in holding that such injury is a compensable property interest. The holding contradicts established principles of condemnation law previously established by this Court.

The longstanding principle of New Mexico law that a mere expectation of lease renewal based on mutual satisfaction is not a compensable interest was decided by this Court nearly fifty years ago in *State ex rel. State Highway Commission v. Gray.* 1970-NMSC-059, ¶16, 81 N.M. 399, 467 P.2d 725. In *Gray*, the defendant leased a tract of land from Southern Pacific Railroad adjacent to a tract which he owned in fee. *Id.* ¶2. The State condemned his fee land, but not the leased land, and Gray, a holdover month-to-month tenant at the time of the condemnation, argued that the leased land should be considered as part of his compensation for the taking. *Id.* ¶3. Specifically, Gray argued that both tracts were used in his business and that one was useless without the other, and that he had an expectation of continued possession because he had possessed the leased tract for seventeen years. *Id.* ¶5, ¶15.

This Court held that regardless of his expectation of continued possession, his interest in the leased tract was based only on "hopes and speculations" and that his interest in the leased land was not sufficient to support a partial taking. *Id.* ¶15. This Court noted that

> "[a] tenant from year to year with a covenant of renewal may have his damages assessed with reference to the covenant, but a mere expectation of renewal, based on evidence that the landlord and tenant were mutually satisfied and were likely to keep on together, cannot be considered by the courts."

Id. ¶13 (citing *2 Nichols*, *Eminent Domain*, § 5.23(4) (3d Ed. Rev. 1962) at 71-72).

Gray is especially relevant to the instant case for two reasons. One, Respondents' claim for inverse condemnation, like Gray's claim, is largely based on "hope and speculation" that SAIA would continue to lease the Hawkins property, since final negotiations with SAIA on the lease had not been completed. [RP 204]. Two, Gray's argument that the owned land and the leased land were useless without one another is similar to Respondents' argument that the loss of the use of the fuel tanks and the turning radius for the dock doors renders the Hawkins property unrentable. [RP 224, 635]. Gray's argument did not impact this Court's holding that he did not have a compensable interest in the leased property, much as Respondents' argument about the fuel tanks and turning radius should not impact this Court's holding in the instant case. Respondents' claim is based entirely on the expectation of successfully negotiating additional leases with SAIA; such expectation is not a

compensable interest under New Mexico condemnation law.

This Court reaffirmed that an expectancy of renewal of a lease is not a property interest to be considered in a condemnation action in the more recent case *Walker v. United States,* 2007-NMSC-038, ¶¶4-5, 142 N.M. 45, 162 P.3d. In *Walker*, two ranchers sued the federal government after it canceled their grazing permits. 882. Historically, the federal governments had always renewed these permits. *Id.* ¶2. The ranchers argued that the cancellation of the permits was a condemnation in violation of the Just Compensation Clause of the Fifth Amendment and a violation of a property interest in "water, forage, and grazing rights" under New Mexico law. *Id.* ¶5; *see* U.S. Const. amend. V; NMSA 1978 § 19-3-13.[1] Because the case involved an unanswered question of state law, the United States Court of Federal Claims certified the issue to the New Mexico Supreme Court. *Walker*, 2007-NMSC-038, ¶6. In analyzing NMSA § 19-3-13, the New Mexico Supreme Court held that "access to the public domain is not a right, but a privilege, governed by license from the federal government" and that such a license did not grant a separate interest that could be "asserted against the United States government if … lost." *Id.* ¶31.

[1] NMSA 1978 § 19-3-13 states "Any person, company or corporation that may appropriate and stock a range upon the public domain of the Unites States … with cattle shall be deemed to be in possession thereof: provided, that such person, company or corporation shall lawfully possess or occupy, or be the lawful owner of possessor of sufficient living, permanent water upon such range for the proper maintenance of such cattle."

Therefore, the Supreme Court ruled that the ranchers' grazing permits were not a compensable interest that could be brought as part of an inverse condemnation action. *Id.*

To support its finding that a lease agreement was a compensable interest in an inverse condemnation proceeding, the court of appeals cited to condemnation blight cases from outside of New Mexico. *SMP Properties, LLC*, 2018 WL 4625803, ¶¶24-26. Applying the condemnation blight principle to this case is inappropriate for three reasons. First, the facts of this case do not support the proposition that any condemnation blight occurred. The condemnation blight principle allows for early valuation of a property after a drop in market value due to a long period of time between announcement of a condemnation and its actual filing. *City of Buffalo v. J.W. Clement Co.*, 321 NYS.2d 345, 357 (N.Y. App. 1971) (in which six years passed between first announcement of condemnation and actual filing). In the instant case, only seven months passed between the City's initial entry onto the Hawkins property and the filing of the condemnation. This is not an unreasonable amount of time in which to obtain the property owner's input for the appraisal, attempt negotiations, send notice, and file a condemnation action. Because such a short amount of time passed between the preliminary negotiations and the actual filing, the condemnation blight principle is inapplicable to the facts of this case.

Second, the condemnation blight principle does not provide recompense for

lost rent, only for lost property value. A plaintiff may recover additional compensation due to the diminution in value of their property due to lost rental agreements under this principle, but the rent amounts and leases themselves are not considered compensable. *See City of Buffalo*, 299 N.Y.S.2d at 12-13 (analyzing the appraised value of the property with and without leases but not the value of the leases themselves); *Niagara Frontier Bldg. Corp. v. State*, 305 N.Y.S.2d 549, 552 (N.Y. 1969) (stating that compensation shall be based on the value of the property after the loss of rentals and not discussing the value of the lost rentals themselves).[2] Under the condemnation blight principle, recovery for diminution in value due to lost rental agreements is permissible; recovery of the value of the specific leases is not.

Third, the condemnation blight principle does not exist in New Mexico case law outside of the court of appeals' holding in *SMP Properties*. It has previously been referenced a single time, in *SFPT*, which states "'mere manifestation of intent to take or a threat to condemn does not constitute condemnation blight warranting recovery for reduction in value of property.'" *SFPT*, ¶37 (quoting McQuillin, § 32.37 at 624). This Court should not adopt the views of other jurisdictions when

[2] Petitioner concedes that under California law, loss of rent is a compensable interest in an inverse condemnation proceeding. *See Klopping v. City of Whittier*, 8 Cal.3d 39, 104 Cal.Rptr. 1, 500 P.2d 1345 (1972). However, in doing so, Petitioner notes that this case is secondary authority which contradicts established New Mexico case law regarding the recoverability of lost leases in condemnation proceedings.

its own case law is available and sufficient to resolve the issue, especially given that the instant case does not involve condemnation blight.

It is clear that under New Mexico law, there is no compensable interest in a lease agreement, especially one involving a month-to-month holdover tenant. The court of appeals itself has recognized this principle in at least one case. *See Environmental Control, Inc. v. City of Santa Fe*, 2002-NMCA-003, 131 N.M. 450, 38 P.3d 891 (stating that plaintiff had no compensable right to continue to perform garbage collection services per the holding in *Gray* that "expecting renewal or continuing possession of lease does not entitle a party to compensation"). As such, the court of appeals' holding in the instant case not only contradicts this Court's previous rulings on inverse condemnation law, but its own rulings as well. This Court should reverse the court of appeals' holding in the instant case per established New Mexico inverse condemnation law.

C. The court of appeals erred in holding that the date of taking is a jury question

In its ruling on the instant case, the court of appeals held that on remand, Respondents must prove to the satisfaction of the jury the date of the taking, meaning that Respondents must prove whether a taking occurred in the first place. *City of Albuquerque v. SMP Properties, LLC*, No. A-1-CA-35261, 2018 WL 4625803, ¶41 (Sept. 26, 2018). This holding contradicts established inverse condemnation case law, and this Court should reverse it.

The court of appeals previously established in *SFPT* that "[w]hether the facts are enough to constitute a taking is a question of law." *SFPT*, 2014-NMCA-093, ¶16 (citing 11 Eugene McQuillan, the Law of Municipal Corporations, § 32.26 at 521-23 (2010)). Therefore, whether a taking occurred is not a question for the jury to decide. However, in the instant case, the court of appeals required Respondents to prove both that an inverse condemnation occurred and the date on which it occurred. 2018 WL 4625803, ¶41. While the date of a taking itself is a factual question if a taking has occurred, whether a taking itself occurred is determined by New Mexico law. *See, e.g.*, *SFPT*, 2014-NMCA-093, ¶20, ¶27 (discussing state law to establish standards for whether taking occurred). The jury cannot find the date of a taking if no taking occurred in the first place; as discussed above, no inverse condemnation occurred under New Mexico law. Thus, this Court should reverse the court of appeals' holding on this matter.

IV. REQUEST FOR RELIEF

Wherefore, the City of Albuquerque respectfully requests that this Honorable Court reverse the court of appeals' holding in the instant case.

V. REQUEST FOR ORAL ARGUMENT

Pursuant to NMRA 12-214, Oral Argument is requested in order to provide the Court with a thorough understanding of the issues and the policy considerations relevant to this matter, which are beyond the scope of this Brief in Chief. The City

therefore respectfully requests oral argument in this matter.

Dated January 28, 2019

Respectfully submitted,

CITY OF ALBUQUERQUE
Esteban A. Aguilar, City Attorney

/s/ Adam Leuschel
Adam Leuschel, Assistant City Attorney
John E. DuBois, Assistant City Attorney
P.O. Box 2248
Albuquerque, New Mexico 87103
Telephone: (505) 768-4500
Facsimile: (505) 768-4525
aleuschel@cabq.gov
jdubois@cabq.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed through the Court's electronic filing system and emailed to the following counsel of record on January 28, 2019:

William J. Cooksey, Esq.
George A. DuBois
Dubois, Cooksey & Bischoff, P.A.
2040 Fourth St. NW
Albuquerque, NM 87102
wcooksey@dcbf.net
gdubois@dcbf.net

/s/ Adam Leuschel
Adam Leuschel