

  
Joey D. Moya

**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.**

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**CITY OF ALBUQUERQUE'S REPLY TO  
RESPONDENTS-APPELLANTS' ANSWER BRIEF**

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**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 1527 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.

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Petitioner, the City of Albuquerque (“Petitioner” or “City”)<sup>1</sup>, by and through the Office of the City Attorney, hereby replies as follows:

**I. Respondents conflate an intention to condemn with an actual condemnation.**

In its opening brief, the City explained the role of its employee, Mr. Willis, in the condemnation process. [Pet’r’s Br. at 5-6]. However, Respondents argue that Mr. Willis’ conduct, regardless of its adherence to New Mexico condemnation law, constitutes a taking, asking the question “[w]here in any of the statutory condemnation process does it state that so long as you are proceeding under [this process] ... that any acts you might commit while so proceeding will not constitute inverse condemnation?” [Resp. at 21]. Respondents essentially argue that any act, at any point during the condemnation process, even if complying with and following New Mexico eminent domain law, constitutes an inverse condemnation. Not only is this simply untrue, if borne out, it will nullify the legislative intent of the state Eminent Domain Code and frustrate its legislative purpose by punishing governmental entities for following its strict requirements.

It is true that, under New Mexico law, private property cannot be taken for public use or damaged by a public entity without just compensation, and that a

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<sup>1</sup> Throughout this brief, the City shall refer to SMP Properties and R. Michael Pack as “Respondents,” Respondent Pack’s tenant SAIA Motor Freight Line, LLC as “SAIA,” and Respondents’ property located at 3700 Hawkins Street N.E., Albuquerque as the “Hawkins Property.”

governmental entity is liable to a property owner if it commits a taking or condemnation without doing so. NM. Const. Art. 2, § 20, NMSA 1978 § 42A-1-29. However, an intent to condemn is not a condemnation. *See Santa Fe Pacific Trust v. City of Albuquerque*, 2014-NMCA-093, ¶40, 335 P.3d 232, 241. Mr. Willis' role in entering the Hawkins Property was to gather information for the statutorily required negotiation process, which, by necessity, required informing the property owner of the condemnation. [RP 204]. Mr. Willis had little information about the property owner and wanted to ensure that he made contact with Mr. Pack because of the nature of this action, and gathering more information required going to the Hawkins Property and speaking to his tenants. [RP 294]. Doing so required Mr. Willis to reveal the City's intent to condemn the property to SAIA. [RP 204, 405, 407, 526]. At no point did Mr. Willis tell SAIA that it would need to vacate the property, either immediately or in the future. [RP 407, 409]. All Mr. Willis did was express the City's intent to condemn, and it is clear, in this and other jurisdictions, that an intent to condemn is not a condemnation. [*See Pet'r's Br.*, III.A.1].

Respondents makes several analogies to other types of statutes to attempt to argue that Mr. Willis and the City abused the statutory condemnation process to condemn the Hawkins Property prematurely. These analogies do not reflect the circumstances of this case. For example, Respondents note that those who have valid driver licenses are entitled by law to drive, but not entitled by law to run over

pedestrians in crosswalks. [Resp. at 21]. Respondents also note that police officers may not, by law, wrongfully shoot an individual even though they may lawfully carry firearms. [*Id.*]. Carrying firearms and driving vehicles are permissible actions; preparing for negotiations in anticipation of a condemnation action is mandatory. NMSA 1978 § 42A-1-4 states that a condemnor “**shall** make reasonable and diligent efforts to acquire property by negotiation.”

However, if Respondents’ analogies do apply to this case, they make no sense in light of Respondents’ arguments. If Respondents’ logic regarding § 42A-1-4 is applied to these analogies, the act of driving itself should not be allowed because it could potentially lead to fatalities, and police officers should not be allowed to carry firearms because the mere presence of a gun will lead to a wrongful fatality. [*See* Resp. at 21]. Furthermore, if a statutorily required action, by its nature, creates an unlawful act which the required action itself seeks to prevent, complying with the law becomes nearly impossible. Following Respondents’ logic, the condemnor would need to be ready to file a condemnation action before even attempting to contact the property owner or visiting the site. This would be incredibly difficult, if not impossible to do, because the condemnor must be able to speak to the property owner in advance to discuss appraisals and determine if the property is actually appropriate for the condemnor’s future use. *See generally* NMSA 1978 §§ 42A-1-1 *et seq.*

Further, requiring a governmental entity to be prepared to file a condemnation action the moment its agent steps foot on a potential condemnee's property forces that entity to be incredibly cautious for fear that word will get out and the potential condemnee will file an inverse condemnation action. It essentially requires governmental entities to operate in secret, which is not a desirable outcome for any party involved in this case, including the City. And, as discussed in the City's opening brief, given the wide scope of the Inspection of Public Records Act, NMSA 1978 §§ 14-2-1 *et seq.*, a potential condemnee could learn of a potential condemnation even if a governmental entity operates in this secretive manner. [Pet'r's Br. at 13-15].

Expressing a present intent to condemn and conforming with the law is not itself a condemnation. This Court should rightfully recognize that fact and reverse the Court of Appeals' holding. Allowing the Court of Appeals' holding to stand will seriously hinder transparency in government and lead to premature inverse condemnation claims.

## **II. Recovery principles for temporary takings do not apply to this case.**

Respondents cite several cases in discussing the nature of the case. Though the City will not discuss every case cited in this Reply, it will address Respondents' argument that the principals of *Primetime Hospitality, Inc., v. City of Albuquerque* apply to the case at hand and that the Court of Appeals' reversal is logically sound



in light of *Primetime*. [Resp. at 4.]; see 2009-NMSC-011, 146 N.M. 1, 206 P.3d 112. The City agrees that many of the basic eminent domain and inverse condemnation principals are relevant to the issue before this Court. However, *Primetime* is distinguishable from this case and does not apply to the present matter.

In contrast to the permanent takings case currently before this Court, *Primetime* is a temporary takings case, which Respondent admits. [Resp. at 5]. In a permanent takings case, an owner is entitled to the fair market value of the property as of the date of the taking. See *Moriarty Mun. Sch. Dist. v. Thunder Mountain Water Co.*, 2006-NMCA-135, ¶12, 140 N.M. 612, 617, 145 P.3d 92, 97. In contrast, “[t]he measure of takings in a temporary takings case is the market rate of return on the difference in the fair market value of the property without the restriction and ... with the restriction for that period of time during which the restriction was in place.” *PDR Development Corp. v. City of Santa Fe*, 1995-NMCA-074, ¶8, 120 N.M. 224, 226, 900 P.2d 973, 975. While lost profits may be considered in determining the value of temporarily seized property, they are generally not considered in permanent takings actions in New Mexico. See generally *Primetime*, 2009-NMSC-011; *PDR Development Corp.*, 1995-NMCA-074 (discussing lost profits only in the context of temporary takings). Additionally, lost profits are not always used as the measure of damages even in temporary takings cases. *PDR Development Corp.*, ¶11. *Primetime*

focuses on lost profits resulting from temporary takings only and is distinguishable from this case.

However, assuming lost profits as discussed in the temporary takings context factor into calculating Respondents' loss, they would be considered consequential damages. In order to be compensated for consequential damage to one's property, "the damage to the property must affect some right or interest which the landowner enjoys and which is not shared or enjoyed by the public generally." *Public Serv. Co. of N.M. v. Catron*, 1982-NMSC-050, ¶7, 98 N.M. 134, 136, 646 P.2d 561, 563. The affected "right or interest" in this case would be the loss of the expectancy that SAIA would renew its lease, and as explained in the City's opening brief, loss of a potential rental lease is not a compensable interest in condemnation proceedings under New Mexico law. [Pet'r's Br. at 16-19]; see *State ex rel. State Highway Commission v. Gray*, 1970-NMSC-059, ¶16, 81 N.M. 399, 402, 467 P.2d 725, 728; *Walker v. United States*, 2007-NMSC-038, ¶¶4-5, 142 N.M. 45, 47-48, 162 P.3d 882, 884-85. Even *PDR Development Corp.*, which is also a temporary takings case, makes the point that the loss of a potential interest is not compensable. *PDR Development Corp.*, 1995-NMCA-074, ¶9 (discussing loss of potential contracts due to erroneous application of a zoning ordinance and determining that those losses were not compensable). The loss of SAIA does not factor into calculating damages in this case.

### **III. Conclusion**

For the reasons discussed in its Opening Brief and this Reply, the City respectfully requests that this Honorable Court affirm the rulings of the District Court and reverse the Court of Appeals' holding in the case at hand.

Dated April 11, 2019

Respectfully submitted,

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**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 April 11, 2019:

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