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, et al.,

Respondents.

ANSWER BRIEF

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ORAL ARGUMENT REQUESTED

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STATEMENT OF COMPLIANCE

Undersigned counsel state that this Answer Brief complies with Rule 12-213 (F) NMRA in that the body of the Answer Brief is prepared in Times New Roman 14 point typeface, and contains 9,339 words, less than the maximum words permitted. This word count was confirmed using WordPerfect X7 software.

RECORDATION OF PROCEEDINGS AND CITATION TO THE RECORD

No recording record proceedings are relevant to this Answer Brief. When citing to the record proper and the supplemental record proper, counsel for the Respondents used the numbers assigned by the Clerk for the District Court in preparing the record for transmission to the Court of Appeals, e.g. **RP___**.

TABLE OF AUTHORITIES

New Mexico Case Authority:

Case Law From Federal And Other States:

New Mexico Consitution & Statutes:

Rules:

I. REBUTTAL TO SUMMARY OF PROCEEDINGS

A. Nature of The Case.

Party references follow those used in the Brief in Chief, e.g., "Petitioner" or "City" for the Petitioner, and "Respondents" for SMP Properties, LLC and R. Michael Pack, collectively, and "SMP" or "Mr. Pack" when referenced separately.

Petitioner dedicates a significant portion of its Brief in Chief to (a) downplaying the impact of its employee's (Jeffery Willis) personal contact at the property (Hawkins Property) with the Respondents' tenant, SAIA Motor Freight Lines, LLC (SAIA), which allegedly caused SAIA to not renew its lease with Respondents, and (b) attempting statutorily to justify the non-renewal lease loss damage caused by Mr. Willis' entry upon the Respondents' commercial property. Petitioner's purpose in arguing these positions is to evade the paying of just compensation to Respondents.

A significant fact in this case is the concession of the City found in its Statement of Undisputed Material Facts (No. 8) that "(a)fter learning of the City's desired land acquisition and evaluating the possible impacts of that acquisition on its business, SAIA decided not to enter into a new lease for the Hawkins Property." (emphasis added) **[RP 204]** See also the City's concession as to the fact that Mr. Willis expressed to the SAIA tenant during his visit to the Hawkins Property a "present intention to condemn." **[BIC 12]** Respondents point out that the undisputed facts in the record of this case confirm

both of the City's aforementioned concessions. Mr. Willis' entry upon the Hawkins Property was also done without Respondents' permission or knowledge. [**RP 417**] The inverse condemnation damage began when Mr. Willis communicated to SAIA's terminal manager (Kevin Russell) the City's unequivocal intent to condemn significant physical aspects of Respondents' property possessed by SAIA under an existing lease, property critical to SAIA's business operations. [**RP 372-374, 376, & Ex. I, RP 361**] The district court precluded Respondents' inverse condemnation claim for just compensation by granting summary judgment in favor of Petitioner. The district court ruled the SAIA lease could not be considered in calculating fair market value because the lease did not exist by the time the City formally condemned a portion of the Respondent's property, due to the application of the "before and after rule" of valuation found in NMSA 1978, Section 42A-1 -26 (1981). Respondents appealed.

The court of appeals reversed the district court on the basis it had failed to recognize that there was a disputed issue of fact as to whether the City's actions caused SAIA not to renew its lease with SMP, causing damage to the value of SMP's property. The court of appeals ruled "(t)he City cannot, consistent with our constitutional takings clause, engage in such pre-condemnation action which damages the value of property, without paying just compensation for that diminished value when it subsequently condemns the property, notwithstanding the express language of Section 42A-1-26 "

City of Albuquerque v. SMP Properties, LLC, 2019-NMSC-004, ¶22, *cert. granted*, 2019-NMCERT _____(No. 37,343, Dec. 3, 2018) (*SMP*). Taking issue with the court of appeal's reversal of the district court, the City in its Brief-in Chief, without meaningful citations, incorrectly asserts " (t)he court of appeals reversed in favor of Respondents in direct conflict with prior inverse condemnation case law." **[BIC 1]** Respondents dispute this intrepid statement because the City is incorrect for two principal reasons. First, there is ample case law in New Mexico and other jurisdictions supporting the court of appeal's decision. Second, Petitioner wholly ignores (a) the mandates of Article II, Section 20, of the New Mexico Constitution, that "private property shall not be taken or damaged for public use without just compensation", and (b) New Mexico statutory law, NMSA 1978, Section 42A-1-29(A)(1983), providing that one who exercises eminent domain and has taken or damaged any property without making just compensation is liable for such damage at the time the property was taken or damaged.

Strikingly, neither Article II, Section 20, of the New Mexico Constitution nor Section 42A-1-29(A) are cited or discussed by Petitioner in either its Answer Brief filed with the court of appeals, nor its Brief in this case. Without question, these constitutional and statutory proclamations are very significant aspects of New Mexico eminent domain law, which are predominant in their design to provide a remedy for

violations of the constitutional right to just compensation. *See Primetime Hospitality, Inc., v. City of Albuquerque,* 2009-NMSC-011, ¶14, 206 P. 3d 112; *Bd. Of City Commr's v. Harris,* 1961-NMSC -165,¶ ¶ 1,5, 69 N.M. 315, 366 P. 2d 710; *Garver v. Public Service Co. of N.M.,* 77 N.M. 262, 267, 421 P. 2d 788, 793 (1966); and *County of Dona Ana v. Bennett,* 116 N.M. 778, 782, 867 P. 2d 1160, 1164 (1994). Respondents submit that the principles of law established under the New Mexico Constitution, Article II, Section 20, and Section 42A-1-29(A), as precedent, played a significant role in the court of appeal's decision presently under review. *See SMP,* 2019-NMCA-004, ¶¶ 23,31, & 32.

The City's claim that the court of appeal's reversal of the district court was in direct conflict with prior inverse condemnation case law also ignores the precedent established by this Court in *Primetime*, that the New Mexico Constitution and Section 42A-1-29(A) mandate that just compensation be paid when property is taken or damaged, in recognition that "our case law has defined the purposes of just compensation broadly." *Primetime, 2*009-NMSC-011, ¶¶ 14, 15. This Court held that rental value, and in limited circumstances lost profits, can be applied as a method to measure damage to determine just compensation. *Id.*¶¶ 2, 13, 19, 35 & 36. *Primetime,* when reinstating the district court's trial awards, confirmed and quoted the lower court's findings containing condensed, but nevertheless accurate, statements of precedential

principles of New Mexico case law, with the following emphases:

2. The New Mexico Constitution, as well as the inverse condemnation statute, mandates compensation both when a governmental action results in a taking and when such action *damages property.*

3.When *reliable proof of damage* and its amount is presented by a methodology other than a before and after appraisal, such proof is admissible on the damage issue.

4."Property" refers not only to the physical object itself, but to the group or bundle of rights granted to the property owner, including the right to the use and *enjoyment* of the object.

Respondents recognize that *Primetime* dealt with a "temporary takings" case. Nevertheless, Respondents submit that the principles enunciated above in *Primetime* are applicable in this case and support the court of appeal's opinion presently under review, including its holding to the effect that "rent is an appropriate criteria for measuring fair market value. If rental income is lost . . . there is a decline in fair market value." *SMP,* 219-NMCA-004, ¶25 (citing to *Klopping v. City of Whittier,* 8 Cal. 3d, 39, 500 P. 2d 1345, 1354-55 (in bank). The court of appeals cited additional authority from other states in support of its opinion as follows:

1. A condemner should not be permitted to damage and diminish the property's value, and then benefit from the loss it caused by evaluating its value at a later point in time on the basis of its reduced value. *SMP, ¶24 (see citations at ¶ 24).*

2. When a sovereign engages in affirmative value- depressing acts that cause tenants to move from property and it later then condemns, it shall not be permitted to benefit from the loss sustained as a result of its act. *SMP, ¶24 (see citations at ¶ 24).*

3. Notwithstanding a statutory condemnation valuation date, a different date may be required to effectuate the constitutional requirement of just compensation. *SMP,* ¶25 *(see citations at ¶ 25).*

4. If a condemner's pre-condemnation actions effectively deprive the owner of the economic advantages of ownership such as the right to use property, early valuation of condemned property is constitutionally required (provided the four points set forth in the next paragraph are met). *SMP, ¶26 (see citations at ¶ 26).*

5. Marketability must be substantially impaired, the condemning authority must have evidenced of an unequivocal intention to take the specific parcel of land, the owner must hold the land for development/sale and have so developed the land *SMP, ¶26 (see citations at ¶ 26).*

The court of appeals also pointed out that New Mexico applies a broad expansive concept of "property", citing this Court's precedent in *City of Santa Fe v. Komis,* 1992-NMSC-051, ¶11, 114 N.M. 659, 845 P. 2d 753, "that when loss of value is proven, it should be compensable regardless of its source." The court of appeals ruled that a property owner is constitutionally entitled to "early valuation" fair market value damages - that is, fair market value that occurs before the condemnation action is actually filed and the property actually taken, so long as there has been evidence of a prior unequivocal intention to take the specific parcel of property and such condemning authority's communication of its intention is expressed to third parties or the public in general, that substantially impacts the fair market value of the subject property. *SMP,* ¶ 28.

The court of appeals also rejected the trial court's application of the "before and after valuation rule", reasoning that "(t)he City cannot, consistent with our constitutional taking clause, engage in such pre-condemnation action which damages the value of

property, without paying just compensation for that diminished value, when it subsequently condemns the property." *SMP*, ¶22. The City criticizes the court of appeals for its reasoning expressed in the preceding paragraph by the scolding claim, "it 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"*. **[BIC 2]**. Respondents take issue with the City's assertion that *SMP* is in conflict with *Santa Fe Pacific Trust v. City of Albuquerque,* 2014-NMCA-003, 131 N.M. 450, 38 P. 3d 232 (*SFPT*). *SFPT* did not, as this case does, involve an actual taking by formal condemnation of any property. Furthermore, *SFPT, 2014-NMCA-093, ¶ 41,* citing to the Alaska case, *Jacovich Revocable Trust vs. State, Dept. of Transp.*, 54 P.3d 294 (Alaska 2002), outlined a list of factors constituting "substantial interference", which included " **notifying tenants that they would have to vacate**" (emphasis added), which did not occur in *SFPT* but did to a similar degree in this case. *See Dennison v. Marlow,* 1987-NMSC-104, 106 N.M. 433, 437, holding that constructive eviction occurs when a tenant is deprived of the beneficial use of the premises and the tenant vacates. Clearly, *SFPT and Jacovich* emphasized that "substantial interference with property includes entering the property and contacting existing tenants.

The City also fails to mention relevant concepts established by New Mexico cases

pertaining to condemnation. For instance, in order for an owner of private property to be compensated for consequential damages, "an actual taking of property is not required, but only consequential damages so long as the damage to the property affects some right the landowner enjoys which is not shared or enjoyed by the public generally", and the damage which is suffered is different in kind, not merely in degree. *Public Service Co. of NM v. Catron,* 90 N.M. 134, 136, 646 P. 2d 561, 563, citing to *Board of County Comm'rs, of Lincoln County, v. Harris,* 69 N.M. 315, 366 P.2d 710 (1961), and *Troiano v. Colorado Department of Highways*, 463 P.2d 448 (Colo. 1969). Also notable is the concept, "(t)he compensation to which an owner is entitled is an amount sufficient to cover his loss - that is, to make him whole and fully indemnify him." *State ex rel, State Highway Commission vs. Pelletier,* 76 N.M. 555, 560, 417 P.2d 46, 49 (1996). *See also, Primetime, ¶15,* 2009-NMSC-11, 46 N.M. 1.

B. Course of Proceedings and Summary of Relevant Facts.

The City seeks to diminish the damages caused to Respondents by alleging Respondents lost only one tenant and just 4% of their property. **[BIC 3, 4]** These attempts to downplay the true consequences of the City's actions ignore that there were only two tenants occupying the entirety of the commercial trucking terminal operating at the Hawkins Property (UPS & SAIA), and that the loss of the SAIA lease caused the Respondents to lose approximately 46 % of their annual rental income. **[RP 312, 313,**

348, 349 & 421] Additionally, the City's vague map exhibit inserted at Page 4 of its Brief merely showing where the condemned strip of property is located fails to show that the strip of property goes directly through the portion of the rental property where the fuel tanks were located. The exhibit also fails to show the location of the truck terminal in relation to the condemned strip of land, and does not illustrate the north end of terminal where the turning radius for SAIA's trucks was impacted. Also not disclosed is the imposition of the one year construction easement associated with the taking of the strip of land, which would further interfere with SAIA's business operations when road construction commenced. See Notice of Order of Entry at **RP 41-46.** A true prospective of where the condemnation occurred in relation to the location of the fuel tanks and the terminal can be found in the record in the exhibits and photographs at **RP 341 - 343.**

Respondents also take issue with the City's selected statement of facts, omitting many of the relevant facts of this case. Respondents encourage the Court's attention to (1) the statement of undisputed facts outlined by the court of appeals in its opinion (*SMP,* ¶ 2,), (2) the extensive statements of unchallenged facts contained in Respondents' Brief in Chief filed with the court of appeals at pages 10-12, & 19-21, (3) Respondents' statement of material facts and designation of exhibits at **RP 354-378 & 400-422**, and (4) Respondents' Reply Brief filed at pages 2-5.

The City's statement of facts at pages 4 and 5 of its Brief alleges that the loss of the SAIA lease stems only from the pre-condemnation visit by Mr. Willis. The City ignores the facts of SAIA's separate evaluation of the impact the announced condemnation was going to have on its operations. SAIA determined that it was not feasible to move the fuel tanks anywhere else at the terminal. SAIA determined it was going to cost $60,000 to move the tanks. SAIA determined there would be a loss of the use of four of its doors at the north end of the terminal. These were the main reasons as displayed in the record that caused SAIA not to renew its lease. SAIA was operating at full capacity using all of its doors at the terminal. It is undisputed that SAIA was going to stay but for the City's condemnation. SAIA had completed a study as to the feasibility of staying more than one year prior to Mr. Willis' visit to the property. SAIA also installed the two fuel tanks near the end of its current and last lease period at a cost of over $180,000. SAIA would have not undertaken this installation unless it could stay at the Hawkins Property for at least eight years after such installation. See references to the record regarding the preceding facts below.

The City at page 5 of its Brief also raises the irrelevant fact that the SAIA terminal manager, Mr. Russell, had been "pushing to try to move" to a different location due to a lack of door space and having to share space with another tenant at the Hawkins Property. The fact is irrelevant because the SAIA terminal manager did not make

decisions about moving to a new terminal. This decision was made by higher corporate officers at SAIA, to include Tom Davis. This fact was confirmed by Mr. Russell. **[RP 299]** Mr. Davis pointed out SAIA had sufficient door space at the Hawkins Property. SAIA completed its feasibility study to stay more than a year before Mr. Willis' visit. SAIA knew that if it needed more space Mr. Pack would install more doors. **[RP 372, 374]** In regard to the "pushing to try to move" comment, Mr. Davis in response stated that terminal managers do not make decisions on how many doors SAIA needs and that "with only a couple of notable exceptions, I never met a terminal manager that did not think he needed a bigger terminal, a newer terminal or a nicer terminal. Kevin (being Mr. Russell) was no exception." **[RP-374]** Mr. Davis also explained how the decision making process occurs to move, which did not involve Mr. Russell, adding that SAIA had enough doors. **[RP375]** SAIA was going to stay for nine more years but for the notification of condemnation by the City. **[RP-376]** Mr. Davis also stated "(w)e felt we had the capacity. The location was good. The working relationship with the Landlord was good. If we needed more capacity, he was going to add doors for us. There was absolutely no reason for us to leave." **[RP-376]** "We had made the decision, we were going to stay." **[RP 377]**

The long term plans of SAIA to stay, coupled with the binding promises exchanged between Tom Davis and Mr. Pack confirming the renewal of the subject

lease are also uncontroverted. **[RP 219, &368-370]**. SAIA and Respondents had mutually covenanted to renew the lease. [**RP 370-373**]. Documents evidencing the renewal of the lease were being drafted and were in the final stage of execution at the time of contact by Mr. Willis. **[RP414-RP415]**. Only after Mr. Willis' visit did SAIA inform Respondents of its intent to not renew and terminate the lease. The subsequent timing of termination is established in the record by SAIA's letter sent to Respondents stating " (t)he City's **taking ... will have a serious adverse effect on our ability to operate from the Terminal."** (emphasis added) **[SAIA letter, RP 361]**. The City, and no one else, caused SAIA to change its mind about staying at the property. Had there been no notification of condemnation, SAIA would have stayed. **[RP 374, 376]**. SAIA, in considering whether or not to stay, determined it would not be feasible to move the tanks anywhere else on the property, especially at a cost of $60,000.00. **[RP 372]**

The City also alleges at Page 5 of its Brief, in conflict with Mr. Willis's deposition testimony, that Mr. Willis entered the Hawkins Property to obtain information in preparation for negotiations to purchase the thirty foot strip of land. In support, the City cites to only **RP 204,** which references not a fact but just the City's conclusion as to the existence of this non-record fact, followed by the unsupported in the record citation to non related portions of the deposition of Mr. Pack **[RP-204-Ex.**

2], who was not present at the time of the visit. The stated in the record reason Mr. Willis went to the property was to obtain the telephone number or email address for Mr. Pack. There is no mention of a visit- purpose to negotiate the acquisition of the condemned land in Mr. Pack's deposition. The reason Mr. Willis wanted the telephone number or email address of Mr. Pack was to provide him with notice the City was going to take a portion of his property. **[RP 407]** Mr. Willis' job at the City was not to negotiate the acquisition of the Property. Negotiations were done by a different department. Mr. Wills' department had nothing to do with negotiations to purchase lands associated with City condemnations. Mr. Willis' own testimony raises questions of his lack of authority to negotiate in the first place. **[RP 292]**

The City further attempts to soften the facts at page 5 by the understatement that during visit to the property Mr. Willis was merely discussing with SAIA employees the "general nature" of the condemnation and the portion of the property the City desired to purchase. One might think Mr. Willis' visit was merely some kind of power point presentation to explain the general nature of the purchase requirements of New Mexico condemnation law. Not so, and the record is silent as to any mention of a purchase during the visit. Mr. Willis, at first went to the inside of the terminal in early December, 2011, and met with the UPS and SAIA property managers.**[RP 404]** He then took them out to the northern boundary of the property line to show them where

the City was going to cut a road, a portion of which went right through the middle of the recently installed fuel tanks.**[RP 358,412]** Because the described location of the condemned land was also near the north portion of the terminal, it was recognized by the SAIA manager at the time that the condemnation would impact significantly on the ability of SAIA to "back" its semi-trailers up to four of its loading docks due to restrictions on the turning radius for trucks approaching the northern four doors of the terminal. **[RP 404, 412]** Mr. Willis, in plain terms, informed SAIA that the City was going to impose, by its taking, significant restrictions on the use and enjoyment of the subject property. **[RP 375, 404 & 412]** If Mr. Willis' visit was just to obtain a telephone number or email address for Mr. Pack, why didn't he just leave after obtaining this information while still inside the terminal? Instead, Mr. Willis decided he would take the tenants out to show them where the taking was to occur, which conduct constituted on- site condemning activities with Respondents' tenants on behalf of the City. The case of *County of Dona Ana v. Bennett,* 1994-NMSC-005, 116 N.M. 778, 867 P. 2d 1160, is pertinent. Justice Montgomery pointed out at 867 P. 2d, 1164, that "(u)nder some circumstances, a taking may occur before an order authorizing preliminary entry becomes effective-e.g., when, and if, the condemnor actually enters upon the property, interferes with the owner's enjoyment, and devotes the property to public use for more than a momentary period. *See City of Albuquerque*

v. Chapman, 77 N.M. 86, 89, 419 P. 2d 460, 462 (1966) (stating that there is a taking in the constitutional sense "(w)hen interference with the use of property by its owner consists of actual entry upon land and its devotion to public use for more than a momentary period." *(the Court's additional citations omitted)* One also has to question why would Mr. Willis, if his visit was as the City claims - done pursuant to and consistent with the requirements of NMSA 1978, Section 42A-1-4, for negotiation preparations to purchase the Respondents' property, be discussing condemnation objectives and consequences with an owner's tenant? Section 42A-1-4 mandates "reasonable efforts" by the City. Mr. Willis' direct dealings with the Respondents' tenants, while having questionable authority to negotiate, could easily be characterized as being unreasonable. Mr. Willis' conduct was inconsistent with the objectives of Section 42A-1-4, as the court of appeals noted while discussing this very statute. Judge Bustamonte 's statement is on point, "(n)o one other than an owner with the ability to convey title could be expected to effectively negotiate to a sale." *See Sunland Park v. Santa Teresa Services,* ¶ 50, 2003-NMCA- 106, 134 N.M. 243, 75 P. 3d 843 (discussing § 42A-1-4).

At Page 6 of its Brief the City inaccurately asserts the "Respondents specifically argued that the loss 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." The City shows no citation to this mis-characterization of Respondents' argument. Respondents' argument is that the loss of the use of the fuel tanks substantially interfered with SAIA's free use and enjoyment of its leasehold, and that this interference with their tenant's leasehold use and enjoyment was, in fact, a substantial interference with the Respondents' free use and enjoyment of their property. **[RB 7]** The fact that SAIA decided not to stay at the Hawkins Property after it had agreed to do so certainly caused a loss of rents. Respondents' argument about the cost of the installation of the fuel tanks and the cost of removing them was to show that SAIA had the intention of staying under a lease at the property for at least nine more years. SAIA would not have paid $180,000.00 to install fuel tanks in the last year of its last lease period if it was not planning on staying for another nine years. **[RP 369-377]**

At Page 6 of its Brief the City also incorrectly states that the district court granted summary judgment for the City on May 2, 2015. To the extent it's significant it was November 20, 2015, and then, only after the district court had first denied the City's motion for summary judgment in favor of Respondents on November 2, 2015, on the basis that the City's motion for partial summary judgment was not well taken. **[RP 506, 525 & 540]** The case was scheduled for a five day Jury Trial to begin on November 16, 2015. In conflict with its denial of summary judgment on the City's

motion the district court on November 3, 2015, and November 4, 2015, entered orders in limine precluding the testimony of Bryan Godfrey (Respondents' expert) and Mr. Pack on the issues of the loss of the SAIA lease renewal and the impact of loss of rents on Respondents' property. **[RP 508, 513]** Faced with the prospect of a trial on their inverse condemnation claim regarding the loss of the SAIA lease, with no witnesses being allowed to testify on the damage aspect of the case, Respondents filed a motion for an expedited hearing and order for the allowing of an interlocutory appeal. In response, after hearing Respondents' motion, the district court reversed, sua sponte, its denial of the City's partial summary judgment, stating that the court did not see Respondents' February 10, 2015, claim for fair compensation and inverse condemnation. **[RP 540]** Respondents question the City's arguments and unclear points at page 7 of its Brief regarding what the court of appeals may have held (also confusing due to the City's strange references to *9 & * 7). Respondents submit the court of appeals was very clear on the issues it was reviewing on appeal. *See SMP*, 2019-NMCA-004, ¶ 1. The issues were (1) whether lease payments from a tenant may be considered in computing just compensation when the City's precondemnation actions caused the tenant not to renew its lease with the property owner and the lease term had ended when the condemnation action was filed; and (2) whether those same actions by the City may give rise to a claim for inverse condemnation and damages.

After extensively reviewing and analyzing these questions, the court of appeals held " (t)he district court erred in granting the City partial summary judgment on the issue of substantial interference in Defendants' claim for inverse condemnation" *SMP*, ¶ 40. A review of the court of appeal's opinion establishes its recognition of the precedent established by *SFPT*, at¶ ¶25 & 42, that governmental action that does not "directly restrict" the use of and enjoyment of property may, nevertheless, "substantially interfere" with the use and enjoyment of property, pointing out that the test, again, is one of "substantial interference" by the government. *SMP*, ¶¶ 37,38.

The court of appeals supported its opinion with a recital to numerous record facts. The recited facts (paraphrased hereafter) pertained to Mr. Wills' trip to the property, his acts of condemnation, the $180,000 cost of the fuel tanks installation, the affect of the announced condemnation rendering SAIA's business operations untenable, and the causing of SAIA to leave after the parties had mutually agreed to the lease renewal were but a few of the facts the court of appeals recognized. These facts were undisputed, all of which ultimately resulted in Respondents losing a tenant that had intended to lease twenty-nine doors at their freight terminal for an additional nine years. The court of appeals pointed out "a jury can find as a matter of fact that the lease was agreed upon and was going to be renewed for an additional nine years, pending completion of the usual paperwork." *SMP*, ¶ 39. The court of appeals further

added ". . . SMP was entitled to have a jury decide whether the City's actions 'substantially' interfered with SMP's use and enjoyment of its property, and if so, SMP's damages (citing to *SFPT,* ¶ 42)." *SMP,* ¶ 39.

II. STANDARD OF REVIEW

Respondents do not question the statements of the City regarding the standard of review, except they add with regard to summary judgment that New Mexico Courts view summary judgment with disfavor, seeing it as a drastic remedial tool which demands the exercise of caution in its application. *Little v. Baigas,* 2017-NMCA-027, ¶ 6, 390 P. 2d 201; *Blauwkamp v. Univ. of N.M. Hosp.,* 1992-NMCA-048, ¶ 10, 114 N.M. 228, 836 P. 2d 1249. Respondents also add that evidence tendered by party opposing summary judgment is to be viewed in the light most favorable to support a trial on the merits. *See Bank of N.Y. v. Reg'l House. Auth. For Three,* 2005-NMCA-116, ¶ 26, 138 N.M. 389, 120 P. 3d 471.

III. ARGUMENT (Questions Presented on Appeal)

This Court's Order of December 7, 2018, stated that certiorari was granted on all questions as presented in the City's Petition for Certiorari. These three questions were set forth at Pages 2 and 3 of the City's Petition for Certiorari, and are quoted as follows:

Question One: Whether the Court of Appeals erred 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: Whether the court of appeals erred in holding that the property owner's tenants' lease payments should be considered in calculating just compensation, even though the lease had already concluded.

Question Three: Whether the Court of Appeals erred in holding that determining whether a taking occurred is a jury question, when all previous New Mexico cases say that it is not.

IV. RESPONDENTS' REPLY TO QUESTIONS PRESENTED

A. Question One (statutory justification): The City argues that its condemning conduct under the facts of this case are justified because Mr. Willis was merely following the condemnation statute as set forth under NMSA 1978, Section 42A-1-4. That is to say, the City was just undertaking its due diligence when its agent originally made contact with SAIA. Respondents contest the fact that Mr. Willis was just furthering the purposes of Section 42A -1-4, because he was dealing with a tenant not an owner, and his job and department were not involved in the negotiating of property purchases prior to condemnation. Nevertheless, for the sake of argument, let's for the moment assume that Mr. Willis was just doing "due diligence" in

compliance with statutory condemnation processes. Where in any of the statutory condemnation process does it state that so long as you are proceeding under such a process you can cause damage to property, or, that any acts you might commit while so proceeding will not constitute inverse condemnation? The City's statutory justification argument lacks logic. No one would argue that just because police officers have statutory power to enforce laws, including the statutory right to carry and use firearms, that it empowers them to wrongfully shoot someone. The Motor Vehicle Laws of New Mexico empower persons who hold valid driver's licenses to legally operate automobiles on the streets and highways of New Mexico. While undertaking the lawful operation of an automobile no one could reasonably argue that this empowers a driver to run over pedestrians in crosswalks. What logic supports the City's rational that its employees can commit acts of inverse condemnation or cause damage to property without just compensation, just because that person may be proceeding under §42A-1-4? Furthermore, Mr. Pack says there were no negotiations. The only thing he received having to do with the purchase of the property was a letter sent to him with an offer to purchase the property, which he refused, because it did not compensate him for lost rentals. In fact, all the City is required to do under NMSA 1978, Section 42A-1-6(B) is to make an offer to purchase. It is also to be noted from the testimony of Mr. Pack that his tenants were not authorized to represent him or

discuss any matters pertaining to his business with any third parties. **[RP 222]**

The City's also cites no convincing case law to support its justification argument. Respondents submit there is, however, case law opposed to the City's justification argument. For example, the Oregon Court of Appeals pointed out that the government, while exercising eminent domain rights, even though entitled to do so, is not justified in causing substantial interference. The Oregon court stated "(h)owever, if government, in the process of performing some act for the benefit of the public, inflicts a substantial interference with the use and enjoyment of private property, that act can amount to a taking and give rise to a claim by the property owner for compensation." *See, Dunn v. City of Milwaukee,* 250 P. 3rd 7 (Or. App. 2011); *Morrison v. Clackamas County,* 18 P.2d 814 (Or. 1933). Following similar reasoning, the Missouri Court of Appeals recognized that just because a government entity might hold the statutory right to conduct a precondemnation survey, this does not give the authority to dig up private property. *Missouri Highway and Transportation Commission v. Eillers,* 79 S.W. 2d 471,473 (Mo. 1987), citing to *County of Kane v. Elmhurst Nat. Bank,* 443 N. E. 2d 1149 (Il App. 1982).

The City at page 12 of its Brief concludes its statutory justification argument under Section 42A-1-4 by its statement "(i)n this instance, the City took significantly less action than it did in *SFPT.*" This statement is patently inaccurate and easily

dispelled by the facts of Respondents' case. First, the City entered the property belonging to Respondents. No entry occurred in *SFPT*. Second, the City contacted existing tenants, namely SAIA and UPS, both of which were operating under current leases with the Respondents. In *SFPT* there was no contact with existing or prospective tenants. Third, the City communicated directly to SAIA (Kevin Russell) and Mr. Pack its intent to condemn. In *SFPT* there was no communication by the City to a tenant or owner of an intent to condemn. Fourth, the City filed a formal condemnation proceeding to take the specific property from Respondents it intended to take. No formal condemnation proceeding was filed in *SFPT*. Fifth, the City's conduct caused an existing tenant of Respondents to not renew a lease, the renewal of which had been agreed to, and which was contemplated to last an additional nine more years. No lease renewal was ever interfered with in *SFPT*. Sixth, the City's condemnation declaration interfered with a tenant's full use and enjoyment of its leased property, e.g., the condemning of the land where the fuel tanks were located, coupled with interference to the turning radius for trucking operations at the north end of the terminal. No such interference with tenant enjoyment occurred in *SFPT*. Seventh, due to the City's condemnation declarations, SAIA subsequently vacated the Hawkins Property. No Tenant vacated any property due to condemnation declarations by the City in *SFPT*.

At Page 13 of its Brief the City asserts that other state Courts have found "no taking" when analyzing similar issues to the present case. Respondent submits these cases are either distinguishable, or are not applicable to the facts of this case. The City cites *City of Colorado Springs v. Andersen Mahon Enterprises, LLP*, 260 P. 3d 29 (Colo. App. 2010), for the point that pre-condemnation "publicity" that affected a landlord's ability to rent property for several years prior to condemnation was not a taking. Respondents are not claiming that pre-condemnation publicity is an issue in this case. Also, it is rather surprising that the City would even cite *City of Colorado Springs*, because it is supportive of the court of appeal's opinion in this case. The Colorado Court was very careful to distinguish the fact that the condemnation conduct of the city was limited to "merely" the announcing of an impeding condemnation-coupled with delay. Nothing more. The Colorado Court pointed out that "merely" announcing condemnation is not sufficient to establish a taking. Going further, the Colorado court pointed out there can be a taking if some kind of interference in the use of the property occurs, or the condemning authority commits some affirmative act that interferes with the property, including its physical use or enjoyment. The court added, a taking occurs when the damaging activity has reached a level which substantially interferes with the owner's use and enjoyment of his property. Cited also by the Colorado court were the cases of *"Jackovich"* and *"Klopping"*, cases to which

the New Mexico Court of Appeals discussed in *SMP*, in much the same way as the Colorado Court did. *See SMP*, ¶¶ 25,27,29 & 35. The Colorado Court went on to state "generally a taking of property occurs when the entity clothed with the power of eminent domain substantially deprives a property owner of the use and enjoyment of that property." *City of Colorado Springs*, 260 P. 3d 29, 32, 37 (*citations omitted).*

The City cites *Gardner v. City of Cape Girardeau,* 880 S.W. 2d 652 (Mo. App. 1994) for the premise that precondemnation survey work that made property unrentable prior to condemnation was not a taking. Precondemnation survey work is not the issue in this case. Also, *Gardner* did not rule that precondemnation survey work was not necessarily a taking. *Gardner* was adjudicated on the basis that a claim for damages due to pre-condemnation survey work was barred by the doctrine of collateral estoppel. There had been a previous trial on the condemnation case, which the jury had heard and awarded damages of $75,000. The *Gardner* court ruled at Page 665, "we conclude landowners had a full and fair opportunity to litigate the issue of damages resulting from the City's pre-condemnation survey in the prior case, thus the issue would be barred by collateral estoppel."The City cites *City of Lewiston v. Lindsey,* 853 P. 2d 596 (Idaho App. 1993) for the proposition pre-condemnation notice and negotiations resulting in the loss of a tenant prior to condemnation was not a taking. Respondents take exception to how the City characterizes *Lewiston*. At Pages

11 and 12 of its Reply Brief with the court of appeals Respondents distinguish *Lewiston*. The factual issues referenced in the Idaho trial court were in dispute. The landowner asserted the city had contacted and interfered with a tenant, which the city denied. The trial court made a finding of fact that the city never interfered. The Idaho appellate court's review was one of substantial evidence. The Idaho appellate court determined that the finding of fact of no contact was supported by substantial evidence. As such, the appellate court was bound by the finding of fact, even though the court pointed out that there was conflicting evidence in the record about contact. The issue of a precondemnation contact as a taking was not ruled on because there was a binding lower court "no contact " finding, precluding the need to rule on the issue.

The City cites *City and Cty. of Honolulu v. Chun,* 506 P.2d, 770 (Haw. 1973), for the premise that engaging in negotiations to purchase property is not a taking or damage to property. Respondents agree, merely negotiating for the purchase of property with an **owner** does not constitute a taking. *City and Cty. of Honolulu* ,however, has no similar facts to the present case. A Hawaiian condemne was trying to claim compensation and severance damages for a new concrete retaining wall that had been built after the condemnor had authorized the acquisition of a portion of the property where the wall was constructed. The Hawaiian Court simply applied the before and after rule, and tied the right to compensation to the date of the

condemnation action as the date to measure damages. Respondents respectfully submit this *City and Cty. Of Honolulu* has no applicability to the present case.The City cites *Chicago Housing Auth. v. Lamar,* 172 N.E. 2d 790 (Ill. 1961) for the point that entering into negotiations prior to condemnation is not damage to property as a matter of law. Respondents do not disagree that merely undertaking prior negotiations, standing alone, is not "damage" to property as a matter of law. Respondents point out, however, that Mr. Willis was not negotiating; rather, he was condemning by entering the property, contacting the tenant and informing the tenant that the City was cutting a road through a portion of the property, through the fuel tanks of SAIA, and taking sufficient property to impact SAIA's use of at least four doors at the Hawkins Property.

B. Question Two (lease renewal expectation): The City urges this Court to reverse the court of appeals on the basis that a "mere expectation of lease renewal" is not a compensable property interest, citing to the case of *State ex rel. State Highway Commission v. Gray,* 1970-NMSC-059, ¶16, 81 NM 399, 467 P.2d 725. Respondents dedicated extensive argument in its briefs to the court of appeals regarding the City's arguments pertaining to *Gray*, and its clear irrelevance to this case. Respondents' arguments are set forth in detail in its Brief-in-Chief, pages 17-36, and its Reply Brief, pages 12-13. This Court is encouraged to review these briefs.

Respondents are also aware of this Court's order to not predicate or support an argument or rebuttal by simply incorporating by reference matters in their previous briefs. In addition therefore, Respondents do not question the long standing rule that a "mere" expectation of a lease renewal, without more, in New Mexico, is not a compensable property right in condemnation. Nevertheless, Respondents also recognize that this Court in *Gray* specifically limited its holding to only the facts before it. Also, the *Gray* court at Page 402 stated "(a) tenant from year to year with a covenant of renewal may have his damages assessed with reference to the covenant. . . ." In simple words Respondents submit that *Gray* stands for the proposition that a year to year tenant, with a promise of a lease renewal, can have his lease if damaged, measured in relation to a promised renewal. Respondents also cite to the case, *State ex rel, State Highway Commission vs. Chavez*, 1969-NMSC-072, 80 N.M. 394, 486 P.2d 868, for the proposition that an expectation of a lease renewal can be taken into consideration in valuing property. In *Chavez,* the tenants rented property on a highway where they operated a store and gas station. They had a lease which had been previously renewed and which was set to expire several months after the state condemned their property. Eventually the case went to trial and the jury awarded damages which exceeded the remainder of the lease period, on evidence from the tenants' appraiser that the lease had value beyond its remaining lease period. The state

appealed, arguing the award should have been limited to the remainder of the lease period. This Court disagreed and upheld the jury's award ruling that the tenants were entitled to compensation beyond the existing lease period, recognizing that even though the tenants did not have a legally binding option to renew, the lease had been "renewed as a matter of course", and that it "was the unanticipated intervention of the condemnation that caused the loss of value." The *Chavez* court went on to add "(w)e see nothing in our earlier holding that denied the right to have all the elements of damage resulting form the condemnation considered when arriving at the award. Indeed, such a holding would be of questionable constitutionality as permitting the taking or damaging of property without the payment of just compensation." *Chavez,* 80 N.M. at pages 398, 399. *In accord, City of Santa Fe v. Komis,* 1992-NMSC-051, ¶ 11, 114 N.M. 659, 895 P. 2d 753.

The City argues in its Brief at Page 17 that *Gray* is especially relevant because Respondents' claim is 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. The City's point is simply factually deficient. The parties here had already agreed to renew the lease and were awaiting the final letter confirming the renewal from SAIA's legal department. This testimony is uncontradicted in the record. Both the testimony of Tom Davis and Mr. Pack were absolutely consistent, the parties

had agreed to renew the lease. The record is replete with facts establishing the clear evidence of the agreed SAIA lease renewal for another nine years, as clearly recited in the previous points of this Brief, clearly dispelling the "hope and speculation" assertion by the City, which, at the minimum, constitutes a factual question.

The City cites *Walker v. United States*, 207-NMSA-038, 142 NM 45, 162 P.3d 882. for the premise that an expectancy of a renewal of a lease is not a compensable property interest. Respondents adamantly disagree that *Walker* makes any such holding, finding or ruling that the expectation of the renewal of a lease is not a property interest to be considered in a condemnation action. The City attempts to stretch this case such a holding. *Walker* did not deal with a lease renewal. *Walker* dealt with whether or not the law of New Mexico recognizes a limited forage right implicit in a vested water right, or implicit in a right-of -way for the maintenance and enjoyment of a vested water right. *Walker*, 2007-NMSC-38, ¶ 1. In *Walker*, the plaintiffs' federally licensed grazing permits issued as a privilege, through a permitting process, had been canceled. The plaintiffs asserted they owned the surface rights to the property where they had been grazing cattle, and therefore they did not need grazing permits. No lease, lease renewal, or lease expectation was dealt with in *Walker*. The plaintiffs filed a just compensation claim under the Fifth Amendment to the United States Constitution, arguing that the United States had violated the Fifth Amendment

by revoking their grazing permits without compensating them for this alleged property interest. The plaintiffs lost their claim in federal district court on the basis they did not have a fee interest in the surface estate where they had been grazing their cattle. The plaintiffs then asserted a property right under New Mexico law to the effect they had a purported forage right for their cattle incident to their ownership of a water right or implicit in a ditch right-of- way for the maintenance and enjoyment of a water right. Certification to this Court followed on only the two issues referenced above. *Walker,* ¶ *6.* The plaintiffs lost on both questions. Simply stated, *Walker* **does not** stand for a lease renewal expectation not being compensated, as the City claims. Nevertheless, Respondents submit there is a Fifth Amendment "just compensation case," not cited by the City, that is analogous to this case. *Uba Natural Resources, Inc. v. US,* 904 F.2d 1577 (Fed.Cir.1990), held that when the United States, by condemnation, interfered with an almost completed execution of a joint venture agreement to mine gold, this interference with an expected to occur contract, was a taking under the Fifth Amendment. Respondents submit the City's interference with its almost executed lease renewal is supported by *Uba Natural Resources,* not *Walker.*

The City at pages 19 and 20 of its Brief attempts to misdirect this Court to the incorrect conclusion that the court of appeals predicated its reversal of the district court on the condemnation blight principle. The City's assertion rest solely on the basis that

the cases the court of appeal cited to at *SMP*, ¶¶ 24-26, were cited for the condemnation blight principle. Respondents' submit that a clear reading of these cited cases, as well as the court of appeals discussions regarding these cases, easily establishes that they were cited to illustrate factual and legal examples of "substantial interference" such as notifying tenants of condemnation, engaging in value-depressing acts that cause tenants to move, constitutional requirements of just compensation, misapplication of the "before and after valuation rule", acts of unreasonable conduct occurring prior to condemnation, and the New Mexico takings clause and its comparison to other similar state enactments requiring just compensation when private property is "taken or damaged". The words "condemnation blight" are also never used by the court of appeals in *SMP*.

In support of its argument of condemnation blight it asserts that only "seven months" passed between the Hawkins Property entry by Mr. Willis and the filing of the City's condemnation case. Due to such a limited period of time the City claims it would be unreasonable to apply the blight principle to this case. The City's calendar count is wrong, it was nineteen months, not seven. Mr. Willis entered the Hawkins property in early December, 2011, and the City filed its suit on July 10, 2013. [**RP 1, 404**] The City also asserts the blight principle is not available to obtain recompense for lost rent, only lost property value. Respondents disagree. The City ignores the

Respondents' claim of lost value to their property based on the income capitalization method of rental property valuation. Loss of rents impacts property value. Mr. Pack asserts the loss of SAIA's rents impacted the value of the Hawkins property. Mr. Godfrey, Respondents' expert, explained the capitalization of income use in valuating income producing property. See Godfrey and Pack testimony and affidavit. [**RP 254, 223, 226 & 461**] Rental income is how property value is measured for commercial income property. The City misreads the cases it cites in its attempt to argue that lost rents can not be considered in blight principle cases. As its last argument the City asserts the blight principle does not exists in New Mexico case law, except in *SMP*. Then, inconsistently, it goes on to say it was referenced a single time in *SFPT*. Respondents submit the major thrust of *SFPT* was about the blight principle, and that had there been "substantial interference," such as notifying tenants about condemnation and causing them to vacate, or other similar interference, the blight principle may very well have been applicable.

At page 21 of its Brief the City cites in support of its arguments under Question Two the City closes , citing *Environmental Control v. City of Santa Fe*, 2002-NMCA-003, 132 N.M. 450, 38 P. 3d 891. The issue before the court of appeals was whether or not a unilateral expectation of contract continuance constituted an enforceable claim. The court denied the claim because only the plaintiff , not the other party to the

expired contract (the City of Santa Fe), had an expectation of contract renewal. There was no mutuality of expectation. Respondents' present case demonstrates that contract expectation of lease continuance was "mutual" between Mr. Pack and Mr. Davis, not unilateral. Both parties agreed to renew before lease expiration and Mr. Willis' visit.

C. **Question Three (date of taking as a jury question):** The argument the City submits under this question regarding the court of appeal's ruling at *SMP*, ¶ 41, requiring that Respondents at trial must prove the date of the "taking", is confusing. At page 21 of its Brief the City states, "...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 to the satisfaction of the jury whether a taking occurred in the first place." The City then asserts "this holding contradicts established inverse condemnation case law, and this Court should reverse it." Then, in bewildering contradiction at page 22, the City states, " (w)hile 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."

Respondents submit that the questions of whether or not an inverse condemnation taking has occurred and the date of a taking are different, bearing in mind that a "taking" can consist of an actual taking or damages caused by substantial interference. This case comes before the Court in the context of a summary judgement

review on the question of whether or not the district court should have granted summary judgment. At this stage of the proceedings the record on appeal is reviewed to determine whether a claim can in reality be supported on the grounds alleged in the pleadings and whether a controversy as to an issue of fact exists as to the matters raised in the pleadings. *Pederson v. Lothman,* 63 N.M. 364, 320 P. 2d 378, 381(1958). Respondents at trial still must prove facts sufficient to sustain an inverse condemnation award. *Electro-Jet Tool and Mfg. Co. v. City of Albuquerque,* 1992-NMSC-060, 114 N.M. 676, 845 P. 2d 770, 779 (an appeal from a grant of summary judgment). The question is, do the various state of facts present in the record, if proven, demonstrate that Respondents could recover on their inverse condemnation claim? *Electro-Jet Tool,* 1992-NMSC-060, 845 P. 2d at 773. Respondents must not only allege but must also prove the facts that would entitle them to compensation by way of inverse condemnation. *Electro-Jet Tool,* 845 P. 2d at 773. The court of appeals held that under the facts of the present case the conduct of the City could constitute "substantial interference by the government with the use and enjoyment of property." *SMP* ¶ 39. "The test is one of substantial interference. If governmental activity ' substantially interferes with the landowners' use and enjoyment of its property,' the result is an inverse condemnation" *SMP,* ¶ 37 (citing to *SFPT,* ¶25).

Under the guide lines of *Electro-Jet Tool,* Respondents must prove facts

sufficient to establish their claim of substantial interference. Implicit in these facts to be proven is the date of the interference, which is the date of the "taking or damage", which is the point in time at which Respondents' damage claim for just compensation is to be measured. Also to be proven is the amount of damages. Respondents respectfully submit that these preceding points are the factors of proof required at trial, which the court of appeals was directing the Respondents and district court about. For these reasons Respondents submit the City is trying to make a non-issue into an issue, and its claim of error under Question Three should be rejected.

V. REQUEST FOR RELIEF

Respondents respectfully request that this Court withdraw its Writ of Certiorari and allow this case to proceed under the mandate the court of appeals set forth in its opinion presently under review.

VI. REQUEST FOR ORAL ARGUMENT

Pursuant to NMRA 12-214, Oral Argument is requested in order to respond to any questions the Court may have regarding the issues in this case that may not be answered by a review of the record and the Briefs of the parties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing Answer Brief was filed through the Court's electronic filing system and emailed to the following counsel of record on the 18th day of March, 2019:

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