SPIVEY VALENCIANO PLLC

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Today's Post: Common Carriers and Corridors

The Houston Court of Appeals just issued an opinion that is sure to be watched very closely by both sides of the eminent domain docket. In *Hlavinka v. HSC Pipeline P'ship*, No. 01-19-00092-CV, 2020 Tex. App. LEXIS 4569, at *1 (Tex. App.—Houston [1st Dist.] June 18, 2020), the Houston Court of Appeals (First District) examined two hot topics: the common carrier status of a pipeline company and "corridor valuation" in the context of pipeline easements.

Here, HSC Pipeline Partnership, LLC ("HSC") sought a pipeline easement across the property of several landowners (the "Hlavinkas") jointly owning over 15,000 acres in Brazoria County Texas. Notably, the Hlavinkas purchased this land in 2002-2003 for the primary purpose of generating income by acquiring additional pipeline easements - there were already more than twenty-five pipelines crossing the property.

At the trial court level, the parties had competing dispositive motions – HSC won its motion for summary judgment on the issue of common carrier status, and the Hlavinkas lost their plea to the jurisdiction. The Court of Appeals reviewed both trial court rulings *de novo* and thereafter affirmed *Bell* to hold that Section 2.105 of the Texas Business Organizations Code provides an independent grant of eminent domain authority and that the propylene that HSC transports in the pipeline is an "oil product" for purposes of section 2.105. *See ExxonMobil Pipeline Co. v. Bell*, 84 S.W.3d 800, 803-04 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

That left the issue of "public purpose." While HSC established that the Texas Railroad Commission had issued a T-4 Permit to Enterprise to operate the Pipeline on behalf of HSC, that HSC filed a tariff with the RRC in which it agreed to offer its transportation services to other parties, and that HSC agreed to be bound by the rules of Chapter 111 of the Natural Resource Code, that was not enough to establish common carrier status. Rather, the Court of Appeals pointed to evidence that established the pipeline will serve only HSC's private interest in selling its propylene to one company and that "[a]t most, HSC's evidence establishes that there is a possibility that the Pipeline will serve the public 'at some point after construction,' not a reasonable probability." Still, this evidence was enough to create a fact issue. Therefore, the Court of Appeals held that the trial court erred in granting HSC's summary judgment motion. The Court of Appeals remanded this issue to the trial court and overruled the landowner's challenge as to the denial of their plea to the jurisdiction.

The Court of Appeals also held that the trial court abused its discretion in excluding the testimony of Terry Hlavinka as to the market value of the condemned easement. The Court of Appeals agreed that he could testify under the Property Owner Rule. In addition to relying on two private pipeline sales to Dow and Praxair, Hlavinka relied on additional information to support his valuation opinion, including the experience of neighboring property owners and his experience with Dow's former land agent, and he adjusted his "per rod' figure for considerations such as the type and location of the easement. The Court of Appeals also considered the highest and best use of the property, noting that "where the part taken is a self-sufficient economic unit, its value should be determined by considering the part taken alone, and not as a portion of the entire tract of which it was a part." Here, the Court of Appeals agreed that the highest and best use of the area impacted was for the sale of pipeline easements.

We anticipate this is not the end of this case. Indeed, HSC made head-scratching arguments on the valuation front – namely that the Dow and Praxair transactions are not comparable because those are negotiated easements for private pipelines, as opposed to eminent domain seizures by common carriers. Indeed, landowners often cannot provide evidence to support the corridor valuation method because they are met with the argument that eminent domain sales (which appear more prevalent than private pipeline sales or are subject to confidentiality agreements) are not voluntary and thus not evidence of market value. Here, the Hlavinkas were in the rare position of having evidence of prior sales of pipeline easements to private companies. The sale of easements to private pipelines who are not common carriers and, therefore, do not have the power to acquire property by eminent domain are necessarily voluntary sales. These private sales, along with the existence of multiple pipeline easements possibly creating a corridor, allowed the landowners to circumvent prior holdings, such as Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 627 (Tex. 2002), which plagued development of the pipeline corridor valuation model.

In two footnotes, the Court of Appeals added that the parties spent a great deal of time discussing whether

Hlavinka's testimony sufficiently established a "pipeline corridor," which is nothing more than a specialized type of separate economic unit. They noted that the dispositive issue was not whether there is evidence of a "pipeline corridor" – rather, the question presented on appeal is whether Terry's testimony would have established the existence of a separate economic unit. And the Court of Appeals noted that "even if Terry's valuation testimony was properly excluded based on his use of a flawed methodology, he should nevertheless have been allowed to testify regarding factors that tend to affect the value of the land or that would tend to make it more or less valuable, including the highest and best use of the property." **Read the entire opinion here.**

Closing Thoughts:

To all the Dads out there, especially **Alberto Ramon of Eagle Pass**, Happy Father's Day! Stay well!

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About SPIVEY VALENCIANO, PLLC

SPIVEY VALENCIANO, PLLC is a litigation boutique that represents property owners across the the State of Texas in complex eminent domain matters. The firm also represents property owners with significant holdings or affiliated property owners in contested PUC electric transmission line routing cases (CCN Applications). The firm also represents clients in select litigation matters and is frequently engaged to serve as trial co-counsel in pending jury trials. The firm provides complimentary case reviews for prospective eminent domain clients, which may be scheduled by contacting Jim or Soledad via email.

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