"*Sharboneau:* A Lesson for Attorneys and Appraisers — Know Your Facts"

presented by

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The Uniform Standards of Professional Appraisal Practice (USPAP), Standards Rule 1-1(b&c) states "In developing a real property appraisal, an appraiser must: not commit a substantial error of omission or commission that significantly affects an appraisal; and (c) not render appraisal services in a careless or negligent manner, such as by making a series of errors that, although individually might not significantly affect the results of an appraisal, in the aggregate affects the credibility of those results."

This paper follows the recent evolution of Texas eminent domain law and examines the real facts involving *State v. Sharboneau*, a most familiar case to even the casual participants of condemnation practice.

State v. Carpenter was decided by the Texas Supreme Court in 1936, becoming the foundation for modern eminent domain law in Texas.[1] In this seminal opinion, the court ruled that compensation for private property taken for public use should be based on "market value".[2] The court defined this as "the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying." [3] The *Carpenter* decision was clarified as the freeway system cases began to appear in Texas during the 1960's, notably *State v. Meyer*.[4] This case defined the law relating to economic units within a whole property and allowed compensation for more valuable frontage when the taking was from that portion of the property.[5] While cases appeared here and there touching on certain issues surrounding market value, the *Carpenter* case remained the "go to" law for eminent domain in Texas.

[1] State v. Carpenter, 89 S.W.2d 979 (Tex. 1936)
[2] *Id.* at 980
[3] *Id.*
[4] *State v. Meyer*, 403 S.W.2d 366 (Tex. 1966)
[5] *Id.*

The 1980's was fairly quite in Texas condemnation law and pretty much followed the *Carpenter* case. There were approximately 196 reported condemnation cases (January 1, 1980-December 31, 1989), none causing the grief and anguish of the next decade.

Then *Schmidt* happened. On October 27, 1993 the Texas Supreme Court's opinion in *State of Texas and City of Austin v. Schmidt and Austex, Ltd* was issued with quite a bang.[6] What has been lost in the shuffle is what occurred prior to the issuance of the final opinion. Both trial courts rendered judgment in favor of the landowners following the guidance of the *Carpenter* case and both cases were appealed.[7] The Austin Court of Appeals affirmed both cases and the State appealed to the Texas Supreme Court.[8] After considering both cases, the Texas Supreme Court denied writ in each case, effectively affirming the lower court's rulings.[9] According to Steve Adler, attorney for the Schmidts and John McClish, attorney for Austex, these rulings were not "new law", only the reconfirmation of the principles set forth in the *Carpenter* case. For property owners in Texas, too good to be true! It was. Following a motion for rehearing, and a flood of amicus briefs by condemning authorities, the court reversed itself and issued the now famous opinion.[10] Most notably, the court found "the principal issue in these two consolidated cases is whether a landowner, part of whose property is taken by power of eminent domain to convert a roadway into a controlled access highway, is entitled to compensation for a diminution in the value of the remainder due to a diversion of traffic, an increased circuity of travel to the property, a lessened visibility to passersby, and the inconvenience of construction activities. The lower courts allowed the compensation in both these cases. We disagree."[11] After *Schmidt*, several similar cases made their way to the Texas Supreme Court, all with a common theme, "Say it ain't so and let us have *Carpenter* back".[12]

It seems in each of the post *Schmidt* cases the Supreme Court always left a teaser for the landowner. For example, in *State v. Allen* the Court put forth a glimmer of hope in the last paragraph of the opinion.[13] The Court

[6] *State v. Schmidt*, 867 S.W.2d 769 (Tex. 1993)
[7] Both cases were tried in Travis County
[8] *State v. Schmidt*, 805 S.W.2d 25 (Tex. App.-Austin 1991); *State v. Austex*, 862 S.W.2d 1 (Tex. App-Austin 1991)
[9] Writ denied June, 1991; Writ withdrawn January, 1992 and Writ granted on January 8, 1992.
[10] *Schmidt*, 867 S.W.2d at 769
[11] *Schmidt*, 867 S.W.2d at 770 *(internal citations omitted)*
[12] Actual quotes by Steve Adler and John McClish
[13] *State v. Allen*, 870 S.W.2d 1, 2 (Tex. 1994)

held "because the best use of the property issue was disputed, and a change in the best use due to the taking can create compensable damages to the remainder in some cases... "[14] However, in 2008, when confronted with an extremely similar situation as *Allen*, the Texas Supreme Court in *State v. Dawmar*, reversed a lower court's ruling and disallowed damages for change in highest and best use of the remainder, stating that the taking did not result in material and substantial impairment of access. This seems conflicting. If the taking is the reason for a change in highest and best use, then the cause of that change, if the remainder's value is diminished, should be irrelevant?

By the mid-1990s the Texas Supreme Court had thoroughly engrained itself as the maker of eminent domain law in Texas. In condemnation cases, real estate appraisers were being instructed not to consider normal factors affecting value, thus violating USPAP Standard 1-4 (f). Lending institutions, taxing authorities, Internal Revenue Service, Controller of the Currency and virtually all governmental departments require appraisers to include all characteristics of a property affecting value- but not in Texas. Section 1103.405 of the Occupational Code that deals with real estate appraisers, states "A person who holds a license, certificate, or approval issued under this chapter shall comply with:

1) 1) the most current edition of the Uniform Standards of Professional Appraisal Practice adopted by the Appraisal Standards Board of the Appraisal Foundation; or
2) other standards provided by board rule that they are at least as stringent as the Uniform Standards of Professional Appraisal Practice.

How is it that the Texas Legislature pass, as law, the provisions of USPAP and the Texas Supreme Court dictate otherwise? I don't believe that the Court has declared the Texas Appraiser Licensing act to be unconstitutional?

In 1996, the City of Harlingen decided to expand the city owned Pendleton Park. Adjoining the park was property owned by the Estate of David J. Sharboneau, Deceased, and family members. . After unsuccessful negotiations, the City filed suit in Cameron County to condemn the property on August 9, 1996. As usual, both the City and the landowner hired real estate appraisers and the condemnation process began. The landowner's

[14] *Id.* at 2

appraiser considered and relied upon the Subdivision Development method, while the City's appraiser considered the property as one tract and employed the Sales Comparison Approach.

Skipping directly, for now, to the Supreme Court's written opinion, it is worth noting various parts of the opinion concerning the condition of the property:

1) "When the condemnation occurred, the tract was zoned as open land."[15]

2) Patterson admitted that he had never heard of *undeveloped* (emphasis added) land in Harlingen being sold for such a high amount."[16]

3)"Texas law recognizes that sales of subdivided lots do not meet the test of similarity when compared to an undivided tract of land."[17]

4) Although subdivision development analysis requires the appraiser to examine the market for ready-to-build lots, such properties are not comparable to the larger, *unsubdivided property* (emphasis added) actually being appraised. "[18]

5)"*Travis Cent. Appraisal Dist. V. FM Properties Operating Co.., 947 S.W. 2d 724, 729 (Tex.App-Austin 1997, writ denied*) stating that the subdivision development method is best suited for land that is already subdivided and being marketed, because development cost estimates will be more reliable."[19]

6) "By starting with the value of ready-to-build lots in successfully completed subdivisions, Patterson's subdivision development analysis by passed all of the problems that could appear during an actual development, substituting instead the best possible outcome."[20]

7) "Texas courts have consistently held that opinion testimony in condemnation cases about the value of lots in a hypothetical subdivision is inadmissible to indicate raw, unimproved land's market value."[21]

8)"But the jury cannot consider individual lot sales prices as comparable to the condemned property's market value as though the land were already subdivided and improved."[22]

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[15] *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 180 (Tex. 2001)
[16] *Id.* at 181.
[17] *Id.* at 183.
[18] *Id.* at 184.
[19] *Id.*
[20] *Id.* at 185.
[21] *City of Harlingen*, 48 S.W.3d at 186 (Baker, concurring)

9)" In any event, any approach to the subdivision development method uses evidence about the actual sales of individual lots to establish raw, unimproved condemned land's market value. Thus, the subdivision development method is significantly distinguishable from Texas' traditional appraisal methods. As the Court notes, the subdivision development method differs from the comparable sales method because it requires the appraiser to examine ready-to-build, subdivided lots-lots that are not comparable to the landowner's larger, unsubdivided condemned property."[23]

10)"Further, contrary to the Court's cursory conclusion, the subdivision development method *does* require that the expert use individual lot sales as comparable to the undivided land. And in fact, this is exactly what happened here."[24]

11)"Simply because the subdivision development method also requires that the expert take additional steps and consider other factors before arriving at a final dollar figure does not mean the method is any more relevant. Rather, this appraisal method's underlying premise-that the sale price of lots in subdivided areas is comparable to raw, unimproved condemned property-is precisely what the Court rejected in *Willey. 360 S.W.2d at 525."*[25]

The foregoing was included to demonstrate that the briefings and oral arguments presented by both parties gave the Court little or no understanding of the real facts in this case. This was also apparent at the trial court level, since, according to the Court of Appeals opinion, which stated "The testimony adduced at trial shows the land to be open land,"[26] inferring the property was raw vacant land. However, surprisingly, the opinion further states "the appraisal report also notes that utilities and services are connected to the site; public telephone, electrical, and gas services are available to the site; and easements have been granted over the site for road and utility services."[27]

[22] *Id.* at 187.
[23] *Id.*
[24] *Id.* at 189.
[25] *Id.*
[26] *City of Harlingen v. Estate of Sharboneau,* 1 S.W.3d 282, 284 (Tex. App- Corpus Christi 1999)
[27] *Id.*

THE CONDEMNED PROPERTY WAS ALREADY SUBDIVDED WITH ROADS AND UTILITIES IN PLACE.

The City was well aware that the property had already been subdivided and had utilities in place. According to an appraisal, commissioned by the City, dated December 5, 1995, by a State Certified General Appraiser, the property was described as being part of the Harlingen Land and Water Company and Carpenter Subdivisions. The appraisal described the property as having "City water, gas, sewage and electricity are available to the site. The street bordering the site is paved with asphalt, and has curb and gutters. Access is good. Functional utility is good."

Not only was the property subdivided with all utilities at the site, the population of the area exceeded 50,000 within a three mile ring. Does this property sound like the same property that the Supreme Court described?

Remember the FM Properties case? "The development approach…is better suited for a tract of land that is already fully subdivided…" [28] So, how did the landowner's appraiser and lawyer get it so wrong at trial, ultimately resulting in a completely illogical conclusion by the Texas Supreme Court?

Let's examine the real facts in the case: The City of Harlingen's Resolution 96R-18 (attached to Plaintiff's Original Petition) establishes the determination of a public need and necessity for the acquisition of the fee simple title for the real property described as follows:

> "a 9.85 acre tract of land consisting of Tract 1: the west 8 acres of the south ½ of Block 82, Harlingen Land and Water Co. Subdivision, City of Harlingen, Cameron County, Texas and tract 2: Lot 1, Block 1, Carpenter Subdivision, City of Harlingen, Cameron County, Texas.."

Additionally, attached to the City's Original Petition, as Exhibit "B" are the meets and bounds descriptions of the various lots.

Did it not dawn on the trial court participants that if a property is described by Lots and Blocks, it might have already been subdivided? In fact, the property had been subdivided many, many years ago, and according to the

[28] *Travis Cent. Appraisal Dist. v. FM Properties Operating Co.*, 947 S.W.2d 724, 729 (Tex.App.-Austin 1997)

Court of Appeals opinion, the lots were improved with single family residences at the time of the purchases (between 1972 and 1979) by the Sharboneau family, which were subsequently removed.

If these facts had been presented to the Supreme Court, there is little doubt that a much different conclusion would have been rendered in this case.

So, what happened to Sharboneau? The court held that the subdivision development analysis, as applied by the condemnee, "determined only what a developer could hypothetically afford to pay to profitably subdivide the property, not what a developer would pay in the competitive, risk-filled marketplace of the real world" and was therefore not relevant to determining the market value of condemned undeveloped land.[29] The 2001 case was reversed and remanded.[30]

The case remained dormant until early 2007 when Sharboneau family members contacted James Noble Johnson, Johnson, Rial & Parker, PC, an experienced land use and eminent domain lawyer to represent them. Interestingly, the City of Harlingen had neglected to deposit the Award of Special Commissioners'; therefore the date of taking had never been established. Mr. Johnson, recognizing the real facts in the case, obtained an appraisal reflecting the value of the six (previously, the property had been described as five lots) individual lots. Based on the recognition of the valid appraisal issues, the City of Harlingen hired a valley based appraisal firm of to also perform a new appraisal. Their evaluation was also based on six individual lots, recognizing the validity of the previous subdivision of the property and its entitlements.

When both the landowners and City's appraisers employed the appropriate appraisal methodology, the case settled as follows:

> "According to Amended and Ratified Agreed Final Judgment filed with the Cameron County Court at Law 1, Cameron County, Texas, "On September 2, 1997, a Judgment was entered in this cause, wherein by error and mistake the Judgment did not expressly decree and convey to the City of Harlingen title to the above described properties. The parties acknowledge that the intent

[29] *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 186 (Tex. 2001)
[30] *Id.*

of the parties and of the 1997 Judgment was to convey to the City of Harlingen fee simple title in the above-described real properties. The Judgment was appealed and was eventually reversed by the Texas Supreme Court and remanded to this court for further proceedings. The parties have requested that the court amend the earlier Judgment, as agreed by the parties and ratify the Judgment herein, as amended and agreed by the parties."[31]

"Whereas all Parties have agreed and reached a compromise agreement that the total sum of $400,000.00, inclusive of interest, is the amount of compensation to which Condemnees....are entitled."[32]

(The Special Commissioners' Awarded $98,500.00; the trial court awarded $232,000.00).

Many times I've heard from my attorney friends that "bad facts make bad law". In this case, good facts, bad representation, and bad expert testimony made bad law. It's hard for me to understand how the real facts in this case were obviously not presented to the Supreme Court. I would guess that virtually all attorneys or appraisers reading the opinion would visualize an unimproved tract of land with no roads or public utilities. That was simply not the case.

Eminent Domain is a very specialized area of the law and, I believe, requires specific education and experience for both attorneys and appraisers. Had this been the case in the original trial court, I doubt that we would be discussing, what should have been a routine condemnation case, here today.

[31] Cameron County Clerk Records, File # 00024347
[32] Id