

Federal Court Excludes Evidence of Stigma Damages in Eminent Domain Case Involving Gas Pipeline

By Jeremy S. Young

A recurring theme in the area of eminent domain is so-called “stigma damages” caused by the construction of an improvement that may be thought to reduce the market value of a property. A common example is gas pipelines, which are sometimes associated with negative health implications in the form of explosions or environmental contamination from pipeline ruptures. In a recent decision, the U.S. Court of Appeals for the Third Circuit excluded appraisal testimony seeking to increase a damages award due to the stigma allegedly associated with the construction of a gas pipeline, finding that the methodology underlying that testimony was unreliable.

UGI Sunbury LLC v. A Permanent Easement for 1.7575 Acres, 949 F.3d 825 (3d Cir.2020) involved the standard for admissibility of expert valuation testimony in a condemnation proceeding under the Natural Gas Act, 15 U.S.C. § 717 et seq. In that case, the condemnor proposed to construct an underground gas pipeline in Pennsylvania that would cross the properties at issue. The property owners engaged an appraiser who relied on a “damaged goods” theory in reaching his opinion of the compensation due to the property owners for the taking. This theory holds that markets treat real estate near actual, or even perceived, environmental contamination, as a “damaged good,” and that this stigma has a permanent negative impact on market value.

In supporting this theory, the appraiser relied on his own experience working with “scratch and dent” products in his grandfather’s appliance shop as a high school and college student, as well as the reduction of real estate values caused by the Three Mile Island nuclear incident in 1979, the *Exxon Valdez* Alaskan oil spill in 1989, and various leaking underground storage tanks.

The District Court, in a non-jury trial, permitted the appraiser to testify regarding his “damaged goods” theory and attributed some weight to it in reaching its decision regarding the compensation owed to the property owners. On appeal, the Third Circuit reversed on the basis of Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), which provide that expert testimony is only admissible if it is based on reliable scientific methods. As the Third Circuit explained, this reliability threshold involves many factors including, among others, whether the method consists of a testable hypothesis, whether it has been subjected to peer review, the known or potential rate of error, the existence and maintenance of standards controlling the method’s operation, and whether the method is generally accepted.

In rejecting the “damaged goods” theory, the Third Circuit found it had not been subjected to peer review, there was no data on the known or potential rate of error, there were no standards controlling its application, and it does not enjoy general acceptance. The Court further found that the theory was based on the appraiser’s subjective views and was inherently speculative, as the appraiser conceded in his testimony. On these bases, the Court found the “damaged goods” theory unreliable.

The Court further found that the “damaged goods” theory did not “fit” the case, which is also required for admissibility, because it was not based on any examples of properties whose value actually decreased after the construction of a gas pipeline.

The appraiser in *UGI Sunbury* likely would have fared better if he had employed a paired sales analysis, an appraisal methodology that isolates the effect a particular feature has on property value by comparing the sales of two properties that are similar in every respect except for the particular feature under consideration. When the sales are compared, the difference in price is best explained by the one feature that is different. Property owners' appraisers employing paired sales analyses have survived *Daubert* challenges in pipeline cases on numerous occasions. See e.g. *Columbia Gas Transm., LLC v. 76 Acres, More or Less, in Baltimore & Harford Ctys., Maryland*, 701 Fed.Appx. 221 (4th Cir.2017); *Atlantic Coast Pipeline, LLC v. 0.07 Acre, More or Less, in Nelson Cty., Virginia*, 396 F.Supp.3d 628 (W.D.Va.2019).

Lest one might think paired sales analyses are exclusively the province of property owners looking to increase damages awards, that is not the case. Pipeline companies can and do argue that pipelines have no impact on property value. In 2015, Integra Realty Resources undertook an analysis of the impact underground, regulated interstate natural gas transmission pipelines have on property values in Ohio, Pennsylvania, New Jersey, Virginia, and Mississippi. Central to the study was a paired sales analysis. The results of the study were released by the Interstate Natural Gas Association of America (INGAA) Foundation in a 2016 report entitled *Pipeline Impact to Property Value and Property Insurability*. As one would expect, the report included a finding that underground pipelines have no measurable impact on property value.

Thus, as with so many things, enterprising experts can find data to support opposing conclusions as to the impact a gas pipeline will have on property value. This explains why courts addressing the admissibility of paired sales analyses typically decide it's best to admit the evidence and let a jury decide.

UGI Sunbury stands as a cautionary tale that, as subjective as admissible appraisal testimony can sometimes be, there are limits, and courts will exclude appraisal experts who push the envelope too far. Parties to an eminent domain lawsuit should ensure they have qualified eminent domain counsel who can ensure an appraiser does not resort to theories that will render their testimony inadmissible.

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