

ORAL ARGUMENT – 04/07/04
03-0471
COUNTY OF BEXAR V. SANTIKOS, ET AL.

TOPHAM: I would like to first address the two issues of first impression and imminent domain law in Texas. The first is whether a jury may consider diminished market perception in determining the value of the remainder property, where diminished market perception is not an element of damage. It begs the question as to the cause of such perception, and is testified to by the experts in this case, is based upon and one of the same thing is diminished access and diminished visibility, which are not compensable. Secondly, whether the jury may consider unsafe access in deciding the value of the remainder unimproved property.

In other words is unsafe access where you have unplanted property, raw property, undeveloped land, as decided by this court in Interstate Northborough, does it apply, and where there's no material and substantial impairment of access?

Diminished market perception - I've not found any case law saying that that is a compensable element of damage. It by definition is an effect. It's not a cause. Any property that has a partial taking can have a diminished market perception. The key is whether the cause is compensable.

O'NEILL: In answering this question, do we look just at the land as it is, or do you agree that we look at the hypothetical highest and best use?

TOPHAM: You look at the land as it is, and you could also consider the highest and best use. But in this particular case, the highest and best use as testified to by all the experts was to buy and hold for future development. This conceptual plan presented by Santikos, which was speculative and it was based upon future development. Not the hold period. Anything can happen during the hold period. The economy can go up or down. So that conceptual plan is not based upon the highest and best use in this case.

O'NEILL: But how can you separate out the hold period from the hypothetical development? Do you agree with the concept of hypothetical development, but just think it was flawed here because they didn't factor in a hold period?

TOPHAM: It may be considered with respect to the highest and best use of the property.

O'NEILL: If the highest and best use is as a development.

TOPHAM: Assuming that that's the case.

O'NEILL: Assuming that's the case. What if there were proof that it would cost more because of this higher or lower grade to put any access to potential development, would that be compensable? Not perception or visibility, but just hard costs it's going to cost a bulldozer more to go down hill longer. Would that be compensable?

TOPHAM: Not unless the causes are compensable. And the causes in this case, if you boil down the testimony, the summary reasons of the CA's, if you boil down the trial testimony of the experts, they are all effects except for diminished access, diminished visibility and unsafe access. Unless the cause is compensable there can be no compensation.

O'NEILL: Hard costs that would be higher because of the grade, you say that is or is not compensable?

TOPHAM: In this case I do not believe it's compensable. Because there is no material and substantial impairment of access. There is no denial of access. You can get a permit either before or after the taking. You have to get a permit, build a drive. That is not a material and substantial impairment of access just because the drive must be a little bit longer. With regard to unsafe access, you look at unsafe access to the remainder. The remainder is 26.5 acres of 2,000 front feet. Santikos is focusing on 3.5 acres with 215 front feet at the lowest elevation of the property, adjacent to the 100 year flood plan.

BRISTER: And the rest of the 26 acres is not below grade?

TOPHAM: It is about at grade.

BRISTER: So it's just the 3.5 acres that's in a hole below grade. The rest is above grade. And your position is they could build a driveway at grade. People would just drive down in to the hole if they wanted.

TOPHAM: That's correct. And also the evidence is disputed with regard to the access to the 3.5 acres. Michael Morton the county engineer testified that the South 67 feet of that 250 feet will accommodate a 10 to 12 percent slope. And it's an engineering fact that - Mr. Martin also testified to a 3 to 1 slope, 3 ft vertical to a 1 foot horizontal. It's an engineering fact that that equates to 18.4 degrees. In other words, looking at a 90 degree right angle, it's 18.4 degrees. That's not an inherently unsafe slope. And the court can take judicial notice of this engineering fact.

WAINWRIGHT: What's your understanding of the law as to whether diminished market value - if it were diminished market value is that compensable, and there was evidence of the value of the 3.5 acres before and after the taking of the strip?

TOPHAM: In this case it's not compensable because the causes. When you boil the evidence down to the causes, there are diminished access, diminished visibility which are not compensable, and also unsafe access. Without a compensable cause, the diminished market

perception or value is not compensable.

WAINWRIGHT: If there's a 10 acre resort with swimming pools and hotels on it, and the state builds a highway right down the middle of it splitting it in to 2, 5 acres pieces, and the testimony is that the value of that resort has now dropped. Would that be compensable irrespective of whether it's at grade, below grade, or any of the facts of this case?

TOPHAM: I believe it can be because that's one of the examples where if you have like a 1 acre lot at the corner and you put a road right through the middle of it, you affect the size, you affect the shape, you bi-sect a building you're going to have damages to the remainder. That's compensable.

WAINWRIGHT: So in my example, the lower market value after building the road would be compensable?

TOPHAM: I would say as a general rule it would be, but it would also be subject to an analysis of whether the smaller tracts on each side with perhaps increased access might be worth more. But as a general rule if you're going to divide up the property and you're going to affect the size and shape, you could have damages.

WAINWRIGHT: In this case the evidence at trial focused on actual out of pocket costs of dealing with the 10 foot drop in grade, not the difference in market value pre and post taking of the strip. So there's no evidence about the market value itself before and after the condemnation is there?

TOPHAM: Mr. Glenn estimated the value before and after. And he also considered the three estimates of costs to cure in his opinion, which was to fill the entire 3.5 acres with 60,000 cubic yards in related improvements. Those estimates ranged from \$719,000 to \$938,000. His estimate as to the damages to the property was \$765,000. It was very close and in accordance with this cost to cure.

SMITH: What is the flood plain? Is it this _____ creek?

TOPHAM: _____ creek.

SMITH: Is that a real creek, or is that a Texas creek that's only got water in it when it rains?

TOPHAM: Most of the time it's a real creek. And the development upstream to the West is expanding. And that 100 year flood plain extends 150 feet from the North boundary of this property to the South where it meets this 3.5 acres. And the 3.5 acres is relatively flat.

SMITH: So the fill would take it down to the flood plain as well as it make even to the

frontage road?

TOPHAM: At least \$340,000 of the \$400,000 verdict was for damages to the remainder.. That will elevate the 3.5 acres to some extent and place Mr. Santikos in a better position than he was before. That is manifestly unjust notwithstanding the fact that there are cases that say if that testimony is within the range of the expert's testimony it's okay.

O'NEILL: I'm still interested about more of the hard costs. If unsafe access is compensable why isn't more expensive access compensable? If it's going to cost you more to build a driveway, why can't you recover the extra cost that factors in the difficulty of building? Not based on - I understand your argument vis-a-vis cars driving by and sort of an intangible perception. But if it's more expensive to build it, why is that not compensable?

TOPHAM: For one thing there's no driveway here. If there was a driveway there obviously the cost to cure would apply.

BRISTER: Is it more expensive only if you assume they would have built a driveway to the 3.5 acres someday when it was actually built, or would in any event would be more expensive to build a driveway because of this taking?

TOPHAM: If there was a driveway there obviously the difference if the cost to cure applies would be the cost of the new driveway verses the cost of the old driveway. Any increase would be compensable. Whether it's going to be more expensive, whether you can consider whether it's more expensive or not, I think depends upon whether you have a compensable cause and what also in accordance with the Spendor case, which was the cost to cure case, are the damages reasonably foreseeable? With regard to this 3.5 acres out of the 26.5 acre remainder, you can foresee that you may have some visibility and access problems. You could argue that you might need or you might want a driveway, but this conceptual plan and 60,000 cubic yards of fill to fill 3.5 acres is not reasonably foreseeable.

O'NEILL: You would agree that just the concept of cost to cure if - I'm not talking about the creek in this case because I understand you have problems with the hypotheticals and it's too speculative. But if it were shown that access is only on this property based on its highest and best use there's only one means of access and this taking is going to cause X amount to work with the slope problem. You would agree that that cost to cure would be compensable? It's just too hypothetical in this case.

TOPHAM: Yes.

O'NEILL: So if they did meet their proof on cost to cure based on a hypothetical, if the hypothetical was valid it would theoretically be recoverable? I understand the proof problems you have in this case getting there, but just the basic concept of cost to cure based on the highest and best use hypothetical, if the proof elements met you don't have any problem with the concept of future

cost...

TOPHAM: I have a problem with the concept with regard to cost to cure for a conceptional speculative hypothetical plan.

O'NEILL: But if there were only one plan that fit this space, and there was one way to put a driveway and this was going to cost more because of the grade, then you believe that would be compensable?

TOPHAM: If we're talking about raw land there's still no driveway to be cured.

O'NEILL: If there wasn't a proof problem, if there weren't hypothetical or speculative problems, if it could be shown definitely that here's the development that's going on, let's say they have a development plan done and there really is only one means of access here, and it's going to cost us this much more to deal with the grade, theoretically that would be compensable as a future cost?

TOPHAM: Theoretically if it's reasonably foreseeable. With regard to diminished market perception, Santikos takes the position that they only presented evidence of cost to cure unsafe access and diminished adaptability. It says all these are compensable causes.

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RESPONDENT

SAMPSON: This is a case about waiver. We believe that the county failed to preserve waiver. All the evidence came in. Whether it was a hypothetical plan or the hard costs to show how much more it would cost to develop as a result of the use of the part taken, all the evidence came in without objection. All the 19 exhibits that showed the plan to fix the problems caused by the use of the property being taken came in without objection.

This is also a case about special damages. Just a couple of years ago this court handled the Interstate Northborough case, where you made it very clear about what a property owner needed to prove to show that the uses of the part taken as they affect the on site characteristics of the remainder would get us to the point where a landowner was entitled to compensation for damages. And it's a great roadmap to follow. And I think that the way our case was presented on behalf of Mr. Santikos, we followed the roadmap.

The case that we presented was not about Schmidt prohibitive damages. We didn't talk about the uses of the existing state of right of way. We didn't talk about the use of the adjoining property. We talked about the uses being put by the government piling tens of thousands of cubic yards of dirt on my client's property that the government needed to expand their highway.

BRISTER: If they had built the frontage road lower, you would have no claim?

SAMPSON: The frontage wasn't within the part taken. So it was not relevant. The only improvements within the part...

BRISTER: If they had built the frontage road lower there wouldn't have been fill put on the part taken, so you would have no claim.

SAMPSON: If there was no change of grade that's correct.

BRISTER: And so why is this case different from Schmidt? Schmidt we said when you raise Research Blvd, so that all of the businesses along it are now in a hole, that's no claim there, how is your case different?

SAMPSON: Because in Schmidt we had new uses to the existing government property. Here we have property being taken and the government is putting highway improvements...

BRISTER: Property was taken in Schmidt.

SAMPSON: But in this case the focus is on the damages caused by the use of the part taken, which in this case was not a new road, not new main lanes. It was tens of thousands of cubic yards of dirt placed and sloped at a severe angle on my client's property. The actual use.

BRISTER: But that doesn't address whether your property is in a hole or not. Your property is in less of a hole than businesses along Research Blvd. are now after the road was raised 37 feet.

SAMPSON: That's correct. But the landowner's claims in Schmidt related to the new uses of the government property. Whereas in this case this is a new use on the part taken that impacts the remainder and puts it in a hole. Which it will cost more. It will cost according to three estimates over \$700,000 to restore the grade to the preexisting condition.

BRISTER: That's on the 3 acres. Right?

SAMPSON: Right.

BRISTER: On the rest of the property grade is not changed and you can slap a driveway down there without any problem.

SAMPSON: If the whole 26 acres was left in a hole, our number would be a lot bigger. But we're only talking about 3.5 acres.

BRISTER: So how come you know there would have been a driveway on one sliver of your property rather than on 80% of your property?

SAMPSON: And the reason that we put a driveway that would lead up to this impacted 3.5 acres is because it's the closet corner to the nearest intersection. It's the Northwest corner of the property.

BRISTER: So how far would you have to move it from the - you happen to pick a driveway spot that it will be the most expensive place to put it in. How far would you have to move that driveway down? How many feet? Is it 200 feet where it would have cost you nothing extra to put it in?

SAMPSON: 215 feet we would have to move it so it would be off the corner.

BRISTER: So because you're going to have to put a driveway in 200 feet away, in a property that's completely unimproved now, that's really why you're entitled to hundreds of thousands of dollars in damage?

SAMPSON: The unsafe access claim is only one of our compensable special damages. I would like to give you each of the specific damages that we are claiming. The first is the severe change of grade in topography. It was a flat piece of property before. You could walk across the property line and it was relatively no change of grade. The testimony was it was flat. The highest and best use was for future commercial development, pad sites in front, big box retailer in the back. That was the highest and best use before. Now with this 11 foot wall, which according to both side's experts could be converted to a retaining wall along that 215 foot strip during the ultimate expansion of 1604, where you would have a complete drop. That severe change in grade in topography if the state exercises all of its rights according to State v. Ware that this court heard, would cause incredible special damages to the remaining 3.5 acres, which is in a hole. It's depressed.

OWEN: What about the cases where we've held that they close off access to a street so that and you didn't have access at all for the remainder, but you still had access from the back. And we said it's not compensable.

SAMPSON: You hit on that issue in Interstate Northborough. You had five driveways. Two were rendered unsafe. One had to be closed. The court still found compensation to the property owner for the cost to cure and the diminished curb appeal related to going from 5 driveways to fixing one and closing one. And so this court still found compensation to the landowner even though the property owner did not have to prove substantial impairment of access. That was 2-1/2 years ago that this court made that decision.

Just the fact that we still may have reasonable access along this 2,000 ft of frontage, the highest and best use before was to put that driveway so we could reach the 2 pads and the big box retailer. Because it's the closest to the corner.

OWEN: Setting Northborough aside and arguably it's different because they did affect existing improvements on the property. What about the other cases that I've alluded to where they

put a gate, or they completely closed off a street.

SAMPSON: If you have to drive farther that's not compensable. But when you basically can't get a driveway permit because you've got a 33% grade and the best...

OWEN: But you could get a driveway permit to your property.

SAMPSON: After you spend the money to fill it up.

OWEN: No. You've got 20 something acres. You can get all kind of permits to your permit.

SAMPSON: Well that's true. But to max out the development of this property, to achieve its highest and best use...

OWEN: Well that's true of any property. Once its access is cutoff to the main thoroughfare, you've affected its highest and best use. But we said sorry, not compensable.

SAMPSON: But if you change the existing right-of-way - the state's got the right to do it and the landowner gets zero. But when you change the characteristics of the remainder by the uses of the part taken, which you did in this case to the 3.5 acres, then we have special damages.

OWEN: I'm thinking about all the highways that have the huge, huge sound walls, and the people on the other side of that don't get damages. How is this different?

SAMPSON: Because they put that sound wall on the government property.

OWEN: Let's say it's on the boundary line. Your property now abuts to the sound wall. And you have access on the other side of the sound wall. Haven't we said you're not compensated for the blocking that occurs because of that sound wall?

SAMPSON: If the retaining wall or sound wall is placed on government property, the existing right-of-way, the landowner gets zero. But if they put the sound wall as part of an acquisition and it causes that increased proximity of that new highway improvement to that house, in Northborough it says basically the property owner if they can prove it can get damages to the increased proximity of those highway improvements on that condemned property. And they are entitled to compensation, which happened in Interstate Northborough. Which is happening in this case. This wall of dirt which wasn't there before is placed there closer to a 3.5 acre portion of my client's remainder that we're going to have to spend a bunch of money to restore the grade so it can achieve the same highest and best use potential that it had before.

O'NEILL: If you speak in terms of diminished development of marketing potential, to a certain extent marketing potential depends upon visibility. A developer coming in is going to look

at how visible is this from the road, how accessible is it. And if those are not compensable how can we be sure that the diminished development of marketing potential doesn't include those elements?

SAMPSON: We look at the testimony. Mr. Glenn said it's going to take longer to market this property - the remainder will take longer to sell.

O'NEILL: Because?

SAMPSON: Because it's a depressed property. It's on a grade.

O'NEILL: But this was based on how a developer would view the property. It's going to take longer because a developer is not going to want it as much.

SAMPSON: It's got a problem because of the topography has been changed. It's no longer a flat piece of property. It's a depressed property.

O'NEILL: And I understand cost it's going to take to put a driveway in or fix that...

SAMPSON: Or fix the elevation to what it had before. It's important to make the landowner whole. He had flat property before. The testimony showed that before you could fit in the uses that we've talked about: the pad sites in front and the big box in the back. Because it was a general sloping. Nothing was in the flood plain. We're not putting any fill in the flood plain. And then as a result of that fill, you have to put a ramped driveway down and the pads have to be pushed back because you only have so much space. And you lose the big box because you have this ramp to go down to have a legal permissible driveway. And that area takes up parking area, building area.

BRISTER: How many pads can you put in 3.5 acres?

SAMPSON: One and a half.

BRISTER: So you lost one restaurant space which it just happens on this totally unimproved land you were certain you were going to put down at the lowest spot. I assume you're also counting on pads on the other 26 acres?

SAMPSON: We're looking at \$2.80 plan. We're not talking about \$20 sq. ft. land. And it's whole to do this. And certain buildings can fit before. And none of the property that we are going to develop is in the flood plain. All this property is developable property. The exhibits that we show, the conceptual plan all came into evidence before and after the taking. And in each instance we showed that the property did not have the same development potential. You couldn't build as much on it if you didn't cure the topography problem caused by the thousands of yards of dirt that were placed and sloped on the part taken.

The testimony from our engineer was that when we have developers looking

at the property, looking at a property and then what they see is a problem when you have a below grade property. They like to develop flat properties. They like to develop flat properties that are at the grade.

O'NEILL: I wrote down four things that your expert said: diminished development and marketing potential; diminished market perception; unsafe access; increased development costs. Three and four I can see as being tangible, quantifiable. Here's what it's going to take to fix the actual problem. The question I have is the way the jury was instructed resulting from diminished market perception, it's the market perception problem that's difficult for me because it seems just to encompass visibility from the street and how much is a potential customer going to want to go there.

SAMPSON: And I thought that this court wrestled with that in Interstate Northborough. Because you were presented by the property owner loss of curb appeal. The buildings went from Class A to Class C. They lost the park like setting. The campus like environment. Well you know I can see your dilemma. But there was an award made due to loss of curb appeal and those other issues. I just use a different term. I'm sorry I used the term diminished market perception. I wish I had just said loss of curb appeal and I could have pointed to the Interstate Northborough case.

WAINWRIGHT: Isn't there an important difference though between the property in this case and the property in Interstate Northborough which is the property in Northborough was developed. It had the landscaped yard out front. It had parking spaces that it lost because of the development. None of that's at issue in this case. I'm wrestling with the seemingly more tenuous connection between your damages and this conceptual development plan. In Northborough there was no plan. The property was developed. Here we're talking about conceptual plans. Were there any offers to develop the land? It wasn't even platted at this point and there weren't utilities on it right?

SAMPSON: All utilities are available. No infrastructure. It's a vacant tract of land that's suitable for future commercial development.

WAINWRIGHT: And Mr. Santikos was holding it for future sale to a developer. Correct?

SAMPSON: Correct.

WAINWRIGHT: The conceptual plan, where do they come from and give me some more details about those.

SAMPSON: Mike ____ is an engineer. He's been developing pad site, big box developments for quite awhile. He testified, he came up with conceptual plans that were similar to 3 or 4 other developments along Loop 1604. There were 2 or 3 different intersections where he worked for Albertson, HEB, he worked for developers of the McDonalds, branch banks, and he prepared an exhibit, that was basically similar to 2 or 3 developments where one in fact was in a depressed area and it was filled up by the developer. So he used his own personal experience in

dealing with developers. He basically used plans that he had used on other projects and he said look this property is suitable for this type of development in the future.

WAINWRIGHT: Were any of these plans in existence before the litigation?

SAMPSON: No. This is just to show highest and best use. The county has made the argument that look if you have a vacant piece of property how can you damage it? Only improved properties like in the Northborough case can you get these sort of damages. And I think if you look at the constitution it says no person's property shall be taken, damaged or destroyed. It doesn't say no person's improved property. And then you look at the property code.

OWEN: Let's suppose this was Research Blvd and instead of improved property we had a large tract of land where before the elevation, before the Research renovation there is Research going right by it. A flat piece of land you have access. After Research the property is elevated. Because there's ½ mile to this ramp, and another ½ mile this way, you're stuck right in the middle where there is no access at all to the freeway.

SAMPSON: Is there property being condemned?

OWEN: Yes.

SAMPSON: What's being done within the property being condemned by the gov't?

OWEN: They put up a wall.

SAMPSON: If the wall is put up there like we've talked before and that use of the part taken changes the characteristics of the remaining property, then there is special damages according to Interstate Northborough.

OWEN: It doesn't change the characteristics. The grades the same except that the access is different. You don't have access anymore on to 183. You've got access from other areas. Now the developer says well that's not a good place for a box, because it's too far, within ½ mile each way of the ramp on to 183. Nobody in their right mind would put a big box there.

SAMPSON: As soon as you start talking about offsite characteristics we're in a different equation, different ball game. We've got to focus on the uses of the part taken.

OWEN: The wall is 200 ft on the property. But you've got access around the wall, behind the wall. You just can't go into the property right there where you want to. And the developer says well because of the placement of that wall and because people can't see the big box and they can't get to it, we wouldn't put a big box there. Is that compensable?

SAMPSON: Because somebody's complaining about diminished visibility, which we're

not, or complain about diminished access, which we're not, it's not compensable. We're talking about compensable items.

OWEN: You can still get to the property just not the way you want to. How is that different from the 183 guy who's holding this property?

SAMPSON: Unsafe access is 1 of 7 special damages claims that we've made.

OWEN: How is my example different?

SAMPSON: Because you're blending off-site characteristics - ramps that are not within the part taken with use of the part taken. You have to focus only on how the highway improvements being built in the part taken impact the remaining property. You can't focus on what's going on there. That's what this court has said in 1994 in Schmidt, and Interstate Northborough in 2001. You've got to focus on what are their special damages...

OWEN: The special damages that they - you wanted to build the driveway there and you can't, because it's _____. But you can build it anywhere else on the property that you wanted to.

SAMPSON: If there's no unsafe access, then there's no compensation. If you have other reasonable access, there's no compensation. But that's not the Santikos's case. The Santikos's case is about thousands of cubic yards of dirt placed on the part taken and it causes it to be more expensive to develop. It's not as appealing because it's no longer a flat piece of property. And the only way to make my client whole is to restore the grade that he enjoyed before. And that's going to cost money. And the appraiser in this instance determined that he would value flood plain type properties or lower properties and he used those land sales to determine that this is what someone would pay for the property in a hole.

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REBUTTAL

O'NEILL: How do you distinguish diminished curb appeal which we found to be special damages in Northborough with the diminished market perception element here?

LAWYER: I would suggest that there is a distinction because in the Santikos's case you have no curb whose appeal has been damaged. It is vacant land.

O'NEILL: I think you disagree with what your co-counsel said. I thought I heard him to say that yes you value it based on highest and best use not on the land as it is.

LAWYER: Land is based on its highest and best use. However, you're not entitled to damage in every situation in which your highest and best use has been affected. I think maybe what

the court may be struggling with is that Santikos has shown some economic injury. But the problem is that this court has said over and over again that a landowner is not entitled to be compensated for every economic injury. Yes, the drives may cost more afterwards. Yes they did show a difference in the value before and the value after. But you have to look behind that and see what are the damages that they are actually complaining about and are those in fact compensable damages. And if you look at the whole diminished market perception concept, which in this case was clearly based on the difference in grade and the perception that the property was in a hole.

In the Schmidt case this court discussed at length why damage such as loss of visibility was not in fact compensable.

O'NEILL: But you would agree this is a bit of a different _____ because we usually dealt with developed property. The problem I'm struggling with is do we pretend that a development is there? Do we have to because that would be the highest and best use, that's what it was bought for and held for, or not? Those seem intentioned to me. Because if we have to treat it as a developed property based on its highest and best use, I don't see how we can distinguish it from the diminished curb appeal as in Northborough. Do we totally disregard highest and best use? Do we totally disregard a hypothetical development?

LAWYER: Surely in this case you have to totally disregard this conceptional development plan. The Santikos have somehow tried to take this plan and throughout the stages of its brief transform the plan into the highest and best use. But if you look back at the record all the appraisers including their appraiser and their land planner said this plan is not the current highest and best use.

O'NEILL: Different issue. If it were shown that this was the highest and best use, then would we be looking at the hypothetical development there, or just the raw land?

LAWYER: I think you would be looking at whether or not the landowner had shown compensable damage. It may be that the highest and best use, if this were the highest and best use, has been damaged in some way. I would suggest it's not in this case. But even if it were you have to look behind that and say well what is the damage? And here the damage is well I can't put my drive in the exact place where I wanted to put it. But the case law is replete with holdings that all you are entitled to is reasonable access. You're not entitled to have the best possible access that you could possibly get. In other words put the drive in the one most difficult place to get it in right next to a corner.

O'NEILL: So that statement is premised on potential highest and best use - potential shopping center let's say. And so if you're going to do that why can't you say result in diminished curb appeal?

LAWYER: There's nothing there right now to have a curb appeal that's diminished. A landowner's highest and best use can be damaged and the landowner is still not entitled to

compensation. Because you have to look at the nature of the damage. And here the nature of the damage that has been alleged is being in a hole, which is like visibility, and that's not compensable because of the fact that the roadways are built for the benefit of the traveling public. That was discussed in Schmidt. They are not built for the benefit of the landowners along the right of way. And that's why you have no vested interest in the traffic that goes along the roadway and you have not vested interest in being visible from the roadway.

O'NEILL: So you say diminished curb appeal for an existing shopping center is compensable, but for a future shopping center is not?

LAWYER: I would say that's correct. It was compensable in the Interstate Northborough case, but I think you have to limit that case to its facts, or else you are going to have - if you apply Interstate Northborough to this situation, apply the unsafe access holding there, you're going to have landowners coming up with the most difficult conceptual plans ever...

O'NEILL: And I understand there's a continuum there. What if the foundation had just been laid. Would that fit the Northborough paradigm or the undeveloped property? You don't look at diminished curb appeal at all.

LAWYER: I think it would be closer to the undeveloped property because there's still nothing there. And what's been affected possibly is the perception and the grade and the fact that you can't put your drives exactly where you want them. But those are not compensable items.

Repeatedly Santikos in argument here has tried to make a distinction based on the fact that the damages arise out of the use of the part taken and suggests in that situation they are entitled to all of their damages no matter what the basis of those damages are. And I would suggest that specific argument was rejected in Interstate Northborough case where the court said that - the argument was that the community damages principle doesn't apply where the damages are caused by the use of the land taken. And this court rejected that argument in the Interstate Northborough case.

The bottom line is, and this was held in Interstate Northborough and it was also held in a Munday case, that if a verdict in a condemnation case is based on any evidence of noncompensable damages, then the government is entitled to a new trial. I would ask that you grant Bexar county a new trial in this case because noncompensable damages certainly did come into evidence in this case.