

2020 WL 2782370

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Court of Appeals of Texas, Houston (1st Dist.).

THE STATE OF TEXAS, Appellant

v.

CC TELGE ROAD, L.P., A TEXAS LIMITED PARTNERSHIP, Appellee

NO. 01-18-00416-CV

|

Opinion issued May 28, 2020

**On Appeal from the County Civil Court at Law No. 1**

**Harris County, Texas**

**Trial Court Case No. 1043486**

Panel consists of Justices [Keyes](#), [Landau](#), and [Hightower](#).

## OPINION

[Sarah Beth Landau](#) Justice

### THE STATE OF TEXAS, Appellant

This is an appeal of a multi-million-dollar jury verdict in a condemnation suit. The issues center on the proper determination of market value and the admissibility of evidence relevant to that determination.

The State argued it owed \$1.3 million for its taking. The landowner, CC Telge Road, L.P., argued market value was much higher: \$28.8 million. Telge supported its argument with expert testimony and evidence of (1) the condemnation project's influence on the property's market value due to both condemnation blight and active interference by the State with the landowner's pre-condemnation development efforts, (2) the highest and best use of the property compared to the alternate use the property was adjusted to because the State was condemning the focal point of the property and interfering with its intended use, and (3) the unique damages to the remainder property in that the remainder's highest and best use was altered.

In five issues, the State challenges the trial court's evidentiary rulings and the sufficiency of the evidence to support the judgment. The State alleges that, in ruling on the evidentiary issues, the trial court misapplied three (corresponding) concepts on condemnation law: (1) project influence rule, (2) highest and best use, and (3) community damages.

Because the trial court did not abuse its discretion and adequate evidence supports the jury's verdict, we affirm.

### Background

The subject property is 600-plus acres owned by Telge in north Harris County. When Telge bought the property, there was a 30-acre lake and a naturally occurring, forested watershed that benefitted the property with drainage and an appealing location for outdoor activities. The relevant history of this property predates Telge's purchase of the land in 2010. We begin in 2005.

North Harris County was experiencing a development boom in 2005. Many residential developments were springing up. According to Telge's witnesses, the type of development that was getting the most consumer interest and was the most profitable was high-density residential developments centered around water-based community amenities.

Royce Homes owned a 600-plus-acres parcel of land in north Harris County. It planned to develop a high-density residential community. In 2005, Royce obtained approval from the City of Houston for its high-density site plan. Royce planned to develop the land with more than 1,000 residential lots. To that end, Royce obtained State approval for a municipal utility district for the property. It built a water plant to serve the homes it planned to develop on the property. It began geotechnical studies of the soil. It obtained a Texas Commission on Environmental Quality discharge permit for sewage and wastewater discharge. And it began efforts to incorporate the wetlands into its development plans, including starting a wetland permit approval process. Royce spent the next two years and hundreds of thousands of dollars obtaining entitlements for its property in furtherance of its high-density residential development plan.

The growth was not limited to north Harris County; Houston, generally, was growing as well. For several decades, various governmental entities in and around the Houston area had recognized the benefits of constructing an outer toll road to circle the outer-most parts of the Houston metropolitan area. The idea had been around for a while, but, in 2005, when Royce was beginning its development, there still had not been any visible steps taken to bring the idea into fruition. Witnesses described the toll road project, at that point, as an unfunded “dream.”

Perhaps because of the development explosion in the area and the impact that development would have on crafting a future route for a toll road, local landowners saw an increased urgency in the toll road project beginning in 2008. On November 20, 2008, the federal government issued a Record of Decision for a portion of the Grand Parkway toll road known as Segment F-1.<sup>1</sup> The Record of Decision marked a path for the toll road that would bisect Royce's property.

Around the same time, Telge was looking for land in the area because its partners wanted to invest in a residential development project. Telge contacted Caldwell Companies about developing land together. The two entities were interested in Royce's land, in particular, because of its naturally occurring water feature. They agreed the land was well suited to high-density residential development because the lake and forested watershed could be enhanced and made into a signature amenity, satisfying a current market demand.

Because Telge and Caldwell Companies were aware of the Record of Decision, they contacted Harris County officials and attended public presentations about the toll road project. They also reached out to the Grand Parkway Association, which had been established by the state legislature to coordinate the toll road project. Telge and Caldwell Companies inquired into the possibility of moving the toll road to avoid Royce's land and its watershed.

The executive director of the Grand Parkway Association, David Gornet, met with Fred Caldwell in 2009 and confirmed the Grand Parkway in northern Harris County was still a “hope” and a “dream” with no funding. There were no formal plans in place and no drivers for the project. Once the project did get funding, the routes would be subject to change and realignment.

Fred Caldwell had extensive experience in building master-planned communities, including two successful communities near Royce's land. He also had experience with roadway realignments and had worked with governmental authorities in the past to move roads. Drawing on that experience, Caldwell testified he was confident that, if and when the Grand Parkway project got underway in north Harris County, the realignment process would result in the toll road's relocation for several reasons. First, Record of Decision routes are marked and are considered “preliminary” and “subject to change.” They are “simply lines on a map” that are nothing more than “a planner's rough idea where roads may go.” Once construction funding materializes and

engineers actually place their “feet on the ground,” the routes are adjusted as needed. And as adjustments are made, the State engages in a realignment process that further adjusts the route. From Caldwell's experience, the realignment process would take into account the on-going development in the area.

Second, the projected path of the toll road tracked the watershed's natural path, yet the environmental impact would not be fully realized until engineers walked the land and saw what was there. Caldwell believed that, once people looked at the property's features and considered the environmental ramifications of tearing up a natural watershed to build a highway, a better route would be selected.

Third, a highway on this route would have to be elevated, which would make it more expensive than a surface-level road moved to dry land.

Fourth, in his experience, governmental entities were willing to move roads when there was a reason to do so. There were legitimate reasons to move this road. Caldwell “never dreamed that a governmental entity, in particular, would run a freeway down a creek shed—a creek area and destroy it.” And his experience told him, as he considered the issues in 2009 and going into 2010, that the toll road would be moved off the Royce land that Telge and Caldwell Companies were considering developing. With all this in mind, Telge and Caldwell Companies moved forward with their development plans.

In April 2010, Telge bought the property from Royce. It began the process of submitting a development plan to the City of Houston. Telge's plan would be similar to the one Royce had submitted, which was approved in 2005 but expired in 2009. Telge planned to build a high-density residential development with more than 1,000 homes on small lots. The lots would share a community amenity in the form of a 30-plus-acre lake and an enhanced waterway for leisure activities and natural surroundings. *See Appendix I.*

Throughout the submission process, Telge remained in contact with the Grand Parkway Association, seeking to adjust the toll road's route. Telge and Caldwell Companies noted that other areas of the Grand Parkway development were being moved from their originally drawn path. There were at least five instances when the paths were redrawn.

According to a Texas Department of Transportation engineer, Pat Henry, there are two key considerations when deciding whether to realign a roadway. First, there must be a good reason to deviate from the originally drawn, “preferred” alignment. Second, there must be a viable alternate route with fewer impacts than the preferred route. One thing that might qualify as a “good reason” to move a roadway is if, between the date of the Record of Decision and the date that funding is obtained and road construction begins, the landowner develops his land on the originally drawn route. Henry acknowledged that at least one Grand Parkway realignment occurred for this reason. In Lakes of Avalon, the property owner developed a subdivision between when the Record of Decision issued and the toll road was ready to be built, and the authorities involved in the Grand Parkway project realigned the road to go around the landowner's development.

In the context of discussing the Lakes of Avalon realignment, Henry explained that the State “doesn't have the power to stop a property owner from developing his property in the path of a future project because we don't know when [the project is] coming.”

Telge, though, could not proceed with its development without approval of the development plans it had submitted to the city and county. And there was uncontroverted evidence that the State interfered with Telge's efforts to obtain necessary approval. In April 2011, Gornet emailed city and county officials about Telge's submitted plan for a high-density residential development on its land. Gornet wrote that he “must object” to the plan because it “does not acknowledge the approved route of ... Segment F1.” He added, as justification for his objection:

State law allows disapproval of the proposed plat as TxDOT and Harris County have entered into an agreement to protect the approved route.<sup>2</sup>

Gornet admitted at trial that his route-protection justification was false. He may have believed at the time he wrote the email that he could protect the route, but he acknowledged at trial he could not. In fact, under existing Texas Supreme Court authority, the State may not suppress development to keep its costs down when it later exercises its powers of **eminent domain**. *City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978); see *City of Houston v. Kolb*, 982 S.W.2d 949, 954 n.5 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (stating that “governmental entities cannot act to gain an unfair advantage by imposing restrictions or prohibitions on the use of property in order to prevent private development from increasing the cost of planned and future acquisition of the property”) (citing *Teague*, 570 S.W.2d at 393 and *State v. Biggar*, 873 S.W.2d 11, 13 (Tex. 1994)). Although Gornet did not have legal authority to stall Telge's development plans to protect the toll road's route and minimize condemnation expenses, he undisputedly inserted the State into the development-plan approval process and requested “disapproval” of Telge's plan to protect the toll road's route.

There was more. Gornet acknowledged at trial that the Texas Department of Transportation officials and the county would normally be involved in deciding realignment requests such as the one Telge made. Nonetheless, Gornet excluded those decision-makers from consideration of Telge's request. In his words at trial, he “did not advance their request” for consideration. The decision remained at his level.

Concerned that Gornet was blocking consideration of better route alternatives, Telge tried to bypass Gornet and meet with a Department of Transportation representative directly. But Gornet appeared at the November 2011 meeting, and Telge's request was subsequently denied.

In January 2012, Gornet informed Telge that the toll road would not be realigned. The Record of Decision route would be the final route for Segment F-1, and it would pass through Telge's property. The route would be 400 feet wide and run the length of the watershed. It would bisect Telge's property, severing a small portion and leaving it with no access. The toll road would be elevated above the watershed, supported by 18 columns that would penetrate the watershed's surface. And there would be no direct access between the toll road and Telge's development.

Facing the inevitability that the watershed, which was supposed to be the community-amenity focal point of Telge's high-density residential development, was, instead, going to be the underside of an elevated freeway, Telge realized the features of its property would no longer support the development it had planned. According to Caldwell, there is not much of a market for high-density homes that do not benefit from a shared community amenity. High-density developments that are highly amenitized sell; if you take away the amenity, the buyers are not drawn to the development. Moreover, Telge had spent two years and between \$75,000 and \$100,000 trying to shift the Grand Parkway out of the watershed to no avail. Telge's investors had contributed capital to this project two years earlier, and no development had begun because the toll road project was interfering with plan approval. Telge felt an obligation to its investors to turn the investment property into something that could get approval.

With these considerations in mind and faced with an inability to get its high-density site plan approved, in the summer of 2012, Telge looked into other ways to develop its property. If there was not going to be a community amenity, then the features of the individual lots had to be more appealing. Thus, Telge looked into developing the land into high-acreage lots. If Telge developed the land into large lots and built an equestrian center and riding trails, it could still appeal to a buying market. There would be down sides though. First, high-acreage developments were less profitable than high-density developments. Second, they sold more slowly. Third, they appealed to fewer potential buyers because the high cost of a large lot was beyond most buyers' means. Even though a high-acreage development was an inferior option, Telge felt “forced into a corner” and “forced into doing an

acreage development” because the State's condemnation project was now inevitable and it was going to destroy the amenity driving the original high-density residential plan.

Telge began the process of preparing the land for a high-acreage development and obtaining approvals and certifications. To create the number of high-acreage lots that would work in their plan, in the summer of 2013, Telge bought an adjoining 103 acres to include in its development.

One necessary step for this or any typical residential development was to establish conditions, covenants, and restrictions consistent with the development plan. If Telge began selling lots before the restrictions were in place, those early lots would be unrestricted, which could cause conflicts among the property owners. So, the restrictions had to be established before any lots were sold. One restriction Telge put in place, consistent with its new high-acreage development plan, was to limit the number of lots in the community to 300. Development work continued.

In October 2013, Willowcreek Ranch had its grand opening. Telge sold 39 lots on 73 acres by the end of 2013.

In early 2014, the State took the next step in its condemnation plan and began legal proceedings to acquire a 40-acre strip of Telge's land for the Grand Parkway. The condemnation would leave Telge with 573 acres in remainder property split as follows: (1) an unplatted northern remainder of 342 acres, (2) a platted middle section with 87 unsold acreage lots on 202 acres, and (3) a severed southern remainder of 29 acres. *See Appendix II.*

The condemnation action was presented to the Special Commissioners to determine an appropriate monetary award. They awarded Telge \$18 million. On June 24, 2014, the State deposited that amount into the registry of the court, fixing that date as the date of the taking. Both the State and Telge objected to the award, and the case proceeded to trial de novo in county court before a six-person jury.

Two key events happened as trial was set to begin. First, the parties agreed that the date of the federal Record of Decision—November 20, 2008—was the first date “that the Grand Parkway Toll Road Project may have first begun affecting the market value of the Whole Property.” That date would play a role in determining market value when the trial court included it in the jury questions.

Second, the State moved to exclude evidence in support of Telge's compensation theory on the basis that the theory violates existing law on the project influence rule, highest and best use, and community damages. Specifically, the State sought to exclude testimony from experts David Bolton and Matt Deal and “any testimony or evidence” consistent with their compensation opinions “offered by any other witness.” The trial court denied the State's motion.

Trial lasted more than two weeks. Telge's representatives and experts testified about Telge's original development plans, its efforts to have the toll road realigned to allow the original development plans, Gornet's interference with its site-approval efforts and with the realignment, the State's denial of realignment, and the need to adjust to a new development plan given the State's actions. Deal testified the State owed Telge \$28.8 million in compensation for the taking. His figure was based on expert testimony and evidence that the highest and best use of the property was its originally intended use: high-density residential lots.

The State and its expert, on the other hand, argued that the taking would have been fully compensated with only \$1.3 million in compensation. It based that figure on a claimed highest and best use consistent with the use the property was ultimately put to: high-acreage residential lots. The State argued it owed compensation for the 40 acres of land taken but owed nothing for damage to the remainder, even though several remainder acres were cut off from the rest of the property because of the taking.

At the conclusion of evidence, the trial court instructed the jury on the definition of market value, the definition of highest and best use, the project influence rule, and allowable remainder damages, followed by two jury questions. The first question asked

the jury to decide the difference in market value between the whole property before the taking and the remainder property after the taking. The second question asked the jury to decide the market value of temporary construction easements.

The jury awarded \$28,825,526 as the difference in market value and \$30,515 for the temporary construction easements. The State appealed.<sup>3</sup>

### The State's Evidentiary Challenges

In issues one through four, the State contends the trial court erred by failing to exclude expert testimony and other market-value evidence. Specifically, the State argues Telge's compensation theory violated existing law on the project influence rule, highest and best use, and community damages. As explained below, we conclude the trial court did not abuse its discretion in admitting the challenged evidence because the evidence did not run afoul of any of these condemnation-law principles.

#### A. Standard of review

We review a trial court's admission of evidence for an abuse of discretion. See *Brookshire Bros., Ltd. v. Adlridge*, 438 S.W.3d 9, 27 (Tex. 2014). A trial court abuses its discretion by acting arbitrarily, unreasonably, or without regard to guiding legal principles. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998).

#### B. Trial court did not abuse its discretion in admitting evidence

The thrust of the State's argument is that Telge “willfully chose”<sup>4</sup> to switch to the less profitable high-acreage development plan and, therefore, should not be compensated based on the more profitable high-density development plan it abandoned. The State's argument rests on its interpretation of the project influence rule, the highest-and-best-use standards, and the limitations on recovering community damages. Thus, the guiding rules and principles applicable in determining whether the trial court abused its discretion are found in these three legal concepts.

##### 1. Condemnation law on compensating market value through application of the project influence rule

The Texas Constitution provides that “[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made ....” TEX. CONST. art. I, § 17. Adequate compensation for real property is its market value, which has been defined as “the price the property will bring when offered for sale by one who desires to sell, but is not oblig[ated] to sell, and is bought by one who desires to buy, but is under no necessity of buying.” *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 182 (Tex. 2001).

The obligation to pay market value is not triggered until there is a taking or some cognizable “direct restriction” on the property's use. *Westgate, Ltd. v. State*, 843 S.W.2d 448, 452 (Tex. 1992). A direct restriction refers to “an actual physical or legal restriction on the property's use, such as a blocking of access or denial of a permit for development.” *Id.* Until a direct restriction occurs, economic damages, like lost profits or lost marketability due to the cloud of impending condemnation, are not recoverable. *Id.* at 453. The landowner might be experiencing negative effects due to an impending condemnation but, until a taking or direct restriction occurs, those negative effects are not compensable. *Id.* We will refer to this as the *Westgate* rule.

But once there is a taking, there are mechanisms to account for the negative effects on market value. One of these is the project influence rule. The project influence rule provides that “any change in property value that results from the government manifesting a definite purpose to take property as part of a governmental project must be excluded from the award of adequate compensation” when the State compensates for the taking. *Caffe Ribs, Inc. v. State*, 487 S.W.3d 137, 142 (Tex. 2016). The jury that is determining market value is instructed to eliminate the distorting effects of the impending condemnation from its award, whether those distorting effects increased or decreased the property's value.<sup>5</sup> *Id.*

Determining market value by applying the project influence rule “becomes to some extent hypothetical.” *City of Fort Worth v. Corbin*, 54 S.W.2d 828, 830 (Tex. 1974). The jury decides what the market value would have been if the impending condemnation had not affected the value of the property. *Caffe Ribs*, 487 S.W.3d at 142; *Corbin*, 54 S.W.2d at 830–31.

To allow the jury to determine the amount of enhancement or diminution in value that must be removed from its market-value determination, the trial court determines, as a matter of law, the date the condemnor manifested a definite purpose to take the particular land, and the jury is instructed to eliminate all positive and negative impacts of the condemnation project on market value that occurred between the date of manifested intent and the date of condemnation, as though there “had been no condemnation.” *Caffe Ribs*, 487 S.W.3d at 138, 142–43; see *Harris Cty. Flood Control Dist. v. Taub*, 502 S.W.3d 320, 336–37 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

Collectively, these rules provide the following parameters for compensating landowners when the State condemns land: (1) the landowner is owed market value, (2) there might be calculable diminishment in value due to the cloud of impending condemnation, but that diminishment is not recoverable unless and until there has been a recognized taking or direct restriction; however, once a taking occurs, (3) the project influence rule applies to remove the distorting effects of the impending condemnation and ensure the landowner receives the market value that would have been in place without the condemnation or its clouding effects.

There is more than one way a property's value can experience project diminishment between the date of manifested intent and the date of condemnation. The most obvious way is when the local market participants learn of a planned condemnation and change their purchasing and development behavior in light of the impending taking. See *Gleannloch Commercial Dev., LP*, No. 14-16-00037-CV, 2018 WL 1189123, at \*2–3 (Tex. App.—Houston [14th Dist.] Mar. 8, 2018, pet. denied) (mem. op.) (*Gleannloch I*). Another recognized way is when the State takes actions before condemning the property that better its purchasing position. *Caffe Ribs* involved this second type of diminishment. See *Caffe Ribs*, 487 S.W.3d at 143.

In *Caffe Ribs*, the landowner wanted to remediate its contaminated property, knowing that a remediated property would have more market value. *Id.* at 139. The landowner worked with the Texas Commission on Environmental Quality through the TCEQ Voluntary Cleanup Program to remediate its land. *Id.* While that process was on-going, the State notified the landowner that it intended to condemn the landowner's property for a highway expansion. *Id.* The landowner continued with its remediation plans and submitted additional materials to the TCEQ for approval. *Id.* In response, the TCEQ required the landowner to install four additional groundwater monitoring wells.

But the landowner could not install the four wells because, in advance of its condemnation project, the State prohibited installation of any new wells on to-be-condemned land. *Id.* at 140. This condemnation-driven State action interfered with the landowner's efforts to remediate. *Id.*

The State initiated statutory condemnation proceedings two years later and argued the property's market value had to be significantly discounted due to its poor environmental condition. *Id.* In other words, the fact that the land had not been remediated should work in the State's favor by lowering the price to condemn the property. The landowner responded that, had the State not interfered with its efforts to remediate two years earlier, it could have fully remediated the property by the date of the taking and eliminated the negative impact the State was relying on to reduce the value of the property. *Id.*

The issue before the trial court was whether to admit evidence of the State's influence on the landowner's TCEQ remediation process. The State argued that the project influence rule required that such evidence be excluded. *Id.* at 141. The landowner argued the proper application of the project influence rule required the opposite—that the evidence be admitted. The Texas Supreme Court agreed with the landowner and reversed the trial court's ruling that excluded the evidence. *Id.* at 143.

The Texas Supreme Court held that the trial court should have admitted evidence of what the market value would have been without the government's project, including the State's actions in delaying the landowner's remediation efforts. *Id.* at 144. Quoting the United State Supreme Court, the Texas Supreme Court explained:

[I]t would be manifestly unjust to permit a public authority to depreciate property values by a threat of the construction of a government project and then to take advantage of this depression in the price which it must pay for the property when eventually condemned.

*Id.* (quoting *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 636 (1961) (citation and internal quotation marks omitted)).

When a condemnation project diminishes market value, “the preferable course” for addressing the effect on market value, according to the Court, is to “admit evidence, under proper instruction, to permit the jury to eliminate the distorting effect of the project,” not to exclude evidence. *Id.* at 143. The Court reiterated:

We believe the use of a proper instruction, as opposed to an evidentiary exclusion, is particularly appropriate in cases ... where project diminishment is implicated.... If the condemnee is unable to introduce evidence about that deflation, it will be difficult, if not impossible, for the deflation to be factored into the value of the property to arrive at an award of “market value.”

*Id.*

## 2. The State's arguments against admitting evidence of its influence on market value

The State makes two arguments why application of the project influence rule should not have resulted in admission of evidence it negatively affected the market value of Telge's land. First, it seeks application of the *Westgate* rule's limiting language to this context that unquestionably involves a taking. Of course, the *Westgate* rule against compensating for project announcement damages if there has been no taking does not apply when there has been a taking; therefore, the trial court correctly rejected the argument. See *Caffe Ribs*, 487 S.W.3d at 144.

Second, it argues the project influence rule must be cabined by other established tenets of condemnation law, including what we will refer to as the *Sharboneau/Radler Pavilion* rule, which prevents a landowner from inflating its land's market value by calculating that value under a hypothetical, alternate use of the property that is speculative. See *Sharboneau*, 48 S.W.3d at 184–86; *Sw. Bell Tel. Co. v. Radler Pavilion Ltd. P'ship*, 77 S.W.3d 482, 486–87 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). Otherwise, according to the State, the project influence rule would work as a “get out of jail free card” to bring speculative evidence before the jury that otherwise would not be allowed.

The error in the State's argument is that it assumes a forward-looking rule, like the *Sharboneau/Radler Pavilion* rule, cannot be integrated with a backward-looking rule, like the project influence rule, and, accepting that assumption, declares without citation that the forward-looking rule predominates. But there is nothing about the varying perspectives of these two condemnation-law rules that makes them incompatible.<sup>6</sup> These two rules may be synthesized. Before doing so, we review the *Sharboneau/Radler Pavilion* rule on highest and best use.

## 3. Condemnation law on nonactualized highest and best use



In *Sharboneau*, the Texas Supreme Court disallowed an expert's opinion testimony that determined the market value of raw land by analyzing it as though it were a subdivision. 48 S.W.3d at 186. The Court concluded the expert's evidence did not properly address what a willing buyer would pay to a willing seller in the relevant market. *Id.* It, instead, assumed a best-case scenario in which the raw land would be developed into a subdivision and the seller would make a profit on the development. *Id.* The Court did not hold that other possible uses were never relevant to the market value determination, only that the landowner's evidence in support of this speculative, alternate use was irrelevant. *Id.* (allowing that it “may be that in some cases involving undeveloped land, expert opinions based on the subdivision development method would be reliable, relevant, and admissible”).

*Radler Pavilion* followed. It too concerned condemnation damages based on a use other than the landowner's current use of its property. *Radler Pavilion*, 77 S.W.3d at 483. In *Radler Pavilion*, the land was being used for a multi-tenant retail shopping center, and the State was seeking to condemn two easements on the land. *Id.* The landowner's expert testified that the highest and best use of the property, from which market value should be determined, was as a high-end, multi-use property, “which probably would include retail office, hotel and perhaps some high-end condominium use with structured parking, with parking toward the back of the property, likely.” *Id.* at 485. The hypothetical parking lot that was “likely” to be built in the back was exactly where one of the easements was located, which meant that a multi-level parking garage would become necessary, according to the landowner and its expert, which also meant more compensation for the taking. *Id.*

The Court held that the expert's opinions were neither relevant nor admissible because they were based on a speculative redevelopment concept. *Id.* at 487. The court did not hold that the market value had to be determined based on the land's current use; it was permissible to base market value on a not-current use, but certain criteria had to be met. *Id.* at 485–86. For one, the alternate use had to be one “to which the property was reasonably adaptable and for which it was, or in reasonable probability would become, available within a reasonable time.” *Id.* at 486. The landowner's expert did not satisfy this requirement. He testified about a possible future use and assumed it would move forward, including future construction of a parking area in an incompatible location and, as a remedy, construction of a more expensive parking garage. *Id.* But, there were no plans to build this replacement development, no-one testified to its proposed size or the timeline for construction, and there was no evidence the alternate use was feasible. *Id.* Because the suggested highest and best use was speculative, the trial court erred in admitting valuation testimony based on that use. *Id.*

Together, *Sharboneau* and *Radler Pavilion* hold that, to warrant admission of market-value evidence based on a highest and best use other than the use to which the land is being put at the time of the taking, the landowner has to show, prospectively, that (1) the property is adaptable to the other use, (2) the other use is reasonably probable within the immediate future or a reasonable time, and (3) the market value of the land is enhanced by the alternate use. *Id.*

#### 4. Synthesizing these condemnation-law rules

Telge's expert's market valuation is based on a use other than the property's use at the time of the taking. Because there has been a taking, the *Westgate* rule does not apply. Because there is evidence the property experienced project diminishment before the taking, the project influence rule does apply and allows Telge to present evidence to the jury of what the market value would have been without the government's project or its market-hindering effects, along with a jury instruction to disregard the distorting effect of the State's project. This is required because a governmental entity may not allow its project to depress property values and then take advantage of the price depression when it buys the condemned property. *Caffe Ribs*, 487 S.W.3d at 144.

The project influence rule involves a retrospective analysis. The jury goes back to the date of manifested intent and evaluates what would have transpired without the government project's altering the course. *Id.* at 143. The landowner then recovers the “hypothetical price that its property would have brought” on the date of the taking, under an alternate timeline, “unaffected by the project” that occurred on the existing timeline. *Gleannloch I*, 2018 WL 1189123, at \*16 (no error in admitting evidence of when market became aware of impending condemnation and of what development in area would have been like without Grand Parkway project, under an alternate timeline, including what development would have occurred near property and on property).

Application of *Sharboneau/Radler Pavilion* when a property has had project diminishment requires recognition of the alternate timeline. Thus, when looking at the second element—which asks whether the landowner's designated alternate use was reasonably probable in the near future—that analysis must occur, not as of the date of the taking, but during the interim period between manifested intent and condemnation. This is because, if the factfinder is to remove all impacts of the project, it also must remove all changes to the land's allowed use that occurred only because of the project. The Texas Supreme Court's analysis in *Caffe Ribs* supports this view. There, the State would not allow additional wells to be installed; therefore, the landowner did not install wells and the land was not fully remediated. *Caffe Ribs*, 487 S.W.3d at 139. The landowner met its burden to establish market value as though the property were fully remediated at the date of condemnation because, under an alternate timeline that did not include the condemnation project, remediation on the property would have occurred. *Id.* at 142.

The landowner did not also have to establish that remediation could be completed with reasonable probability soon after the condemnation date. Indeed, it could not.<sup>7</sup> It sufficed that the landowner could show that remediation would have happened reasonably soon after the announcement date and been completed by the condemnation date. *Id.* In other words, the feasibility of a quickly realized, fully remediated property was not evaluated as of the date of the taking (when the State's action had already prevented that result), the jury was permitted to look back to when the State interfered in the TCEQ remediation process and evaluate feasibility under the hypothetical alternate timeline the project influence rule required.

The same analysis applies here. Under the holding of *Caffe Ribs*, the jury properly received evidence of the condemnation project's distorting effects on market value, including that Gornet, acting on behalf of the State, interfered in the plan-approval process by telling the city and county that he “objected” to the plan, suggested “disapproval” of the plan, and inaccurately indicated it was permissible to prevent private development in advance of a future land condemnation. The State is not authorized to manipulate condemnation processes in this manner, though this is not the first instance of the State doing so as it relates to the Grand Parkway. See *Kolb*, 982 S.W.2d at 953–54 & n.5. And when the government does so, the distorting effects such action has on market value must be disclosed to the jury so it can be removed from the market value determination. See *Caffe Ribs*, 487 S.W.3d at 142–43. Therefore, in this situation in which the condemnation project affected market value in a way that included interference with the land's development to its highest and best use, feasibility is determined at the point of State interference, not at the point of the taking when that interference had already destroyed feasibility.

The combination of the project influence rule and the *Sharboneau/Radler Pavilion* rule does not lead to a “get out of jail free” scenario in which speculative uses become admissible. Instead, it requires the landowner to establish what the market value would have been had the project not come about and includes in that analysis what uses the landowner would have put its property to in the interim. *Cf. id.* at 144. It is sufficient that the land would have been adaptable in the near future at a point between the dates of manifested intent and condemnation, when Telge was seeking approval of its development plans and the State, acting through Gornet, was interfering with the private development.

#### **5. Telge's evidence established that the original proposed use was feasible at the point the State's project and State actors intervened**

There was evidence the land was suitable for high-density residential development and the city and county were amenable to that type of development in the area. Royce's high-density site plan had been approved. Trial witnesses testified Telge's plan likewise would have been approved. Other high-density residential developments were being approved, built, and successfully sold nearby. There was ample evidence a high-density development could have been successfully built on Telge's land.

The State argues Telge cannot base its market-value calculation on this alternate use, even if feasible, because Telge voluntarily placed property restrictions on its land, limiting it to 300 lots, when it switched to the high-acreage development plan and Telge's proposed alternate highest-and-best-use is incompatible with these restrictions. But there was ample evidence that Telge switched to the high-acreage plan only because the State had made clear it would not approve its high-density plan. The State also would not realign the toll road to allow for the high-density development. And there was evidence the State's decisions to

not approve the plan and to not consider realignment were linked to Gornet's interference in furtherance of the condemnation project.

The State's toll road project affected the property's market value by mandating a shift away from a high-density residential development. Telge switched to high-acreage because the project would destroy the focal point of the high-density development, a community amenity needed to drive sales of high-density lots. Without the taking, Telge intended to pursue its property's highest and best use: high-density residential development. Given the inevitability of the taking and the destruction of the watershed as a community amenity, Telge could not proceed with its original development plan. All other options were less profitable. Telge chose from the remaining options when it switched to high-acreage.

It would be manifestly unjust to allow the State to depreciate land by threat of condemnation and then take advantage of the depreciation in the price it would be required to pay for the property once eventually condemned. *Va. Elec. & Power*, 365 U.S. at 636; *Caffe Ribs*, 487 S.W.3d at 143. Similar to what occurred in *Caffe Ribs* with the delayed TCEQ steps, the jury in this case was in the best position to weigh the evidence and determine the reach of the project's influence on the land's development and market value. See *Caffe Ribs*, 487 S.W.3d at 142–43.

A high-density residential development was physically possible, legally permissible, economically feasible, and reasonably probable, according to Telge's experts and supporting evidence, at the point that Gornet, on behalf of the State, interfered in Telge's plan-approval process and the State's condemnation project influenced market value. Even the State's own expert testified that, before the taking, the highest development potential for the property was a “small lot subdivision,” meaning a high-density residential development. The trial court properly admitted evidence of highest and best use as a high-density residential development. See *City of Austin v. Cannizzo*, 267 S.W.2d 808, 814–15 (Tex. 1954). It was then for the jury to decide what weight to put on the parties' evidence of highest and best use. *State v. Windham*, 837 S.W.2d 73, 77 (Tex. 1992) (after holding that the landowner's and State's highest-and-best-use evidence was admissible, concluding: “It is then for the jury to decide which evidence to accept and which to reject in deciding the ultimate issue of market value.”).

## 6. Condemnation law on community damages

Landowners may recover for damages to their remainder property caused by a taking. *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 219 (Tex. 2001). But there are limits. A landowner may not recover for damage shared by the community. *Id.*; *State v. Schmidt*, 867 S.W.2d 769, 781 (Tex. 1993). For example, when the State modifies a highway and that modification causes traffic diversion, inconvenience of access, impaired visibility, and disruption by construction activity, the hardship is shared by the community and is noncompensable community damage. *Schmidt*, 867 S.W.2d at 781. As another example, increased noise pollution from a condemnation project is community-based in nature and noncompensable. *Felts v. Harris Cty.*, 915 S.W.2d 482, 485–86 (Tex. 1996).

But when the damage to the remainder is unique to the landowner, then the losses are compensable. *Interstate Northborough*, 66 S.W.3d at 220. Damage may qualify as unique to the landowner even if several landowners suffer similar injuries. *Schmidt*, 867 S.W.2d at 781. Whether damage is unique or community-based in nature is determined based on the nature of the injury and whether it affects the landowner's remainder property in some special way. *Id.*; see TEX. PROP. CODE § 21.042(d) (including as compensable damages, “an injury or benefit that is peculiar to the property owner and that relates to the property owner's ownership, use, or enjoyment of the particular parcel of real property” but not “an injury or benefit that the property owner experiences in common with the general community, including circuitry of travel and diversion of traffic.”). So, for example, the loss of parking spaces on a landowner's remainder property is compensable. *State v. Centennial Mortg. Corp.*, 867 S.W.2d 783, 784 (Tex. 1993). Likewise, increased proximity to a frontage road, with a resulting loss of curb appeal, green space, and a “buffer” zone, are damages unique to a remainder property. *Interstate Northborough*, 66 S.W.3d at 222. And, important here, when a taking bisects a property and changes the remainder property's highest and best use, the change in highest and best use is unique damage and not community damage. *State v. Gleannloch Commercial Dev., L.P.*, No. 01-16-00427-CV, 2018 WL 4134926, at \*11–12 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (mem. op.) (*Gleannloch II*).

### **7. Admission of Telge's evidence on remainder damages was consistent with law prohibiting recovery of community damages**

The State argues that any damage to Telge's remainder property was a noncompensable community injury. The State quotes trial testimony about the inability to sell the high-density residential lots because “no one wants to be congregated next to an elevated freeway.” It then characterizes the injury complained of as noise and traffic-proximity complaints, which it characterizes as community in nature. But what the State fails to acknowledge is that a change in highest and best use is a specific, individual injury to the remainder that is compensable. *Id.* And there was evidence that the taking destroyed the watershed, which was the amenity that would have drawn home buyers to the planned high-density development. That destruction forced a change in the highest and best use of the property from the more-profitable high-density residential lots to the less-profitable high-acreage lots. A change in a property's highest and best use is an injury unique to the remainder property that is outside the rule against compensation for community injury. *Id.*

Having determined that Telge's evidence did not run afoul of the project influence rule, the highest-and-best-use standards, or the rule against compensating community injury, we hold that the trial court did not err in admitting the evidence the State challenges on appeal.

We overrule the State's first four issues. We turn next to the sufficiency challenge.

### **Sufficiency of Evidence**

In its fifth and final issue, the State raises a challenge to the legal and factual sufficiency of the evidence in support of the judgment.

#### **A. Standard of review**

When considering whether legally sufficient evidence supports a challenged finding, we consider the evidence that favors the finding if a reasonable factfinder could, and we disregard contrary evidence unless a reasonable factfinder could not. *See Choice! Power, L.P. v. Feeley*, 501 S.W.3d 199, 208 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 807 (Tex. 2005)). We view the evidence in the light most favorable to the finding and indulge every reasonable inference to support it. *Id.* We may not sustain a legal sufficiency point unless the record demonstrates: (1) a complete absence of evidence of a vital fact, (2) that the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (3) that the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) that the evidence conclusively establishes the opposite of the vital fact. *Id.* The factfinder is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Id.* If the evidence would allow “reasonable and fair-minded people to differ in their conclusions,” then we will not substitute our judgment for that of the factfinder. *Id.*

In conducting a factual sufficiency review, we consider and weigh all the evidence. *Id.* at 209; *see Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 615 (Tex. 2016). When there is a challenge to the factual sufficiency of evidence supporting an adverse finding on which the appellant did not have the burden of proof at trial, we set aside the verdict only if the evidence supporting the finding is so weak as to make the verdict clearly wrong and manifestly unjust. *Choice! Power*, 501 S.W.3d at 209.

#### **B. There is sufficient evidence to support the judgment**

The State's sufficiency challenge is predicated solely on its admissibility arguments discussed above. According to the State, if the evidence were properly excluded, there would be insufficient evidence to support the verdict.

We have rejected the State's admissibility arguments and held the evidence was properly admitted. Having concluded the evidence was admissible, we further hold there was ample evidence on which a reasonable jury could have relied to support the

verdict reached and the resulting judgment rendered. Telge's representatives and its expert explained the original development plans, the efforts to have the toll road realigned to allow the original development plans, the State's denial of realignment, and the change in development plans that resulted. Telge's experts testified about their methodologies in calculating damages and testified that the full damages due Telge because of the taking was \$28.8 million. This closely approximates the answer the jury supplied when asked to determine the amount of compensation owed.

We overrule the State's fifth issue.

### Conclusion

We affirm.

### Appendix I

Tabular or graphical material not displayable at this time.

### Appendix II

[Tabular or graphical material not displayable at this time.]

\* Platted land is designated with slash marks: / / / /

### All Citations

--- S.W.3d ----, 2020 WL 2782370

### Footnotes

- 1 A Record of Decision is an environmental clearance by the Federal Highway Administration. It does not signify the existence of any funding for construction.
- 2 One city official responded by suggesting Gornet should meet with Telge and by noting Gornet's email would be preserved: "I think it important that we keep a record of this conversation."
- 3 This appeal concerns only the \$28.8 million market-value award, not the easement award.
- 4 The State repeatedly used this characterization at oral argument to describe Telge's switch to a high-acreage development plan.
- 5 If the impending project inflates the value, it is referred to as "project enhancement," and if it deflates the value, it is referred to as "project diminishment" or "condemnation blight." *Caffe Ribs, Inc. v. State*, 487 S.W.3d 137, 142 (Tex. 2016).
- 6 This Court has synthesized bodies of law with varying temporal perspectives in the past. See *Allen v. State*, 570 S.W.3d 795 (Tex. App.—Houston [1st Dist.] 2018), *aff'd*, — S.W.3d —, No. PD-1042-18, 2019 WL 6139077 (Tex. Crim. App. 2019) (synthesizing two lines of cases with different temporal perspectives).
- 7 It was this impossibility that the State was relying on to argue for a reduction in price.