VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 29th day of October, 2015.

Commissioner of Highways, Appellant,

against Record No. 141586
Circuit Court No. 13-216

Mark W. Osborn, et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of Stafford County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that the circuit court did not err in excluding evidence of an alternative parking arrangement and that the landowner continued to use the parcel post-take. Further, the landowner was not required to present evidence of ownership to satisfy the three-prong test for determining whether items constitute fixtures under Taco Bell of Am., Inc. v. Commonwealth Transp. Comm'r, 282 Va. 127, 710 S.E.2d 478 (2011). Therefore, we affirm the judgment of the circuit court.

Mark Osborn and Mary Mitchell (collectively "Osborn") are the record owners of property in Stafford County along U.S. Route 17. The property is zoned for industrial use, and it is the site of a circuit manufacturing facility operating under the name of Colonial Circuits, Inc. ("Colonial Circuits").

On July 6, 2012, the Commissioner of Highways ("Commissioner") filed a certificate of take with the clerk of the Circuit Court of Stafford County, acquiring a portion of the property for planned improvements along Route 17. The building and its contents were not physically affected by the take.

However, the take eliminated thirty of the existing parking spaces on the property. This reduced the available on-site parking well below Stafford County's minimum parking

requirement for manufacturing facilities.[1] The parties agreed that there was insufficient area on the residue to replace the lost parking, and the parties agreed it would not be feasible to continue the existing use.

Initially, the parties were unable to agree on just compensation for the acquired property. After 180 days had passed from the filing of the certificate of take, Osborn filed a petition to determine just compensation pursuant to Code § 33.2-1029. The Circuit Court of Stafford County referred the matter to mediation, and on September 27, 2013, the parties agreed to settle all claims other than claims for just compensation for fixtures for $2,298,300. Subsequently, the Commissioner notified Osborn by letter that the value of the building and the cost to demolish the building was included in the settlement. In the same letter, the Commissioner acknowledged that the Department of Transportation was required by law to consider Colonial Circuits a displaced business.

Osborn's claim for just compensation for the fixtures on the residue proceeded to trial. Before trial, Osborn filed a motion in limine seeking to prevent the Commissioner from introducing evidence that Osborn had entered into an agreement for shared parking with an adjacent property owner and that Colonial Circuits had continued operating post-take. Osborn argued such evidence was speculative as of the date of valuation, and therefore inadmissible, because the agreement for shared parking had been reached after the date of take. Moreover, Osborn argued that the agreement was temporary and ultimately would not prevent the relocation of Colonial Circuits. Finally, Osborn contended such evidence would be contrary to the parties' settlement and the law, which required the Commissioner to consider the business displaced.

The Commissioner countered, citing language from Wammco, Inc. v. Commonwealth Transp. Comm'r, 251 Va. 132, 465 S.E.2d 584 (1996), which, in his view, required the court to consider the proffered evidence as a future circumstance affecting the value of the residue.

In relevant part, the circuit court concluded that "evidence of replacement parking [was] not relevant to the overall compensation," because the Commissioner had "agreed demolition of

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[1] By ordinance, Stafford County requires manufacturing facilities to have 2.5 parking spaces per 1,000 square feet of building area. Stafford County Code ch. 28, art. VII, tbl. 7.1. The Colonial Circuits facility is 40,910 square feet in area. Accordingly, the property was required to have 103 spaces on-site. The property, which Stafford County had previously considered "legal non-conforming," had only 28 spaces remaining after the take.

the building is included in damage assessments." The court also ruled that the facility's "continued operation [has] no relationship to this case." Accordingly, the court granted the motion in limine with respect to evidence of replacement parking and the facility's continued operation.

The issue of just compensation for the fixtures on the residue was tried before a commission. Osborn presented the testimony of Alex Ruden, a machinery and equipment appraiser, and the testimony of John Reyle, a real estate appraiser. Ruden created a list of every asset on the site, noting the initial manufacturing date, the initial cost, and the method of installation for each asset. Ruden also testified to the special relationship between the machines, equipment, and real property, and how the relationship influenced his valuation of the items. Based in part on Ruden's appraisal, Reyle opined that just compensation for the fixtures was $5,306,000, which he based on a contributing value of $6,239,878 and a salvage value of $934,042. To prepare their opinions, Ruden and Reyle consulted this Court's opinion in Taco Bell and applied the three-part test explained therein for determining whether an item is personalty or a fixture. Neither Ruden nor Reyle identified the record owner of any of the listed assets.

At the close of Osborn's case-in-chief, the Commissioner moved to strike on the ground that the evidence was insufficient to prove who owned the items at issue and therefore insufficient to prove that any of the items were fixtures. The court denied the motion, ruling that whether an asset is personalty or a fixture is a factual determination for the commission and that there was sufficient evidence for the case to proceed.

The trial commissioners returned a unanimous report, finding in favor of Osborn and setting damages to the fixtures on the residue at $5,109,788. The circuit court overruled the Commissioner's exceptions and entered a final order confirming the report.

On appeal, the Commissioner presents two arguments. First, the Commissioner contends the circuit court erred by excluding evidence that Osborn had entered into an agreement for shared parking with an adjacent property owner and by excluding evidence that Colonial Circuits had continued operating post-take. Second, the Commissioner contends Osborn failed to present any evidence regarding the ownership of the alleged fixtures, and therefore, the commissioners could not have properly applied the three-part test from Taco Bell.

This Court reviews a circuit court's decision to admit or exclude evidence for an abuse of discretion. Ramsey v. Comm'r of Hwys., ___ Va. ___, ___, 770 S.E.2d 487, 489 (2015). The Commissioner argues that Osborn had a duty to mitigate his damages.[2] Therefore, the circuit court should have permitted him to present evidence that Osborn had entered into an agreement for shared parking. In the Commissioner's view, the excluded evidence was not speculative, because Osborn, in fact, found replacement parking that permitted Colonial Circuits to continue operating. We disagree.

This Court has set forth the following test to determine damages to the residue of a parcel:

> The test of damages to the land remaining after the taking is the difference in the residue's value immediately before and immediately after the taking. In determining such damages, consideration may be given to every circumstance, present or future, that affects the residue's value at the time of the take. Remote or speculative advantages and disadvantages, however, are not to be considered.

Lynch v. Commonwealth Transp. Comm'r, 247 Va. 388, 391, 442 S.E.2d 388, 390 (1994). We consider "the present actual value of the land with all its adaptations to general and special uses, and not its prospective, or speculative, or possible value based upon future expenditures and improvements." Wammco, 251 Va. at 138, 465 S.E.2d at 587 (internal quotation marks and citation omitted).

As a rule, it is "the duty of owners of property taken by eminent domain proceedings to minimize their damages to the residue so far as they reasonably can." Bradshaw v. State Hwy. Comm'r, 210 Va. 66, 68, 168 S.E.2d 129, 130 (1969). Accordingly, "in arriving at the market value of property which has been damaged in exercising the right of eminent domain, the court should admit evidence of possible expenditures which, if made, would diminish the damages." Id. However, a property owner has no duty to undertake "a doubtful and speculative" strategy to mitigate his damages. Id., 168 S.E.2d at 131. Thus, evidence of possible mitigation strategies —

[2] On appeal and in the circuit court, the Commissioner characterized the excluded evidence as relevant to Osborn's duty to mitigate. Therefore, we treat the evidentiary ruling of the trial court as one related to the duty to mitigate, an affirmative defense.

like other evidence of damage to the residue — is inadmissible if it is based on "remote or speculative factors." Wammco, 251 Va. at 137, 465 S.E.2d at 587.

In Wammco, the appellant proffered evidence of adjustment costs based on possible off-site improvements and the possible acquisition of property from third-parties. Id. at 138, 465 S.E.2d at 587. We found such evidence to be "contingent on future acts beyond [appellant's] control which are remote and speculative." Id. Further, we specifically distinguished cases that permitted landowners to present evidence of future development on the basis that the development in those cases "was not dependent on contingencies beyond their control" and did not require acquisition of land under the control of third-parties. Id. at 139, 465 S.E.2d at 587 (citations omitted). Therefore, as a matter of law, we ruled that the proffered evidence was inadmissible. Id. at 138, 465 S.E.2d at 587.

The Commissioner, as condemnor, bears the burden of proof on the issue of mitigation. See 4A J. Sackman, Nichols on Eminent Domain § 14A.04[2][b], at 14A-75 (rev. 3d ed. 2015); cf. Bradshaw, 210 Va. at 68, 168 S.E.2d at 130 (noting that the highway commissioner presented evidence of possible mitigation). At the hearing on the motion in limine, the Commissioner proffered that "[a]s of the date of take, there was off-site parking available to this property," which Colonial Circuits used for two years subsequent to the take. Subject to questioning from the circuit court, the Commissioner clarified:

> We're not saying that [the acquisition of replacement parking] did not happen as a result of filing the certificate of take. But as the court pointed out according to the Bradshaw case, the landowner has a duty to mitigate damages . . . .

Then, before trial, the Commissioner made the following proffer to the circuit court:

> [T]estimony and argument would have been presented that the business has continued to be operational since the date of take [and] there's post — parking off-site that's available.

The Commissioner's proffer does not satisfy the Lynch test. It does not address whether the shared parking arrangement involved the acquisition of adjacent land, a temporary lease subject to conditions, or an informal agreement between neighbors. Further, the Commissioner did not proffer any evidence that would permit the Court to infer the "off-site" parking would be available for any specific length of time. Because the proffer invited speculation on the duration

and adequacy of the alleged mitigation opportunity, the trial court was correct in holding that the proffered evidence was inadmissible.[3]

We also find no merit in the Commissioner's second argument. The Commissioner argues Osborn failed to present any evidence regarding the ownership of the items on the property, and as a result, the trial commissioners could not determine whether the owner intended to make the items fixtures, or determine whether Osborn or Colonial Circuits owned the items. This argument fails because the intent of the owner to make property a fixture need not be express. The intent of the owner "may be inferred from the nature of the article affixed, the purpose for which it was affixed, the relationship of the party making the annexation and the structure and mode of annexation." Danville Holding Corp. v. Clement, 178 Va. 223, 232, 16 S.E.2d 345, 349 (1941).

In essence, the Commissioner contends that the trial commissioners' report was contrary to the evidence. Therefore, the Court reviews the commissioners' report for plain error, and the report will not be set aside unless it is without evidence to support it. Code § 8.01-680.

"In a dispute between a condemnor and the owner of the fee, we have developed a three-part test to determine whether structures annexed by the owner are personalty or realty." Lamar Corp. v. Richmond, 241 Va. 346, 351, 402 S.E.2d 31, 34 (1991). The test considers (1) whether the chattel has been annexed to the realty — either actually or constructively; (2) whether the chattel is adapted to the use or purpose to which the property is dedicated; and (3) whether the owner of the chattel intended to make it a permanent addition to the realty. Taco Bell, 282 Va. at 131-32, 710 S.E.2d at 481 (quoting Danville Holding Corp., 178 Va. at 232, 16 S.E.2d at 349).

The first prong carries little weight, except to the extent that it indicates the owner's intent. The second prong carries great weight, "especially in connection with the element of intention. If the chattel is essential to the purposes for which the building is used or occupied, it will be considered a fixture." Id. at 132, 710 S.E.2d at 481. Ultimately, "[t]he intention of the party making the annexation is the paramount and controlling consideration." Id.

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[3] The Commissioner also contends the circuit court erred by giving Instruction F to the trial commissioners. However, the Commissioner's argument on this point is simply that Instruction F "encompassed" the court's evidentiary ruling. As explained above, the circuit court did not err when it excluded the evidence at issue.

However, the three-part test does not apply to disputes between the condemnor and a lessee. Lamar Corp., 241 Va. at 351, 402 S.E.2d at 34. When the property taken is subject to a lease, "the proper course is to ascertain the entire compensation as though the property belonged to one person, and then apportion this sum among the different parties according to their respective rights." Id. at 350, 402 S.E.2d at 33 (emphasis added) (internal quotation marks and citation omitted). In other words, the general rule is to value the land with all improvements (including any fixtures) as a whole and as though there is a single owner. See Taco Bell, 282 Va. at 133 n.2, 710 S.E.2d at 482 n.2. After the award is rendered, "[t]he lessee becomes entitled to a share of the total award and to a subsequent proceeding to determine the appropriate amount of that share." Lamar Corp., 241 Va. at 352, 402 S.E.2d at 34 (emphasis added); see Code § 25.1-241; Foodtown, Inc. v. State Hwy. Comm'r, 213 Va. 760, 764, 195 S.E.2d 883, 886 (1973). Accordingly, whether the owner of an item is the lessee or the owner of the fee is irrelevant under the present circumstances.

The present case involves a dispute between the condemnor and the property owner. Therefore, the three-part test as explained in Taco Bell applies. Further, as explained in Lamar Corp., the Court presupposes that the subject property, including all improvements, belongs to a single owner. With these principles in mind, the Commissioner's assignment of error challenges only the sufficiency of the evidence to prove ownership of the items, which, as stated above, is irrelevant under these circumstances, since there is no dispute between the owner and lessee. The assignment of error does not contend the evidence was otherwise insufficient to permit an inference of intent from the totality of the evidence, thereby effectively conceding the trial commissioners could conclude the items were fixtures.

For these reasons, we affirm the judgment of the Circuit Court of Stafford County. The appellant shall pay to the appellees damages according to law.

This order shall be certified to the said circuit court.

A Copy,

Teste: Patricia L Harrington

Clerk