United States District Court,
N.D. Texas, Dallas Division.
CITY OF GARLAND, TEXAS Plaintiff,
v.
Lloyd William BURNETT, et al., Defendants.

No. Civ.A. 3:04-CV-1378
March 2, 2005

MEMORANDUM OPINION AND ORDER

Solis, J.:

Now before the Court are the following Motions:

1. Plaintiff City of Garland's ("City") Motion for Summary Judgment on Defendants' Counterclaims ("Pl.'s S.J. Mot." and "Pl.'s S.J. Brief");[1]

2. Plaintiff's Motion to Strike Defendants' Expert Traci Law ("Pl.'s Mot. to Strike Law");[2] and,

3. Plaintiff's Motion to Strike Defendants' Expert Paul C. Mitchell ("Pl.'s Mot. to Strike Mitchell").[3]

After considering the parties' arguments and briefing, and the applicable law, the Court hereby GRANTS Plaintiff's Motion for Summary Judgment, DENIES Plaintiff's Motion to Strike Law, and DENIES Plaintiff's Motion to Strike Mitchell.

I. Background and Procedural History

This case concerns condemnation proceedings against a piece of private property. Specifically, both parties dispute the amount Defendants eventually received. Additionally, Defendants later filed counterclaims "alleging causes of action for: (1) inverse condemnation; (2) equal protection; and (3) substantive due process." Pl.'s S.J. Mot. at 1. Previous to these proceedings, "Defendants owned approximately 3.776 acres of land (the "Property") situation [sic] in the James Howard Survey, Abstract 542, City of Garland, Dallas County, Texas...."[4] *Id.* at 2.

a. Condemnation Proceedings

"In 1998 or 1999, Assistant City Manager Martin Glenn [("Glenn")] contacted David Dodd [("Dodd")], a real estate consultant, to assist in locating sites for acquisition for a fire station in Garland." Defs.' S.J. Resp. at 4; *see also* Dodd Dep. p. 10, ll. 12-19 (Defs.' App. at 50); Glenn Dep. p. 27, ll. 5- 13 (Pl .'s App. at 46). Subsequently, "[i]n 1999, [ ] Dodd identified potential locations for fire stations," including Station 10. Pl.'s S.J. Mot. at 3 (citing Glenn Dep. Ex. 4 (Pl.'s App. at 50-52)). Defendants' Property was considered as one of the potential locations. *Id.*

On March 29, 2000, Dodd allegedly forwarded an offer to Defendants' real estate agent Jeff Martin ("Martin"), "to acquire the northern 2.0 acres out of the 3.78-acre tract." Defs.' Resp. at 5; *see also* Dodd Dep. Ex. 9 (Pl.'s App. at 67-70). At that time, the Property was zoned as an agriculture district. Dodd Dep. p. 50, ll. 11-13 (Pl.'s App. at 65). Although Martin does not recall ever receiving the offer, *cf.* Martin Dep. p. 41, ll. 4-14 (Defs.' App. at 290), and Defendants dispute ever

[1] Defendants Lloyd William Burnett ("Lloyd") and Jo Nell Burnett ("Jo Nell") (collectively "Defendants") filed their Response ("Defs.' S.J. Resp." and "Defs.' S.J. Resp. Brief") on February 1, 2005, and Plaintiff filed its Reply ("Pl.'s S.J. Reply") on February 7, 2005.

[2] Defendants filed their Response ("Defs.' Law Resp.") on February 1, 2005, and Plaintiff filed its Reply (Pl.'s Law Reply") on February 7, 2005.

[3] Defendants filed their Response ("Defs.' Mitchell Resp.") on February 1, 2005, and Plaintiff filed its Reply (Pl.'s Law Reply") on February 7, 2005.

[4] The Property is described further in a "Warranty Deed executed by H.H. Talley and wife, Lydia E. Talley, as Grantors, to Lloyd William Burnett and wife, Jo Nell Burnett, dated April 1, 1978, and recorded in Volume 78150, Page 0923 in the Deed Records of Dallas county [sic], Texas." Pl.'s S.J. Mot. at 2-3 (citing Defs.' First Am. Original Countercl. ¶ 5).

having seen such a proposal until their deposition, Jo Nell Dep. p. 16, ll. 1-6; Lloyd Dep. p. 117, ll. 1-7 (Defs.' App. at 18; 37), Defendants concede that they "had earlier instructed their broker that they were not interested in selling only part of the property." Pl.'s S.J. Mot. at 4; *see also* Lloyd Dep. p. 31, ll. 10-24 (Pl.'s App. at 8).

Subsequently, "[o]n September 13, 2000, on behalf of [the City], [ ] Dodd forwarded an offer for the [full] '3.78 tract [of Defendants' Property]." ' Pl.'s S.J. Mot. at 4 (citing Dodd Dep. Ex. 12 (Pl.'s App. at 71-72)). Nevertheless, sometime thereafter, Defendants declined the September 13 offer. *Cf.* Lloyd Dep. p. 31, l. 10 to p. 32, l. 5 (Pl.'s App. at 8-9).

"On August 21, 2001, the City Council [adopted] a resolution relating to the final offer for [Defendant's] property and potential condemnation if the final offer was not accepted." Pl.'s S.J. Mot. at 5 (citing Resolution No. 8605 (Pl.'s App. at 132-34)). Therein, Resolution No. 8605 stated that "the City Council hereby determines that a necessity exists for, and the public convenience and necessity require, the acquisition of fee simple title to certain property for use as a fire station *and other municipal purposes*, and that the City of Garland should acquire such title as necessary." Resolution (Pl.'s App. at 133) (emphasis added).

Subsequently, "[o]n March 26, 2002[,] after negotiations failed, the City filed its Original Petition in Condemnation against Defendants ... to assess the fair market value of [the Property] being condemned." Pl.'s S.J. Mot. at 8 (citing Petition in Condemnation (Pl.'s App. at 135-38)). Thereafter, on June 25, 2002, "the Special Commissioners appointed by the [c]ourt awarded [Defendants' Property] to the City and assessed the value of the Property at $358,573." Pl.'s S.J. Mot. at 8-9 (citing Award of Commissioners (Pl.'s App. at 189-90)). Afterwards, "[o]n July 1, 2002, Defendants filed in the state court their Verified Plea to the Jurisdiction and Objections to the Award of the Special Commissioners [("Verified Plea")]." *Id.* at 9 (citing Verified Plea (Pl.'s App. at 167-71)). Therein, "Defendants challenged the Plaintiff's Right to acquire Defendants' [Property], as well as the amount of the [A]ward of the Special Commissioners." *Id.; see also* Verified Plea at 2-3 (Pl.'s App. at 168-69). Shortly thereafter, "[o]n September 6, 2002, the City deposited the money awarded by the Special Commissioners into the registry of the Court. On October 24, 2002, [Defendants] withdrew the funds from the registry of the Court." Pl.'s S.J. Mot. at 10; *cf.* Lloyd Dep. p. 40, ll. 4-10 (Pl.'s App. at 13). Notwithstanding the decision, "both the City and the [Defendants appeal] the amount of money awarded to the [Defendants] by the Special Commissioners." Pl.'s S.J. Mot. at 10.

Finally, on June 17, 2004, Defendants filed their Original Counterclaim ("Counterclaim"). Defendants' Counterclaim stated causes of action for: (1) inverse condemnation; (2) equal protection under the 14th Amendment; and, (4) substantive due process under § 1983. Countercl. at 4-6 (Pl.'s App. at 142- 144).[5]

b. Residential Development

"In early November of 2000, Charles Hicks [("Hicks")], developer and real estate broker, noticed [Defendants' Property] posted for sale by a realtor's sign. Upon his further investigation he learned of surrounding property that might be available for purchase and development" for a residential subdivision. Defs.' S.J. Resp. at 6; *see also* Hicks Dep. p. 20, l. 9 to p. 22, l. 18 (Defs.' App. at 69-71). Thereafter, Hicks and David Siciliano ("Siciliano"), acting through Siciliano & Hicks, Inc. ("Siciliano & Hicks"), began negotiations with surrounding property owners. *See, e.g.*, Hicks Dep. p. 21, l. 19 to p. 23, l. 24 (Defs.' App. at 70-72). Siciliano & Hicks "retained Jones & Boyd, Inc., engineering firm, with Jeffrey Miles [("Miles")] as lead consultant, to begin detailed planning for the residential subdivision in

[5] Additionally, "[o]n January 10, 2005, Defendants filed their First Amended Original Counterclaim ... alleging the same causes of action ... as their Original Counterclaim." Pl.'s S.J. Mot. at 11.

June of 2001." Defs.' S.J. Resp. at 6; *see also* Miles Dep. p. 8, l. 12 to p. 9, l. 24 (Defs.' App. at 297- 98). Afterwards, on August 15, 2001, Siciliano & Hicks purchased 108.911 acres of surrounding area. Hicks Dep. Ex. 9; *cf.* Hicks Dep. p. 32, ll. 1-8 (Defs.' App. at 166-206; 80).

Subsequently, on August 22, 2001, Miles "met with City staff members to discuss the proposed development of the property surrounding [Defendants' Property]; consisting of approximately 138 acres of land." Defs.' S.J. Resp. at 7; *see also* Miles Dep. p. 19, l. 2 to p. 20, l. 12; Miles Dep. Ex. 4 (Defs.' App at 300-01; 326). After the City expressed concerns with a proposed access road, Miles sent a revised proposal to Robert Wunderlich, Director of Garland's Transportation Department. *Compare* Miles Dep. p. 23, l. 11 to p. 24, l. 15 (Defs.' App. at 303-04) *with* Miles Dep. Ex. 6 (Defs.' App. at 327-28). "The revision considered an entrance road across [Defendants' Property], not owned by [Siciliano & Hicks] ." Defs.' S.J. Resp. at 8; *cf.* Miles Dep. p. 42, l. 13 to p. 43, l. 22 (Defs.' App. at 311-12).

On February 21, 2002, Miles again met with City staff members "to discuss points to the proposed subdivision." At the meeting, Miles presented a schematic that used a portion of Defendants' Property. Defs.' S.J. Resp. at 8- 9; *see also* Miles Dep. Ex. 9 (Defs.' App. at 335-41). Subsequently, "[o]n March 28, 2002, [ ] Wunderlich sent a reply letter to [ ] Miles expressing [Wunderlich's] favor for the road alignment across [Defendants' Property]." Defs.' S.J. Resp. at 9 (citing Miles Dep. Ex. 10 (Defs.' App. at 410-13)).

"[P]rior to [Defendants] vacating the [P]roperty in January of 2003, Sue Maddox, a neighbor of [Defendants] told Jo Nell that there was going to be a road through [Defendants'] [P]roperty," and that there would not be a fire station. Pl.'s S.J. Mot. at 6; *see also* Jo Nell Dep. p. 5, l. 22 to p. 6, l. 18 (Defs.' App. at 12-13). Thereafter, "[i]n early January of 2003, [Defendants] received a Notice regarding a hearing on a requested zoning change on property surrounding theirs." Defs.' S.J. Resp. at 10; *cf.* Jo Nell Dep. p. 33, ll. 18-22 (Defs.' App. at 24). Following the Notice, on March 18, 2003, the City adopted Ordinance No. 5714, which approved a change in zoning laws from agriculture district to planned development on a 139.84 acre tract of land. Ordinance No. 5714 (Defs.' App. at 370-78). The land affected included "an entrance road designed across [Defendants' Property]." Defs.' S.J. Resp. at 11 (citing Ordinance No. 5714 (Defs.' App. at 378)).

Following the zoning change, on December 15, 2003, the City entered into a Development Agreement with Siciliano & Hicks, Inc. for the development [of the residential subdivision], located near [Defendants'] former property." That agreement "included provisions for an exchange of properties, including portions of [Defendants'] former property for use as a road." Pl.'s S.J. Mot. at 7-8 (citing Hicks Dep. Ex. 12 (Pl.'s App. at 90-113)). Finally, on May 18, 2004, Siciliano & Hicks received the City's approval for the development of the residential subdivision. Ordinance No. 5823 (Defs.' App. at 384-95).

II. Summary Judgment Standard

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). All evidence and the reasonable inferences to be drawn therefrom must be viewed in the light most favorable to the party opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The moving party bears the burden of informing the district court of the basis for its belief that there is an absence of a genuine issue for trial, and of identifying those portions of the record that demonstrate such an absence. *Celotex*, 477 U.S. at 323.

Once the moving party has made an initial showing, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a material fact issue.

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The party defending against the motion for summary judgment cannot defeat the motion unless she provides specific facts that show the case presents a genuine issue of material fact, such that a reasonable jury might return a verdict in her favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Mere assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment. *Id.* at 248-50; *Abbott v. Equity Group,* 2 F.3d 613, 619 (5th Cir.1993). In other words, conclusory statements, speculation and unsubstantiated assertions will not suffice to defeat a motion for summary judgment. *Douglass v. United Servs. Auto. Ass'n,* 79 F.3d 1415, 1429 (5th Cir.1996) (en banc). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to her case, and on which she bears the burden of proof at trail, summary judgment must be granted. *Celotex,* 477 U.S. at 322-23.

Finally, the Court has not duty to search the record for triable issues. *Ragas v. Tennessee Gas Pipeline Co.,* 136 F.3d 455, 458 (5th Cir.1998). "The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which the supports his or her claim." *Id.* A party may not rely upon "unsubstantiated assertions" as competent summary judgment evidence. *Id.*

III. Defendants' Counterclaims

"Both the United States and Texas Constitutions require governments to compensate landowners for *takings* of their property for public use." *City of Harlingen v. Estate of Sharboneau,* 48 S.W.3d 177, 182 (Tex.2001) (citing "U.S. Const. amend. V (requiring 'just compensation'); Tex. Const. art. 1, § 17 ('adequate compensation')"). Furthermore, "[w]hen a government condemns real property, the normal measure of damages is the land's market value." *City of Harlingen,* 48 S.W.3d at 182. Additionally, "[a] city can only condemn the amount of property for which it has a public need and specific purpose." Defs.' S.J. Resp. Brief at 11 (citing *Franklin County Water Dist. v. Majors*, 476 S.W.2d 371, 374 (Tex.Civ.App.--Texarkana 1972, writ ref'd n.r.e.)). "That the lands of the citizen may be taken under the right of eminent domain for public highways is well settled; but the right of eminent domain implies that the purpose for which it may be exercised must be a public one and not a mere private one." *Tod v. Massey,* 30 S.W.2d 532, 534 (Tex.Civ.App.-Galveston 1930, no writ).

Although both sides contest the compensation awarded to Defendants, Plaintiff's Motion for Summary Judgment addresses only Defendants counterclaims for inverse condemnation, equal protection, and substantive due process.

a. Inverse Condemnation

Because Defendants have not yet relinquished legal title to the Property, the Court analyzes the current situation under inverse condemnation. *See* Black's Law Dictionary 310 (8th ed.2004) (defining inverse condemnation as "[a]n action brought by a property owner for compensation from a governmental entity that has taken the owner's property without bringing formal condemnation proceedings"). While Plaintiff concedes that Defendants may contest the *amount* of the compensation, it disputes vigorously that Defendants may contest the actual taking *itself.* Specifically, Plaintiff contends that Defendants taking argument is prohibited as a matter of law; and, notwithstanding this response, Defendants alternative theory also fails as a matter of course.

1. Irrebuttable Presumption

Plaintiff begins its argument by declaring that "[t]he [Defendants] waived any right to complain about the taking by withdrawing the funds from the registry of the Court. Indeed, *"State v. Jackson,* 388 S.W.2d 924 (Tex.Sup.Ct.1976) [ ] holds that withdrawal by a condemnee of the money paid into the court on quick taking forecloses a legal challenge to the validity of the taking and limits further litigation to the amount of

the award."[6] *Smart v. Texas Power and Light Co.*, 525 F.2d 1209, 1210 (5th Cir.1976). Furthermore,

> [t]he Supreme Court long ago approved the Jackson-type presumption of consent: 'But by accepting the sum awarded for the land actually taken, [the property owners] have lost the right to insist that the petition [of condemnation] was not maintainable. They cannot ratify the condemnation by receiving the appraised value of the land condemned and then ask to have the condemnation set aside and annulled....'

Smart, 525 F.2d at 1211 (quoting *Winslow v. Baltimore & Ohio Railroad Co.*, 208 U.S. 59, 62 (1908). Hence, after the condemnee withdraws the award, such action creates an *"irrebuttable* presumption of legal consent to the taking." *Id.* at 1210 (emphasis added). As Plaintiff emphasizes, such a presumption is absolute. Indeed, an irrebuttable presumption, or conclusive presumption is one "that *cannot* be overcome by any additional evidence or argument." Black's Law Dictionary 1223 (8th ed.2004) (emphasis added).

In their response, Defendants do not contest the premise of the irrebuttable presumption. Rather, they argue the presumption should not apply because the City committed fraud in its actions. To wit, Defendants argue that in order for there to be a presumption of consent, or waiver, such consent must be voluntary. *See* Defs.' S .J. Resp. Brief at 8 (" 'Waiver' is the intentional relinquishment of a known right." (citing *Cathey v. Meyer*, 115 S.W.3d 644, 658 (Tex.App.-Waco 2003, pet. Filed); *United States Fidelity & Guar. Co. v. Bimco Iron & Metal Corp.,* 464 S.W.2d 353, 357 (Tex.1971))). Moreover, due to the City's alleged illegality, Defendants waiver required "a voluntary action *after* discovery of the fraud which either relinquishes a right or validates the fraud." *Id.* (citing *Cathey,* 115 S.W.3d at 661). Therefore, because Defendants did not validate the fraud *post facto,* there was no voluntary waiver, and the irrebuttable presumption does not apply.

However novel or sound, the Court cannot accept such conclusions.[7] Notably, the argument fails because of Defendants' own actions. In their Verified Plea, filed July 1, 2002, in state court, Defendants assert "Plaintiff failed to determine *public need and necessity* prior to filing its Petition in Condemnation" and "filed to determine the appropriate location *and amount of land* required prior to filing the Petition in Condemnation...." Verified Plea at 2 (Pl.'s App. at 168). Therefore, Defendants began their private use argument nearly two years before their now stated counterclaims. However uncertain the outcome in the end, Defendant recognized the possibilities from the beginning. To wit, in 2002, Defendants faced two mutually exclusive options. They could either pursue the public need argument, or receive the award. They chose the latter. Indeed, they did so intentionally, in full view of their own arguments. In sum, Defendants willingly relinquished their ability to determine public need and necessity when they removed the award. There is simply no need to determine fraud *post facto;* Defendants have waived that option.[8]

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[6] "Even when a condemnee accepts the award and is *foreclosed* from challenging the validity of the condemnation, he may pursue his due process right to receive just compensation." *Smart,* 525 F.2d at 1211 (emphasis added).

[7] Defendant readily admits its innovative approach. *See* Defs.' S.J. Resp. Brief at 8 ("These facts are a case of first impression. Research has revealed no case law directly on point or even so similar as to be a clear avenue for this court to follow. However, such a situation does not make the position wrong or illogical, only novel".).

[8] Moreover, the Court remains dubious as to Defendants' fraud argument. Not only is there a lack of fraudulent activity, but Defendants fail to show why the road providing access to a land-locked subdivision does not conform to "other municipal purposes," or more specifically, to public use. Merely because a municipality uses a private developer for its mechanical actions, does not transform its

They can only dispute the award amount.

Therefore, the Court GRANTS Plaintiff's Summary Judgment Motion with respect to Defendants' taking argument.

IV. Expert Testimony

As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility, and should be left for the jury's consideration. *Dixon v. International Harvester Co.*, 754 F.2d 573, 580 (5th Cir.1985). "Indeed, expert testimony is uncertain, at best, as a basis for an estimate by the jury of the value of land. Jurors usually understand that." *Hays v. State*, 342 S.W.2d 167, 173 (Tex.Civ.App.-Dallas 1960, writ ref'd n.r.e.)). Moreover, Plaintiff has not demonstrated that these experts' opinions so lack a "reliable basis in the knowledge and experience of the discipline" as to fail to be of assistance to a jury. *Daubert*, 509 U.S. at 592. The Court therefore finds both expert opinions sufficiently valid to be considered by the trier of fact.

a. Traci Law

Plaintiff moves to Strike Defendants' expert Law on two separate grounds. First, Plaintiff argues that "[a]ll four sale comparables chosen by Law have drastically varying characteristics from the Property and are not acceptable under [*Guadalupe-Blanco River Authority v. Kraft*, 77 S.W.3d 805, 808 (Tex.2002)]."[9] Pl.'s Mot. to Strike Law at 3. Second, Plaintiff moves to Strike Law because "Law's methodology in ascertaining [fair market value] of the Property does not comply with federal evidentiary standards set forth in *Daubert*, and therefore, her opinions should be stricken ." *Id.* at 7. Notwithstanding Plaintiff's objections, this Court believes Defendants are correct in their Response that "Plaintiff's Motion is nothing more than a collection of complaints about professional differences in opinion that go to the weight of the expert's opinions, not the admissibility of [Law's] testimony." Defs.' Law Resp. at 5.

1. Comparable Sales

The Supreme Court of Texas states that "the central requirement of any reliable appraisal technique" is to "determine the fair market value of the [property] actually taken."[10] *Kraft*, 77 S.W.3d at 808. "Courts have long favored the comparable sales approach when determining the market value of real estate property." *City of Harlingen*, 48 S.W.3d at 182; *United States v. 320.0 Acres of Land*, 605 F.2d 762, 798 (5th Cir.1979). Under this approach, "[c]omparable sales must be voluntary, and should take place

activities into private dealings. If the basis of fraud is private development, evidence must be shown in support. The Court finds it troubling that Defendants omit such discussion.

[9] Hereinafter *Kraft.*

[10] Additionally, Plaintiff cites *Kraft* for the proposition that "when the underlying data relied upon by the appraiser is not comparable to the condemned land, the methodology fails rendering the appraiser's opinions unreliable." Pl.'s Mot. to Strike Law at 3-4; Pl.'s Mot. to Strike Mitchell at 5. The Court agrees fully with the stated rule of law, but finds error in Plaintiff's application. First, the term comparable does not mean identical. *State v. Rust*, 468 S.W.2d 581, 586 (Tex.Ci.App.-Ft.Worth 1971, writ dism'd) ("Similarity does not mean identical, but having a resemblance."). Furthermore, the Court observes the unique facts of *Kraft*, where the expert compared current sale to a *hypothetical tract* of land he contrived. Specifically, *that* is why the Court rejected the inclusion of the expert's testimony, and found the evidence incomparable. *See Kraft* 77 S.W.3d at 809-10 ("Although [the expert] asserted that he used the sales comparison method to value the condemned easement, his comparable sales were similar *not* to the strip of land taken, but to a *hypothetical* tract reconfigured and relocated to a portion of [Defendant's] property with markedly different characteristics.") (emphasis added).

near in time to the condemnation, occur in the vicinity of the condemned property, and involve land with similar characteristics." *City of Harlingen,* 48 S.W.3d at 182; *see also United States v. Trout,* 386 F.2d 216, 223 (5th Cir.1967). Furthermore, "[c]omparable sales need not be in the immediate vicinity of the subject land, so long as they meet the test of similarity." *Id.* Finally, "if the comparison is so attenuated that the appraiser and the fact-finder cannot make valid adjustments fore these differences, a court should refuse to admit the sale as comparable." *Id.; Kraft,* 77 S.W.3d at 808 ("The comparable sales method fails when the comparison is made to sales that are not, in fact, comparable to the land condemned.").

Plaintiff argues that Law's comparables are flawed for a variety of reasons. Specifically, the Court finds such arguments break down into the groups of: (1) size; (2) zoning; and (3) idiosyncrasies, such as surrounding roads and abutting golf courses. However, as precedent shows, these are issues for the trier of fact.

First, as Defendants state, "the difference in sizes of the subject property and a comparable sale has been held to go to the *weight* of a witness's testimony, not its admissibility, since at least 1937." Defs.' Law Resp. at 9 (emphasis added) (citing *City of Houston v. Pillot,* 105 S.W.2d 870 (Tex.Comm.App.1937); *Hays,* 342 S.W.2d at 172. Second, "the fact that two properties do not have the same zoning also goes to the *weight* of an expert's opinion, not its admissibility." Defs.' Law Resp. at 9 (emphasis added) (citing *Board of Regents v. Pruett,* 519 S.W.2d 667, 672-73 (Tex.Civ.App.- Austin 1976, writ ref'd n.r.e.)). Finally, particular nuances between properties, such as accessibility and burdens of easement, has been "held to go to the weight of the evidence and not to its admissibility...." *Hays* 342 S.W.2d at 172. Although such differences taken to an extreme may well present properties with *diss* imilar characteristics, *see United States v. 33.90 Acres of Land,* 709 F.2d 1012, 1014 (5th Cir.1983), in this case, the Court cannot say *as a matter of law,* that such differences exist.[11] The issue is simply one for the trier of fact.

Moreover, the Court finds little novelty or logic in Plaintiff's arguments. Property differences will always exist, and expert distinctions will always be likely. *Cf. Hays,* 342 S.W.2d at 170 ("It has been said that on no other rule of evidence has there been a grater divergence of opinion among the courts than on the question whether evidence as to sales of similar property is admissible as substantive proof of the value of a particular tract of land or interest in realty." (quoting 32 C.J.S. Evidence § 593, p. 444)). To wit, Plaintiff must proffer more than mere non-parity.

This is not to say that all comparables deserve inclusion. Indeed, "should it appear that reasonable minds cannot differ from the conclusion that the evidence of another sale lacks probative force because of dissimilarities,

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[11] While *33.90 Acres of Land* contained some factors existing in the case *sub judice,* such as differences in size and use classification, it also contained other factors, such as a "time differential of seven or eight years between the offered comparable sales and the government's taking," *id.* at 1014, which are simply not present here. Regardless, a district court has broad discretion in its determination of comparable sales. *See 320.0 Acres of Land,* 605 F.2d at 798-99 ("As with all evidentiary matters, the trial judge has considerable latitude in admitting or excluding tendered 'comparable sales ....' "); *see also Board of Regents v. Puett,* 519 S.W.2d 667, 673 (Tex.Civ.App.-Austin 1975, writ ref'd n.r.e.) ("The discretion of the trial court, in determining whether a sale is sufficiently similar to be admissible, as a circumstance influencing an expert witness in arriving at his opinion of value, is very broad."). As such, no hard and fast rule can be developed for comparables; each case must be analyzed in its own right. *See Rust,* 468 S.W.2d at 586 ("No general rule can be laid down regarding the degree of similarity that must exist to make such evidence admissible.").

remoteness in time and distance, or not being voluntary, then the trial court should exclude evidence of the details of such other sales." *Hays,* 342 S.W.2d at 174. Such is not the present case. Although the lands compared differ somewhat in size, zoning, and abutment properties, the Court finds reasonable minds could agree the properties compared are reasonably similar.[12]

2. Fair Market Value Methodology

Because Plaintiff challenges the reliability of Law's fair market value ("FMV") methodology, the Court must therefore analyze the argument under the standards first articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). In *Daubert,* the Supreme Court instructed district courts to function as gatekeepers in order to ensure that only reliable and relevant expert testimony is presented to the jury. *Id.* at 590-93. The analysis focuses on the reasoning or methodology employed by the expert, not the ultimate conclusion. *Watkins v. Telsmith, Inc.,* 121 F.3d 984, 989 (5th Cir.1997). The district court has wide latitude in deciding how to determine reliability, just as it has considerable discretion with respect to the ultimate reliability determination. *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 152-53 (1999).

To a large extent, Plaintiff's methodology arguments mirror the reasoning used in its comparable arguments. As such, the Court need not repeat its previous analysis. Items such as the timing of comparable sales, *see* Pl.'s Mot. to Strike Law at 12, go to the *weight* of the evidence and not its admissibility. *See, e.g., Hays,* 342 S.W.2d at 171.

Plaintiff voices its largest FMV methodology complaint with respect to sales comparable number four. "Law allegedly confirmed a price of $4.77 per square foot for sales comparable four ... [but] later discovered that the actual price ... was $2.15 per square foot ." Pl.'s Mot. to Strike Law at 9; *cf.* Law Dep. p. 202, ll. 8-24 (App. to Pl.'s Mot. to Strike Law [hereinafter "Law App."] at 110). Plaintiff argues that because Law did not alter her opinion and report after discovering this error, her methodology is patently flawed. The Court disagrees. As Defendants point out, Law states that due to less reliance placed on comparable four, no adjustments were necessary. *See* Law Dep. p. 212, ll. 6-20 (Law App. at 113). Other than the fact that it vehemently disagrees with Law's report, Plaintiff presents no compelling reason why such evidence should not go to the trier of fact.[13]

In sum whether considering comparable sales or

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[12] Furthermore, such a decision by the Court does not foreclose the Plaintiff's opportunity to expose any differences between such properties. On the contrary, Plaintiff may highlight opposing qualities before the trier of fact. *Cf. United States v. 5139.5 Acres of Land,* 200 F.2d 659, 662 (4th Cir.1952) ("If the expert has made careful inquiry into the facts, he should be allowed to give them as the basis of the opinion he has expressed. If he [has] not made careful inquiry, this will be developed on cross examination and will weaken or destroy the value of the opinion.").

[13] In perhaps its weakest argument, Plaintiff alleges that Law's methodology is flawed because she evaluated the entire tract of Property, rather than the subject in dispute. Pl.'s Mot. to Strike Law at 14. Specifically, Plaintiff asserts that "[t]he property at issue herein is the unidentified portion of the property which Defendants assert Plaintiff had no right to condemn. Hence, the valuation of the entire property as of the trial date is irrelevant." *Id.* at 14-15. Such an argument is illogical, if not disingenuous. As Defendants respond, "[t]he fact is that the City has alleged to take the entire subject property and has not designated only a portion of it." Defs.' Law Resp. at 16. In essence, Plaintiff ignores "the central requirement of any reliable appraisal technique: that it first seek to determine the 'fair market value of the *strip actually taken." ' Kraft,* 77 S.W.3d at 808 (citing *State v. Meyer,* 403 S.W.2d 366, 371 (Tex.1966)).

fair market value methodology, the Court finds no reason to exclude either Law or her opinions and reports from the trier of fact. Therefore, the Court DENIES Plaintiff's Motion to Strike Law.

b. Paul C. Mitchell

Plaintiff next moves to Strike Defendants' expert Mitchell on three separate grounds. First, Plaintiff claims that "Mitchell's report is irrelevant because it values the entire tract and the entire tract is not at issue in the counterclaim."[14] Pl.'s Mot. to Strike Mitchell at 4. Second, Plaintiff argues that "[b]oth sale comparables chosen by Mitchell are not acceptable under *Kraft." Id.* at 5. Last, Plaintiff contends that "Mitchell's methodology in ascertaining [fair market value] of the Property does not comply with federal evidentiary standards set forth in *Daubert,* and therefore, his opinions should be stricken." *Id.* at 7. Analogous to Law, the Court agrees with Defendants response that "Plaintiff's Motion is nothing more than a collection of complaints about differences in appraisal experts' opinions that go to the weight of the experts' opinions, not the admissibility of the testimony." Defs.' Mitchell Resp. at 4.

1. Comparable Sales

Plaintiff argues first that Mitchell's comparables are patently invalid because of resulting adjustments. "For example, Mitchell [increased] the comparator price 30% for location, 10% for size, 5% for Front Footage and 10% for potential use," and added "an additional 25% for 'extraordinary assumptions." ' Pl.'s Mot. to Strike Mitchell at 6 (citing Mitchell Report at 25; 27 (App. to Pl.'s Mot. to Strike Mitchell [hereinafter "Mitchell App."] at 44; 46)). In sum, Plaintiff states "[t]he mere necessity of these assumptions demonstrates the weak comparison between the two properties." Pl.'s Mot. to Strike Mitchell at 6. The Court, however, finds room for disagreement.

"Under a comparable sales analysis, the appraiser finds data for sales of similar property, then makes upward or downward adjustments to these sales prices based on differences in the subject property." *City of Harlingen,* 48 S.W.3d at 182. Mitchell's adjustments follow this application. Moreover, Mitchell adjusts for factors that have already been held to go to the weight of the evidence, and not its admissibility. *See, e.g., City of Houston,* 105 S.W.2d 870 (differences in size go to the weight of testimony). In short, the Court cannot say that Mitchell's comparables are invalid as a matter of law.

2. Fair Market Value Methodology

Plaintiff asserts two minor arguments with respect to Mitchell's methodology. First, it argues that "the number of properties offered as comprators [sic] is too small to form an adequate basis for an opinion of value...." Pl.'s Mot. to Strike Mitchell at 8-9. The Court finds such contentions unsupported. Plaintiff cites no authority for its inference that too few comparables fail to establish *prima facie* evidence. On the contrary, precedent construes otherwise. *Cf. United States v. 131.68 Acres of Land,* 695 F.2d 872, 876-77 (affirming decision of district court where it relied on only two comparable sales). In sum, Plaintiff fails to establish any numerical minimum for comparable sales.

Plaintiff next argues that Mitchell makes unnecessary upward adjustments to the comparables, and that such error renders his FMV methodology invalid. The Court has already considered this argument. Indeed, as the Court found the upward adjustments an issue for the trier

[14] Essentially, Plaintiff repeats its preceding argument that Mitchell's methodology is flawed because he evaluated the entire tract of property, rather than the subject in dispute. Pl.'s Mot. To Strike Mitchell at 4. As stated before, because the City is now attempting to take the entire Property, it must live with the consequences of litigating the whole portion. *See supra* note 9. Therefore, the Court will not address this argument in any further detail.

of fact, Plaintiff fails in this argument as well.[15]

As before, other than the fact that it vehemently disagrees with Mitchell's report, Plaintiff presents no compelling reason why such evidence should not go to the trier of fact. Therefore, the Court DENIES Plaintiff's Motion to Strike Mitchell.

V. Conclusion

For the foregoing reasons, Plaintiff's Motion for Summary Judgment on Defendants' Counterclaims is hereby GRANTED, Plaintiff's Motion to Strike Defendants' Expert Traci Law is hereby DENIED, and Plaintiff's Motion to Strike Defendants' Expert Paul C. Mitchell is hereby DENIED.

It is so ordered.

[15] In support of its contentions that Mitchell's FMV methodology is flawed, Plaintiff cites to its own expert report. Unsurprisingly, disagreement is found. However, such discordance does not establish success for either party. Rather, tension of opinion supports the posture of this case. Moreover, it is the trier of fact, and not a matter of law, that judges the battle of experts.