IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

LAND INVESTMENT COMPANY, a New Mexico limited partnership, HINKLE HOMES, a New Mexico corporation, HERB MARCHMAN, Trustee of the Burroughs Liquidating Trust, and FOUR HILLS ASSOCIATES, a New Mexico general partnership,

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED
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Intervenors-Appellants,

v.

NO. 24,600

CITY OF ALBUQUERQUE, a municipal corporation,,

Petitioner-Appellee.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Wendy E. York, District Judge

Hunt & Davis, P.C.
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for Appellants Land Investment Co. & Hinkle Homes

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for Appellee

MEMORANDUM OPINION

ALARID, Judge.

Intervenors, Land Investment Company (Land Investment), Hinkle Homes, Inc. (Hinkle Homes), Herb Marchman, Trustee of the Burroughs Liquidating Trust (Trust), and Four Hills Associates (Four Hills) appeal from the judgment of the district court.

PUBLIC EASEMENT BY PRESCRIPTION

Section 36 is located east of Four Hills Village Subdivision. A portion of Four Hills Village and the Manzano Open Space is located within Section 35, to the west of Section 36. A roadway known as Stagecoach/La Cabra traverses Four Hills Village in Section 35 and crosses the Manzano Open Space to the western boundary of Section 36. The principal issue presented by this appeal is whether the district court erred in finding that twenty-foot wide public prescriptive easements arose within Section 36 prior to 1958.

Intervenors jointly requested that the district court determine that a public right of way by prescription provided access to their properties and that it extended *through* Section 36. Intervenors argued that "the road, according to [Charles] Williams, went all the way through the property he now owns and goes up to a high point located on the property presently

owned by the Burroughs Trust, or Mr. Marchman." Intervenors cited to the testimony of Gene Hinkle, who recalled that the roadway "extended to the east through Section 36." In a letter ruling, the district court determined that a twenty-foot wide public prescriptive easement crossed the condemned parcels and the remaining parcels within Section 36. The district court further determined that the existence of this public prescriptive easement prevented an easement by necessity from arising. The district court subsequently incorporated these rulings in its findings of fact and conclusions of law.

Following the district court's letter ruling, Intervenors filed a motion for reconsideration, asking the district court to find that the public prescriptive extended only *to* the boundary between Sections 35 and 36 and that it did *not* extend *through* Section 36 to their respective properties. Intervenors argued that roadways *within* Section 36 were not clearly visible in the 1935 aerial photograph and that the testimony of Williams and Hinkle establishing roadways within Section 36 was limited to the period of their actual knowledge of the public's use of the roadways, which commenced in 1950. Intervenors acknowledged that the evidence was sufficient to establish that prescriptive easements providing access to their respective properties matured by 1960—in other words, that the ten year prescriptive period began to run no later than 1950: "The [c]ourt is correct in its finding that a public prescriptive easement arose across the condemned parcels *and the remaining tracts within Section 36*. However, Intervenors would respectfully argue that the evidence established the public prescriptive easement *within Section 36 to the Intervenors' parcels matured by 1960*." (Emphasis added). Intervenors nevertheless argued that the evidence was insufficient to establish the requisite user prior to 1950. The district court denied Intervenors' motion for

reconsideration without explaining the grounds for its decision.

On appeal, Intervenors Land Investment, Hinkle Homes and Trust challenge the district court's finding that a prescriptive easement existed in 1958. Intervenors argue that the district court erred as a matter of law because the ten- year prescriptive period could not have begun to run as long as the State owned Section 36. Intervenors also argue that the district court's decision is not supported by substantial evidence of user prior to 1950.

Intervenors' argument that the ten-year prescriptive period did not begin to run while Section 36 was owned by the State was not raised in a timely manner in the district court and therefore was not preserved. There is absolutely no discussion of this issue in Intervenors' written closing argument ,or in their motion for reconsideration. To the contrary, Intervenors conceded in their motion for reconsideration that a public prescriptive easement within Section 36 matured in 1960. A prescriptive easement could not have arisen in 1960 unless the ten-year prescriptive period had begun to run in 1950, while the properties within Section 36 were owned by the State. The issue of whether a prescriptive easement can arise over property owned by the State was raised by Four Hills for the first time at a November 11, 2001, hearing on the location of the easement, *after* the district court had denied Intervenors' motion for reconsideration.

Apart from Intervenors' failure to preserve the issue, we agree with the City that Intervenors should be judicially estopped from taking a legal position that is inconsistent with the position they successfully asserted in the district court. *Citizens Bank v. C & H Constr. & Paving Co.*, 89 N.M. 360, 366, 552 P.2d 796, 802 (Ct. App. 1976). Intervenors jointly asked the district court to find a public prescriptive easement based on evidence of

public use beginning prior to 1958, when Section 36 was owned by the State. The district court granted Intervenors relief consistent with their legal theory that the prescriptive period began to run in 1950, during the period of State ownership. We see nothing unfair in holding Intervenors to the legal theory they successfully asserted in the district court. *Id.*; *see also Harrison v. ICX Illinois-California Exp. Inc.*, 98 N.M. 247, 252, 647 P.2d 880, 885 (Ct. App. 1982).

We reject Intervenors' sufficiency-of-the-evidence argument, holding that there was substantial evidence from which the district court could have found that a public prescriptive easement existed by 1958. As previously noted, Intervenors conceded in the district court that the evidence was sufficient to establish the existence of a prescriptive easement by 1960. Under Intervenors' own theory of the case, the ten-year prescriptive period necessarily began to run no later than 1950. We must decide whether the district court had a reasonable basis for extrapolating backwards in time to 1948. Charles Williams testified that a road within Section 36 was used prior to the 1950s to access "two old mines" on the Trust's property. Hinkle corroborated Williams, testifying that a road crossing Section 36 to the Trust's property existed in 1950 and ran up "to the gold mines that existed back some time ago." Hinkle testified that as of 1950 this same road was used for hay rides across Section 36 to the Trust's land and that by 1950, when he arrived in Albuquerque, these hay rides already were "quite popular." In the absence of evidence suggesting that the character or intensity of activities on the lands within Section 36 changed significantly between 1948 and 1950, when Hinkle arrived in New Mexico and became involved in recreational activities in the Four Hills area, the district court was entitled to draw the reasonable inference from the

evidence that the roads within Section 36, observed by Hinkle in1950, existed prior to the period of Hinkle's and Williams' personal knowledge and that similar use of the road had occurred for some period prior to 1950. We therefore hold that the district court's finding that the public easement arose by 1958 to be supported by substantial evidence.

In a related argument, Intervenors Land Investment, Hinkle Homes, and Trust argue that the district court erred by failing to rigorously apply the heightened clear-and-convincing-evidence standard of proof to the elements of a prescriptive easement. This argument is another example of Intervenors' reliance on inconsistent positions. Intervenors urged the district court to freely draw inferences from the evidence about events occurring decades earlier. The district court's determination that the activities within Section 36 predated Hinkle's and Williams' personal knowledge, beginning as early as 1948, is as easily reasonable as the inferences that Intervenors encouraged the district court to draw from the evidence. We will not subject the district court to dual standards.

Intervenor Four Hills raises an additional challenge to the sufficiency of the evidence. Four Hills argues that even if a prescriptive easement is found to have reached the other Intervenors' properties by 1958, there was no evidence that an easement extended to the north into Four Hills' property. Four Hills' argument is yet another example of taking inconsistent positions. As the City correctly observes, during the liability phase Four Hills joined with the remaining Intervenors in requesting that the district court find that Intervenors had access to a public prescriptive easement extending across Section 35 and within Section 36 to their properties. In Intervenors' Joint Closing Argument, Four Hills made no effort to distinguish itself from the other Intervenors. Likewise, in Intervenors' motion for

reconsideration, Four Hills joined the remaining Intervenors in conceding that the prescriptive easement arose across Intervenors' parcels. Four Hills did not attempt to distinguish itself from the other Intervenors in the Intervenors' Motion to Reconsider. We agree with the City that Four Hills did not preserve this issue.

Even if the issue had been preserved, it is without merit. Hinkle testified during the liability phase trial that by the1950s roads extended from the main road into what is now Four Hill's property. Hinkle's testimony provides substantial evidence supporting the district court's finding that the easement extended into Four Hills' property.

Intervenors also challenge the district court's finding that the easement is twenty feet wide. Once again, we affirm the district court. The width of a public prescriptive easement is the width necessary to accommodate the adverse use by the public that establishes the easement. *State ex rel. Baxter v. Egolf*, 107 N.M. 315, 318, 757 P.2d 371, 374 (Ct. App. 1988). We recognize that this width is not necessarily limited to the beaten path. *Id.* It can be wider or narrower than the beaten path, depending on what width is necessary to accommodate the historical use of the easement by the public. *Jicarilla Apache Tribe v. Bd. of County Comm'rs*, 116 N.M. 320, 333, 862 P.2d 428, 441 (Ct. App. 1993), *rev'd on other grounds*, 118 N.M. 550, 883 P.2d 136 (1994). There is substantial evidence supporting a determination that historically the trails within Section 35 were no more than twenty feet wide. This evidence is summarized in the City's Answer to Brief-in-Chief of Four Hills at 8 and the City's Answer to Brief-in-Chief of Land Investment, Hinkle Homes, and Trust at 16. There was no evidence that a twenty-foot wide easement could not safely accommodate the historic public uses of the easement. The district court's finding that the easement is

twenty feet in width is supported by substantial evidence and is consistent with the controlling legal standard.

EASEMENT BY NECESSITY

The district court concluded as a matter of law that "[t]he existence of the twenty (20) foot public prescriptive easements, precludes any easements by necessity over Section 35 and Section 36." Although Intervenors have challenged the district court's determination that easements of necessity providing access to their properties arose by 1958, they have not challenged the district court's legal conclusion that if public prescriptive easements existed in 1958, those easements precluded Intervenors from demonstrating their entitlement to easements by necessity. *See Herrera v. Roman Catholic Church*, 112 N.M. 717, 720-21, 819 P.2d 264, 267-68 (Ct. App. 1991) (discussing elements of easement by necessity; observing that necessity and unity of title of the dominant and servient estates must exist concurrently). In view of our affirmance of the district court's findings that public prescriptive easements providing access to Intervenors' properties arose by 1958, we affirm the district court's legal conclusion that "[n]o easement by necessity arose within Section 36 as a result of the 1958 Auction."

DAMAGES

Damages for a taking are measured by the difference between the fair market value of the property immediately before the taking and the fair market value immediately following the taking. *City of Albuquerque v. Westland Dev. Co.*, 121 N.M. 144, 148, 909 P.2d 25, 29 (Ct. App. 1995).

Intervenors Land Investment, Hinkle Homes, and Trust argue that the district court

improperly based its damages analysis on the wrong legal standards. Intervenors focus on the district court's conclusion of law No. 32, in which the district court stated that "[i]n determining damages . . . , the uses made of the property at the time of the taking and also the highest and best uses for which the property may have been suitable and adaptable in the *immediate* future must be considered." (Emphasis added). As we understand Intervenors' argument, from the present to the *near* future is a broader period than from the present to the *immediate* future. Under Intervenors' analysis, Intervenors were prejudiced if in determining the market value of their properties immediately prior to the taking, the district court failed to consider reasonable uses of their properties which were feasible within the near future, even though those uses might not have been feasible within the shorter time frame of the immediate future.

New Mexico law has not been entirely consistent in characterizing the time period extending into the future relevant to the highest and best uses of property. Our cases variously refer to the immediate future, *City of Albuquerque v. PCA-Albuquerque # 19*, 115 N.M. 739, 741, 858 P.2d 406, 408 (Ct. App. 1993) and the not too distant future, *Peterson Properties v. Valencia County Valuation Protests Bd.*, 89 N.M. 239, 243, 549 P.2d 1074, 1078 (Ct. App. 1976). The Uniform Jury Instruction adopted by our Supreme Court refers to the "near future." UJI 13-714 NMRA. We agree with the City that the purpose of qualifying "future" with terms such as "immediate," "near," or "not too distant" is to allow the factfinder to disregard possible future uses that are so distant or remote that their effect on the market value of a given property is speculative and uncertain. The district court was required to consider only those future uses that were sufficiently likely and feasible as to

have influenced the market value of Intervenors' properties, and this is so whether the relevant time frame is characterized as the "immediate future," "near future," or "not too distant future."

The crucial factor affecting damages was legal access to Intervenors' properties. In the words of the City's expert witness, Larry Brooks, access was the "focal" issue. There is no dispute that adequate legal access was essential if Intervenors' properties were to be subdivided for residential development.

The district court found that Intervenors had taken inconsistent positions regarding legal access to the north. The district court found that during the liability phase, Intervenors attempted to establish that there was no legal access to the north from their properties and that the prospects of obtaining legal access to the north was "uncertain and speculative," while during the damages phase, Intervenors put on evidence that prior to April 7, 1998, they had entered into agreements providing access to the north. Because of this inconsistency, the district court found that the evidence Intervenors offered during the damages phase regarding access to the north lacked credibility. These findings regarding access have not been challenged on appeal. Because Intervenors' testimony was the only evidence establishing legal access to the north, the district court's decision to reject Intervenors' testimony effectively foreclosed Intervenors from recovering damages based on any method of valuation that assumed the present or future availability of legal access to the north. In view of the district court's evidentiary ruling, any distinction between the "immediate future" and the "near future" was immaterial.

Intervenors also argue that the district court erred by relying on the analysis of the

City's expert, Larry Brooks. Intervenors argue that Brooks' analysis was flawed because he limited his analysis to uses to which the land was adapted on April 7, 1998, without considering uses that might arise in the near future. Intervenors also argue that Brooks failed to take into account Intervenors' evidence that "the Trust would probably, in the near future, have secured a 50 foot easement across the Baca/Johnson property." Intervenors mischaracterize Brooks' methodology. Our examination of Brooks' testimony satisfies us that he clearly understood that future uses that were "reasonably probable" as of the date of the taking should be taken into account in calculating the highest and best use of a property. However, Brooks also testified that in determining the highest and best use of the property, an appraiser should not incorporate "extraordinary assumption[s]" or "hypothetical condition[s]" into the appraisal. According to Brooks, it is improper to rely on extraordinary assumptions or hypothetical conditions in calculating an as-is value because "[i]t doesn't represent the value of what a willing buyer and a willing seller would agree to under those conditions." Brooks testified that "verbal agreements are not ordinary or usual, especially in something as important as access." Brooks testified that "a buyer would not pay for [the] uncertainty and risk associated with some kind of unenforceable verbal agreement." It is undisputed that as of April 7, 1998, Intervenors had not entered into any written easement agreements or otherwise clearly established a fifty-foot easement across the Baca/Johnson tract. Our reading of Brooks' testimony satisfies us that he applied a correct legal standard and that he considered and rejected Intervenors' testimony because he was convinced that as of April 7, 1998, legal access across the Baca/Johnson tract was a hypothetical condition that would not have been reflected in the market value of Intervenors' properties. The

district court did not err in relying on Brooks' testimony.

Intervenors Land Investment, Hinkle Homes, and Trust argue that the taking occurred in 1992 or 1993, rather than in April 1998 as found by the district court. This argument relies on evidence that beginning in 1984 the City attempted to limit public use of the Stagecoach/La Cabra public way providing access across the Manzano Open Space.

If Intervenors mean to argue that the City physically deprived their properties of access via Stagecoach/La Cabra, their argument is foreclosed by the district court's findings that "[t]he City either gave the Intervenors keys or gave them the opportunity to obtain keys to the keyed lock on the west gate of the Manzano Open Space," and that "[t]he fencing and gating of Stagecoach/La Cabra in the Manzano Open Space did not deprive the Intervenors of reasonable access to their land in Section 36." These findings have not been properly challenged pursuant to Rule 12-213(A)(3) and (4) NMRA, and therefore are binding. *Gutierrez v. Connick*, 2004-NMCA-017, ¶ 7, 135 N.M. 272, 87 P.3d 552.

To constitute a non-physical taking, the City's actions in restricting access over Stagecoach/La Cabra must have deprived Intervenors of all or substantially all beneficial use of their properties. *Estate & Heirs of Sanchez v. County of Bernalillo*, 120 N.M. 395, 397, 902 P.2d 550, 552 (1995).

Intervenors' argument that their properties were taken prior to April 7, 1998, assumes that the highest and best use of their properties has always been for residential development and that the City's efforts to limit traffic across the Manzano Open Space deprived them of that use as early as 1992 or 1993. As we now know, Intervenors' properties lacked the access required for residential development due to (1) the bottleneck resulting from lack of

developable access *within* Section 36, and (2) the lack of developable access to the north. The district court found that between 1958 and the date of condemnation, none of the Intervenors took steps to establish developable access. Thus, entirely apart from any claimed interference by the City with Intervenors' access over Stagecoach/La Cabra, Intervenors' properties were not suitable for residential development at any time between 1958 and April 7, 1998. "The term 'property' in a constitutional sense refers not to the physical object itself but to a group of rights granted to the property owner, including the right to use and enjoyment of the object." *Id.* The City's actions between 1984 and 1993 did not deprive Intervenors of the beneficial use of their properties for residential development because the group of rights owned by Intervenors did not include the rights necessary for that use.

Intervenors' properties appear to have been suitable for assembly with other lands for future development from 1958 forward. Intervenors do not argue that the City's efforts to restrict traffic over Stagecoach/La Cabra between 1984 and 1993 precluded this beneficial use of their properties. Accordingly, Intervenors have not established that they were deprived of all or substantially all beneficial use of their properties.

The district court did not err in determining that a taking of Intervenors' properties did not occur prior to the filing of the condemnation action.

Intervenors Land Investment and Hinkle Homes argue that the district court erred by limiting their damages to damages measured by the "before and after" method of valuation. Intervenors rely on *State ex rel. State Highway Dep't v. Kistler-Collister Co.*, 88 NM. 221, 539 P.2d 611 (1975). We do not read *Kistler-Collister* as endorsing a departure from the before and after test. Rather, *Kistler-Collister* merely recognized that "planned future uses

for which the property is adaptable by reason of location, its state of improvement, or other special elements of value" may be used to establish the "before" value of property. *Id.* at 224, 539 P.2d at 614. As we have previously noted, the district court rejected Intervenors' evidence establishing access to the north as lacking credibility. The district court instead relied upon evidence introduced during the liability phase establishing that the prospects of obtaining developable legal access to the north were "uncertain and speculative." With respect to access to the west, the district court found that legal access was limited to a twenty-foot wide public easement. There is no dispute that a twenty-foot wide easement was insufficient to support residential development. Intervenors' expectations of recouping their investment and of profiting from future residential development were frustrated because, on the facts as found by the district court their properties at all times lacked developable access to the north and west. Thus, to use our Supreme Court's terminology, Intervenors failed to establish that Land Investment's property was "adaptable by reason of location, its state of improvement, or other special elements of value" for development as a residential subdivision. *Id.* The district court did not err in declining to depart from the before and after valuation method in determining damages.

Hinkle Homes argues that it should have been awarded damages for the loss of an option to purchase Land Investment's property. Hinkle Homes argues that the district court erred by limiting its recovery to a share of the damages and litigation expenses recovered by the optionor, Land Investment.

As we have previously noted, New Mexico follows the before and after method in determining damages for a taking. If the activities Hinkle Homes engaged in as consideration

for the option rendered Land Investment's property "adaptable by reason of . . . its state of improvement," *id.*, for a higher use than in its raw state, any additional value presumably would have been reflected in the before value of Land Investment's property. The before and after method of valuation would have taken into account the enhancement in value, if any, attributable to Hinkle Homes' activities. Even if New Mexico were to adopt the approach of *County of San Diego v. Miller*, the maximum damages available to Land Investment and Hinkle Homes, collectively, would still be limited to the difference between the before and after values of the condemned property, in this case, nothing. *See* 532 P.2d 139, 143 (Cal. 1975) (observing that allocating compensation between optionor and optionee does not increase the total compensation award).

Hinkle Homes' argument that it was entitled to damages for lost future profits that it would have realized from exercise of the option and subsequent development of Land Investment's property is foreclosed by the district court's findings establishing that Land Investment's property lacked developable access to the west and that the prospects of obtaining developable access to the north were uncertain and speculative. In view of these findings, Hinkle Homes' claim that it would have realized profits from future residential development of Land Investment's property was mere speculation. *Camino Sin Pasada Neighborhood Ass'n v. Rockstroh*, 119 N.M. 212, 216, 889 P.2d 247, 251 (Ct. App. 1994) (upholding district court's refusal to grant damages allegedly incurred as the result of defendants' blocking easement).

Hinkle Homes also argues that it should be compensated for the loss of an option to purchase Four Hills' property. In its requested findings, Hinkle Homes asserted that "[t]he

City's actions in blocking the access through the Manzano Open Space caused Hinkle Homes to lose its option on the Four Hills Associates property." The district court declined to adopt Hinkle Homes' proposed finding. "Where a party has the burden of proof on an issue and requests findings on that issue, which are refused, the legal effect of the refusal is a finding against that party." *Jensen v. N.M. State Police*, 109 N.M. 626, 630, 788 P.2d 382, 386 (Ct. App. 1990).

Hinkle Homes' requested finding was based upon the testimony of Gene Hinkle. It was for the district court, as factfinder, to determine the weight to be afforded this testimony. *See State v. Graham*, 2005-NMSC-004, ¶ 11, 137 N.M. 197, 109 P.3d 285. The district court was entitled to disbelieve Hinkle and to attribute Hinkle Homes' decision not to exercise the option to other circumstances, including uncertainty as to Four Hills' ability to obtain approval of its development from Bernalillo County.

CIVIL RIGHTS CLAIMS

Land Investment and Hinkle Homes argue that the district court's ruling that they were not deprived due process of law is not supported by substantial evidence. We decline to address the issue of whether Land Investment's and Hinkle Homes' constitutional rights were abridged in view of Land Investment's and Hinkle Homes' utter failure to develop a cogent argument. Land Investment and Hinkle Homes do not cite a single case in support of their constitutional claim of error.

Four Hills argues that the district court's ruling on its civil rights count "is either not supported by substantial evidence or those findings were based upon an erroneous application of the law."

As an initial matter, we note that the sole legal theory relied upon by Four Hills in support of its 42 U.S.C. § 1983 claim in the district court was that the City took its right of access to its property. We agree with the City that Four Hills' proposed findings and conclusions did not alert the district court to the procedural and substantive due process arguments asserted on appeal and that these alternative legal theories were not preserved.

To the extent that Four Hills relies upon a taking as the basis for its § 1983 claim, its § 1983 claim is foreclosed by Four Hills' failure to establish a taking. As we have noted above, the district court found that the City's actions in fencing and gating Stagecoach/La Cabra did not deny Intervenors (including Four Hills) reasonable access to their properties. Thus, the City did not accomplish a physical taking of Four Hills' right of access. For the City's actions to have amounted to a regulatory, non-physical taking of its access, Four Hills was required to demonstrate that the City's efforts to restrict access via Stagecoach/La Cabra deprived Four Hills of all or substantially all beneficial use of its property. Due to the lack of developable access to the north and the limitation of access to the west to a twenty-foot wide public easement— circumstances that existed from 1958 forward to the date of condemnation—the highest and best use of Four Hills' property at all times was for assembly with other properties for future development. The City's actions cannot have deprived Four Hills of all or substantially all use of its property because at all times Four Hills was able to use its property for its highest and best use: for assembly with other properties for future development. Accordingly, Four Hills failed to establish a taking of its property. Without an underlying claim based on federal law, Four Hills failed to state a claim under § 1983. *Wilson v. Garcia*, 471 U.S. 261, 278 (1985) (observing that 42 U.S.C. § 1983 does not of

itself create any substantive rights), *superseded by statute as stated in Merrigan v. Affiliated Bankshares of CO, Inc.*, 775 F. Supp. 1408 (D. Colo. 1991).

ATTORNEY FEES

Intervenors Land Investment, Hinkle Homes ,and Trust argue that the district court erred by denying them litigation fees incurred subsequent to the City's abandonment of the condemnation of the public easement. We agree that this was error.

The City concedes that pursuant to NMSA 1978, § 42A-1-25(A)(1) (1981), Intervenors are entitled to litigation expenses incurred during the first phase of the trial. The City argues that "nothing in § 42A-1-25 establishes any basis for the Intervenors to recover attorney fees for the damages phase of the case."

Section 42A-1-25 must be read together with NMSA 1978, § 42A-1-2(F) (1981), which contains an extremely broad definition of "litigation expenses":

> 'litigation expenses' includes all expenses reasonably and necessarily incurred in the condemnation proceeding including and *subsequent to the filing of the petition*, in preparing for trial, during trial *and in any subsequent judicial proceedings* including reasonable attorney's fees, appraisal fees and fees for the services of other experts where such fees were reasonably and necessarily incurred to protect the condemnee's interest in the proceeding, in preparing for trial, during trial and in any subsequent judicial proceedings[.]

(Emphasis added).

As this case illustrates, it is entirely foreseeable that by the point in time that a condemnor abandons a condemnation action, the condemnee will already have been subjected to a temporary taking. In such cases the "condemnation proceeding" necessarily will include "subsequent judicial proceedings" to fix the amount of the condemnee's damages. *Id.* While there is no question that the district court had the authority to order

separate trials on liability and damages, Rule 1-042(B) NMRA, we will not apply the Rules of Civil Procedure so as to override the legislature's broad definition of "litigation expenses." We therefore reverse the district court's award of damages as to Intervenors Land Investment, Hinkle Homes ,and Trust and remand for reconsideration of litigation expenses. The district court should award expenses "reasonably and necessarily incurred" in *both* phases of the case.

We affirm the district court's denial of costs and attorney fees incurred in unsuccessfully litigating their civil rights claim. *Miles v. Bd. of County Comm'rs*, 1998-NMCA-118, ¶ 6, 125 N.M. 608, 964 P.2d 169.

CONCLUSION

We reverse the district court's denial of litigation expenses incurred in the damages phase as to Land Investment, Hinkle Homes, and Trust, and remand for a determination of litigation expenses reasonably and necessarily incurred in the damages phase. We affirm the judgment of the district court in all other respects.

IT IS SO ORDERED.

A. JOSEPH ALARID, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

JONATHAN B. SUTIN, Judge