

SUPREME COURT
STATE OF LOUISIANA
NO. _____

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT
Respondent

versus

VIOLET DOCK PORT, INC., L.L.C.
Applicant

Application for Writ of Certiorari to the Louisiana Supreme Court from the Fourth Circuit Court of Appeal, No. 2016-CA-0096 c/w 2016-CA-0262 and 2016-CA-0331, and from the Thirty-Fourth Judicial District Court, Parish of St. Bernard, State of Louisiana, No. 116-860, Judge Jacques A. Sanborn, Presiding

CIVIL PROCEEDING

ORIGINAL WRIT APPLICATION OF
VIOLET DOCK PORT, INC., LLC

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MAY IT PLEASE THE COURT:

WRIT GRANT CONSIDERATIONS

A. La. S. Ct. Rule X, § (1)(a)(2) – Significant Unresolved Issues of Law

This expropriation case presents significant unresolved issues of law under the Louisiana and United States Constitutions.¹ St. Bernard Port, Harbor & Terminal District (“St. Bernard”), a public port, expropriated a fully-functioning private port facility (the “Property”) owned by Violet Dock Port, Inc., L.L.C. (“VDP”). St. Bernard took the Property with the express written intention of: (1) taking over VDP’s contract with VDP’s largest customer to perform the same services that VDP formerly provided on the Property; and (2) conducting the same type of bulk cargo operations that VDP had recently improved the Property to accommodate. In short, St. Bernard took VDP’s assets to operate them. However, St. Bernard did not intend to conduct bulk cargo operations itself. Long before the expropriation, St. Bernard had hand-picked a private operator—Associated Terminals, which operates St. Bernard’s Chalmette Slip—to lease the Property. The Louisiana courts have never before been faced with such a brazen taking.

Both the United States and Louisiana Constitutions prohibit the taking of a privately-owned, ongoing business for government operation, or for operation by another favored private entity. In the courts below, VDP identified three different subsections of Article I, § 4 of the Louisiana Constitution that bear upon the legality of the taking:

- La. Const. art. I, § 4(B)(6), which provides that “[n]o business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise;”
- La. Const. art. I, § 4(B)(1)(a), which prohibits takings “for predominant use by any private person or entity;” and
- La. Const. art. I, § 4(B)(3), which prohibits consideration of “economic development, enhancement of tax revenue, or any incidental benefit to the public” when evaluating the public purpose of a taking.

La. Const. art. I, § 4(B)(6) is crystal clear in its prohibition against St. Bernard’s taking and thus is the focus of VDP’s Louisiana Constitutional challenge.

¹ “It is the role of the judiciary to determine the meaning and effect of the constitution.” *La. Fedn. of Teachers v. State*, 13-0120 (La. 05/07/13), 118 So.3d 1033, 1037 (La. 2013); *see also In re Office of Chief Justice*, 12-1342 (La. 10/16/12), 101 So.3d 9, 10-11 (“[T]he constitution is color-blind, written in black letters on white paper, which occasionally produces grey areas. It is the role of the judiciary to resolve competing claims by interpreting that most fundamental legal document, which emanates from the citizens of Louisiana.”).

VDP also challenged St. Bernard's taking under the United States Constitution. The United States Supreme Court has never approved the taking of private business assets so that the government or other private persons may redirect the revenue stream into their own pockets; taking for a pre-textual public purpose is not allowed. *See Kelo v. City of New London*, 545 U.S. 469, 477 (2005); *id.* at 493 (Kennedy, J., concurring).

This Court, which is tasked by law with the solemn duty of enforcing Constitutional limits on takings authority, has never interpreted Louisiana Const. art. I, §§ 4(B)(1), 4(B)(3) or 4(B)(6) or their relationship to Art. VI, § 21(A). Likewise, this Court has not addressed the impact of the United States Supreme Court's decision in *Kelo* on the limits of government taking authority under the Fifth Amendment.² This case tests the limits of government takings powers and falls squarely within the types of takings that *Kelo* stated would offend the Fifth Amendment. In addition, if St. Bernard's expropriation of VDP's Property does not violate the express prohibitions set forth in La. Const. art. I, § 4, it is difficult to imagine what sort of taking of private property would be prohibited.

The need for this Court's guidance in interpreting the Constitutions and the importance of this case cannot be overstated. Several well-respected organizations filed amicus briefs in the court of appeals expressing their concerns. The Pacific Legal Foundation and the Institute for Justice each explained why they believe St. Bernard's taking was unconstitutional and must be stopped to avoid setting a dangerous precedent. VDP anticipates amici will appear before this Court, too. Thus, this case raises issues of widespread importance that warrant this Court's review.

B. La. S. Ct. Rule X, § (1)(a)(4) – Erroneous Interpretation or Application of Constitution or Laws

As explained above, the trial court did not address the prohibitions contained in La. Const. art. I, § 4. The Fourth Circuit panel issued three distinct opinions with three differing views on the meaning of Article I, § 4(B)(6), and the extent to which, if any, La. Const. art. VI, § 21 creates an exception to it. In holding that La. Const. art. VI, § 21 contains exceptions that trump art. I, § 4 in its entirety, the Fourth Circuit Majority erroneously interpreted the Louisiana

² The Fifth Amendment is made applicable to the states by the Fourteenth Amendment. *See Penn-Central Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978).

Constitution to immunize a broad spectrum of governmental takings from Constitutional scrutiny.

The Fourth Circuit Majority additionally erred by failing to address VDP's argument that the expropriation violated the Fifth Amendment to the United States Constitution. Although the Majority acknowledged VDP's Fifth Amendment argument, it offered no reason for its implicit rejection of it. Appendix, p. 22. As a matter of law, the Louisiana Constitution cannot authorize takings of private property that would be prohibited under the United States Constitution.

Review is warranted to correct the Fourth Circuit's erroneous interpretation of the Louisiana and United States Constitutions. *See* La. S. Ct. Rule X, § 1(a)(4).

C. La. S. Ct. Rule X, §§ 1(a)(1) and (5) – Conflicting Decisions and Gross Departure From Proper Judicial Proceedings

As detailed above, the Fourth Circuit Majority's opinion conflicts with the United States Supreme Court's decision in *Kelo*, as well as other state Supreme Court decisions such as *Rhode Island Economic Development Corp. v. The Parking Co., L.P.*, 892 A.2d 87, 104-08 (R.I. 2006). These cases, while acknowledging the breadth of the government's Fifth Amendment expropriation powers, recognize that there are also limits, which St. Bernard exceeded when it took VDP's Property.

The Majority also grossly departed from judicial proceedings in the following three ways:

1. The Majority failed to address VDP's assignment of error relating to its legal entitlement to recover replacement costs of its unique and indispensable Property. *See, e.g., Haynes v. United Parcel Service*, 05-2378 (La. 7/6/06), 933 So.2d 765 (finding reversal was proper due to trial court's failure to consider applicable law). For more than thirty years, Louisiana courts have followed this Court's holding in *State Through Dept. of Highways v. Constant*, 369 So.2d 699, 706 (La. 1979), that landowners are entitled to recover, as part of their just compensation, the replacement costs of expropriated property and improvements that are unique and indispensable to the landowners' businesses. *See, e.g., Orleans Parish School Board v. State*, 2012-1312 (La. App. 4 Cir. 2/27/13), 177 So.3d 711, 713, *writ denied*, 2013-0683 (La. 5/3/13), 113 So.3d 216 ("In fact, the Louisiana Supreme Court has held that a property owner in an expropriation suit is entitled to replacement costs upon a showing that the location of the

property or some physical feature of it is unique and indispensably related to the success of the business.”).³ The Majority’s opinion conflicts with this settled body of law.

VDP’s Property, with its “one mile of water frontage on the Mississippi River” and “five heavy-duty docks and related infrastructure,” Appendix, p. 19, was specifically “designed to meet the Navy’s detailed specifications” related to the layberthing of military vessels. L-143(a). There is no other privately-owned property on the lower Mississippi River that has a mile of river, railroad and highway access, and that has been certified to layberth Navy ships at multiple docks simultaneously. The Property was tailored to the needs of VDP’s commercial marine business, including its expansion of bulk cargo capabilities. Moreover, the Property’s location and physical attributes made it uniquely suited for its business, as evidenced by decades of Navy occupancy and use of three of its five berths. L-202. The Property was undeniably indispensable to VDP’s business; indeed, St. Bernard’s taking put VDP out of business. The Majority therefore erred by failing to award VDP the replacement costs of its land and improvements as compensation “to the full extent of [its] loss” under La. Const. art. I, § 4(B)(5).

Instead of applying the correct legal standards for determining just compensation, the Fourth Circuit glossed over the trial court’s use of a “fair market value” method for determining VDP’s compensation. Appendix, p. 26. Because the trial court legally erred by failing to apply the standard set forth in *Constant* and its progeny, the Fourth Circuit likewise erred when it gave undeserved deference to the trial court’s value conclusions that were reached without consideration of the proper legal standard.

2. The Majority upheld the trial court’s findings regarding the alleged “highest and best use” of VDP’s Property even though those findings were irreconcilable with the trial court’s conclusions when upholding the taking against VDP’s constitutional challenge. In short, the trial court allowed St. Bernard to take VDP’s Property to build a bulk cargo terminal, but when it was time to pay the bill, the trial court explained all of the reasons why it believed VDP’s Property

³ See also *City of Shreveport v. Standard Printing Co. of Shreveport, Inc.*, 427 So.2d 1304 (La. App. 1 Cir. 1983); *Monroe Redevelopment Agency v. Kusin*, 398 So.2d 1159 (La. App. 2 Cir. 1981), *writ denied*, 405 So.2d 530 (La. 1981); *State v. Ford*, 520 So.2d 774, 777 (La. App. 3 Cir. 1987), *writ denied*, 522 So.2d 564 (La. 1988); *State v. Latiolais*, 95-1441 (La. App. 3 Cir. 11/6/96), 690 So.2d 66, *writs denied*, 97-0138, 0169 (La. 4/25/97), 692 So.2d 1082; *State ex rel. Dept. of Transp. and Dev. v. Wade*, 07-1385 (La. App. 3 Cir. 5/28/08), 984 So.2d 918, *writ denied*, 08-1896 (La. 12/12/08), 997 So.2d 561; *State, DOTD v. McKeithen*, 42,830 (La. App. 2 Cir. 2/20/08), 976 So.2d 832; *State, Department of Transportation v. Hecker*, 493 So.2d 125, 129 (La. App. 5 Cir.), *writs denied*, 494 So.2d 325, 326 (La. 1986).

was inadequate for such a facility. *Compare* Appendix, pp. 24-25 (discussing St. Bernard's alleged "plan to include a dry and liquid bulk cargo operation) *with* Appendix, p. 27 & n.23 (discussing the alleged "physical constraints of the Property"). Like the trial court, the Majority never even attempted to reconcile the findings. Either the taking was unconstitutional because of the "physical constraints" on St. Bernard's articulated use for the property, or VDP was undercompensated by reducing the valuation based on the alleged constraints.

3. The Fourth Circuit Majority erred by deferring to the trial court's other findings that were based upon faulty legal premises. The trial court explained its approach to the valuation evidence by stating: "the Court ... does not have the discretion to 'split the baby' and arrive at a valuation somewhere in between" St. Bernard's and VDP's experts. Appendix, p. 9. This Court and the courts of appeal unanimously disagree, holding that a trial court does indeed have the discretion to accept or reject expert testimony in whole or in part, and may reach conclusions of value that lie between those offered by competing experts.⁴

Because the trial court applied the wrong legal standard for reviewing the evidence and consequently interdicted the valuation fact-finding as a whole, the Fourth Circuit should have reviewed the record *de novo*. *Evans v. Lungrin*, 708 So.2d 731, 735 (La. 1998). By deferring to the trial court's erroneous evidentiary analysis, the Fourth Circuit Majority departed from precedent and proper judicial proceedings.

⁴ See, e.g., *Green v. K-Mart Corp.*, 03-2495, p. 5 (La. 5/25/04), 874 So. 2d 838, 843; *State Dept. of Hwys v. Salassi*, 244 So.2d 871, 877 (La. App. 1 Cir. 1971); *State, Dept. of Transp. & Dev. v. Biscomb*, 94 So.3d 195, 196 (La. App. 2 Cir. 2012); *Southwestern Elec. Power Co. v. Scurlock*, 485 So.2d 72, 77-78 (La. App. 2 Cir. 1986); *State, Dept. of Transp. & Dev. v. Van Willlett*, 386 So.2d 1023, 1028-29 (La. App. 3 Cir. 1980), *writ denied*, 392 So.2d 692 (La. 1980); *State, Dept. of Transp. & Dev. v. Rushing*, 514 So.2d 209 (La. App. 3 Cir. 1987); *State Dept. Of Transp. & Dev. v. Stumpf*, 519 So.2d 279 (La. App. 5 Cir.1988), *writ denied*, 520 So.2d 753 (La. 1988).

INTRODUCTION

Since its adoption in 1974, the Louisiana Constitution has absolutely prohibited the taking of a “business enterprise or its assets … for the purpose of operating that enterprise or halting competition with the government.” La. Const. art. I, § 4(B)(6). In 2006, the Louisiana Legislature and voters amended the Louisiana Constitution to strengthen its protection of private property rights in the wake of the United States Supreme Court’s decision in *Kelo v. City of New London*, 545 U.S. 469 (2005).

Based on an erroneous interpretation of the 2006 Constitutional Amendments, the Fourth Circuit Majority approved St. Bernard’s expropriation of VDP’s private port for purposes of running the same facility to generate revenues to help expand St. Bernard’s port operations. Appendix, p. 25. In spite of the Louisiana Constitution’s explicit prohibition against government operation of private business, the Majority turned the 2006 amendments on their head and held that they weakened the protections provided by Article I, § 4(B)(6).

The Majority, in an opinion by Judge Belsome, wrote that “[t]he constitutional rights of Article I, § 4 that VDP maintains were violated, are subject to the exceptions provided in Article VI, § 21.” Appendix, p. 24. However, Judge Love, who provided the second vote in favor of St. Bernard, stated (in her concurrence in the denial of rehearing) the exact opposite: “the majority did **not** find that La. Const. art. VI, § 21 exempted ‘public port takings from the prohibitions contained in La. Const. art. I, § 4(B)(6).’” Appendix, p. 43 (emphasis added). Thus, although two judges voted to uphold St. Bernard’s takings authority, they did so for different reasons.

Judge Lobrano dissented and concluded that the “Louisiana Constitution expressly prohibits the taking of a business enterprise,” and that “the Port’s taking of VDP’s Property is clearly unconstitutional.” Appendix, p. 34. Judge Lobrano expressly disagreed that La. Const. art. VI, § 21 provides an “unrestricted exception to La. Const. art I, § 4’s protections from the unchecked use of eminent domain,” and characterized the Majority’s interpretation of the Constitution as “fundamentally incorrect.” Appendix, p. 35. Judge Lobrano determined that:

The taking of a business enterprise in order for government or its chosen beneficiaries to produce revenue is exactly the kind of violation of property rights La. Const. art. I, §4(B)(6) exists to prevent. Should the majority’s interpretation stand, a public port convinced that it can make better use of a private business enterprise’s assets will be empowered to usurp that private business enterprise and fashion it into a revenue maker for government.

Appendix, p. 37. Moreover “[a]ny interpretation of La. Const. art. VI, § 21 that grants public ports unfettered rights to expropriate private property exceeds the authority that has been bestowed by the Legislature and the citizenry of this State.” *Id.* Thus, Judge Lobrano concluded that the Majority “reach[ed] beyond the authority of a judge” to undo the “carefully crafted” balance between private property rights and public port authority when it upheld the taking. *Id.* at 37-38.

Should this Court permit the Majority’s interpretation of Article VI, § 21 to stand, the resulting expansion of government takings powers would be much broader than Judge Lobrano suggested. Article VI, § 21 is not limited to public ports; rather, it addresses general powers and authority that the Legislature may grant to “any political subdivision,” except “a school board.” La. Const. art. VI, § 21. Moreover, Article VI, § 21 is not limited to “port” facilities; it also refers to the development of “industrial enterprises” and “industrial plants,” which is significantly broader than just “port” facilities. La. Const. art. VI, § 21. If (as the Majority held) such a general grant of expropriation authority is sufficient to exempt almost any political subdivision from the constraints imposed under La. Const. art. I, § 4, then the protections of private business property rights have been eviscerated. Indeed, the Majority interpreted the Louisiana Constitution as permitting expropriations that would violate the United States Constitution, even as broadly interpreted by the United States Supreme Court in *Kelo*.

STATEMENT OF THE CASE

A. Factual Background

Violet Dock Port was a privately-owned, 75-acre industrial marine facility in St. Bernard Parish with one mile of deep-water frontage on the Mississippi River, plus railroad and highway access. VDP built the facility over many decades by reinvesting its profits to construct five heavy-duty docks and related infrastructure. VDP’s improvements were specially designed to berth and service ocean-going ships for the United States Military Sealift Command (the “Navy”), which had inspected and approved the Property and three of its five berths for Navy use. The surrounding improvements were likewise constructed to comply with the Navy’s detailed access, parking, security, and engineering specifications. *See* L-204 (VDP 2008 Navy contract). For decades, VDP had successfully obtained competitively-bid contracts to service Navy ships measuring nearly 1,000 feet in length and over 100 feet wide, making them some of

the largest cargo ships in the world. VDP also used its docks for cargo operations, topside repair, and commercial vessel layberthing.

In 2010, due to skyrocketing market demand, VDP was actively improving the Property for dry bulk aggregate cargo operations, once again using its profits to fund the improvements. VDP had obtained the necessary government permits to renovate Berth 4 to handle aggregate bulk cargo, and it planned to lease the Berth and adjoining land to Vulcan Materials once construction was complete. In March 2010, the Corps of Engineers issued a Public Notice to governmental agencies such as St. Bernard and others detailing VDP's proposed plans, including drawings of Berth 4 and the planned cargo unloading conveyor system. L-150(b).

VDP's facility was six river miles away from the Chalmette Slip, which is a public port owned by St. Bernard and operated by its exclusive Marine Terminal Operator, Associated Terminals. The Chalmette Slip handled significantly more cargo than VDP handled at its facility. However, VDP's Property had distinct competitive advantages, because it had multiple deep-water docks and could dock a wider variety of ships than the Chalmette Slip could accommodate. VDP's expanded cargo capacity and imminent lease to Vulcan Materials placed it in direct competition with St. Bernard and Associated Terminals.

St. Bernard disclosed its desire to eliminate private competition within its jurisdiction when it stated in public filings that, by gradually gaining exclusive "control of key waterfront sites," it had "systematically positioned itself to take advantage of its strategic location for maritime commerce." L-167. St. Bernard recognized that the Property was one of the last major properties on the Mississippi River suitable for cargo transshipment, with adequate highway and rail access and deep water on a straight section of the river. Consequently, St. Bernard representatives "targeted" VDP's Property for acquisition and expressed an urgent need to "take it off the market." L-167; L-182; R. 16-96, V. 12, 2238.

St. Bernard intended from the outset that it would take VDP's Navy business and that Associated Terminals would be the sole Marine Terminal Operator of the Property. In February 2007, Associated Terminals "snuck down" to the Property to evaluate it. L-234. In an internal email, Associated Terminals noted that the Property was suitable for further development for bulk cargo use, and that "[a]ll three berths [on the Property] can accommodate vessels of 1000' feet or more." *Id.* Associated Terminals' representatives expressed concern that someone might

enter into competition with it for cargo operations on the Property, stating that, “[o]bviously, there is also a concern about potentially opening the door for another terminal operator coming into” the area if the Property were further developed for cargo use. *Id.*

St. Bernard could not afford to purchase VDP’s Property, so it applied for public funding from the Department of Transportation and Development’s (“DOTD”) Port Priority Program in 2008. Associated Terminals, as the designated future “marine terminal operator” of the Property, provided more input into St. Bernard’s Port Priority Submission than St. Bernard Port did. Multiple Associated Terminals managers and employees worked closely with the consulting firm who prepared the submissions, supplying revenue projections, market analysis, a “letter stating why they need the new facility,” and a written commitment to lease the entire Property as soon as it was acquired. L-26.

In its Port Priority Submission, St. Bernard informed the DOTD that Associated Terminals desired to expand its cargo and port operations in St. Bernard Parish, but St. Bernard estimated it would cost between \$30 and \$40 million to build a new dock on its own property. St. Bernard considered the expropriation of VDP’s Property and docks as a less expensive alternative to expansion on its own property.

St. Bernard extolled the unique virtues of VDP’s Property, saying its land alone “should be considered a national asset for transportation and manufacturing” in view of the “finite” and “limited” nature of Mississippi River land. St. Bernard further explained:

The best attribute of [the VDP] site is that it features three sturdy docks designed to berth some of the largest cargo ships in the world. These docks can be easily modified to support cargo handling operations similar to those currently taking place at the Chalmette Slip, such as ship or barge to truck or rail or to storage. The reverse movement is also available.

L-143(a).

St. Bernard found VDP’s Property “to be attractive to importers of bulk commodities due to its location on the river which translates into lower transportation costs.” St. Bernard singled out Associated Terminals, a private company, as its chosen operator of the Property and admitted its intent to lease the Property to Associated Terminals. St. Bernard concluded that VDP’s “heavy duty” docks could be used for bulk cargo operations “immediately” and could conservatively handle 450,000 tons of cargo (such as “mineral sands”) in the first year. L-143(a).

St. Bernard also included in its Port Priority Submission its plan to take VDP's Navy business and to "compete" for future Navy revenue on VDP's Property. R.16-331, V.1, 7; L-125, 142, 143(a). St. Bernard detailed the decades of Navy use of the Property and explained:

The MSC manages strategic sealift ships that can be activated from reduced operating status to support the U.S. military in exercises, contingencies and war. The MSC's large, medium-speed, roll-on/roll-off ships, or LMSRs, are among the largest cargo ships in the world and can carry up to 380,000 square feet of combat cargo - the equivalent of more than six football fields of wheeled and tracked vehicles - at speeds up to 24 knots. The MSC operates eleven LMSRs using commercial operating companies to crew and maintain the ships as necessary in order to be ready to sail within 96 hours of notification.

Violet Dock Port, Inc. has constructed three docks to support these staging activities, along with an assortment of mooring dolphins, buoys and deadmen to secure the vessels. In addition, they have constructed roads, parking areas, and fenced secure areas in accordance with MSC requirements. There are also offices, sheds and outbuildings within the site associated with their private sector clients.

L-142. St. Bernard stated its intent was to usurp VDP's Navy revenue for its own use for at least ten years, first projecting in 2008 that "in the short term, it is expected that the marine terminal operator [Associated Terminals] will take over the existing Navy concessions and possibly compete for future contracts as a means of securing immediate revenues from the site."

2/1/12 Hearing Tr. 11-12; D-Exh. "I;" L-125; L-142. In its 2009 Supplemental Application, St. Bernard represented that it "will continue to compete for these MARAD/Navy contracts" and that "the annual net revenue from the Navy contracts at the Violet site has averaged \$550,000. Future contracts are expected to be in that same range." 2/1/12 Hearing Tr. 37; L-143(a). St. Bernard included this Navy revenue in its own financial projections, noting that "VDP has been successful in landing these Navy contracts virtually continuously for over thirty years." L-125. In other words, not only did St. Bernard plan to take VDP's business of berthing the Navy ships that were already located on the Property as well as VDP's future Navy business, it also assumed that the Navy would not continue to do business with VDP (*i.e.*, it would not move its existing ships to another location or award contracts to VDP in the future).

In December 2010, after receiving \$15 million in funding from the DOTD, St. Bernard initiated expropriation proceedings. Knowing that VDP was actively renovating Berth 4 with a cargo dock, St. Bernard waited until VDP substantially completed construction of Berth 4 before expropriating the Property. In its Resolution to expropriate the Property, St. Bernard described its plan as "basically a port expansion project accomplished by acquiring property and assets on

the Mississippi River.” Later, in its Petition and subsequent pleadings, St. Bernard described a three-phase plan. Phase I, the only phase that was actually funded, was simply to acquire the Property and “enable Associated Terminals of St. Bernard to occupy and use the site...” 2/1/12 Hearing Tr. 21-22. St. Bernard did not obtain any engineering drawings to determine whether all three phases were feasible. Rather, its plan for approximately ten years was to use the Property as VDP had intended to use it—for Navy layberthing and bulk cargo operations. *See* R.16-331, V.1, 7-8 (December 2010 Petition for Expropriation, stating St. Bernard’s immediate “inten[t] to enter into a new contract with the Military Sealift Command for its continued use of the Violet Port...”).

St. Bernard did indeed contract to continue servicing the same Navy ships that VDP was servicing at the time of expropriation. Compare L-204 with P-391 (VDP and St. Bernard Navy contracts). The contracts are substantially similar and provide for layberthing and related services for the Navy ships on the Property. The only change—St. Bernard now receives the revenue that VDP formerly received.

The Navy ships are still berthed on VDP’s former property—over six years after this expropriation proceeding began. Without its Navy contract revenues or a suitable replacement property, VDP is out of business today.

B. Course of Proceedings

The St. Bernard Parish trial court denied VDP’s Motion to Dismiss in 2012 without directly addressing VDP’s Constitutional arguments. Instead, it simply recognized “[t]he St. Bernard Port’s stated reason for expropriation was to build and operate a terminal to accommodate transport of liquid and bulk commodities into national and international commerce to or from St. Bernard.” Appendix, p. 3. “The acquisition of the Violet terminal would be a logical extension of port services in St. Bernard. The port would acquire heavy duty docks and forty two hundred (4200 LF) linear feet of Mississippi River frontage available for immediate use.” *Id.* The trial court understood “that the expropriation will not affect the use by [the Navy] for its vessels should [the Navy] elect to continue the use.” Appendix, p. 4. Although the trial court expressly recognized that St. Bernard intended to take and use VDP’s assets (*i.e.*, its docks) and to seize VDP’s business revenues (*i.e.*, the Navy business), the trial court did not even attempt to reconcile its decision with the prohibition imposed under La. Const. art. I, § 4(B)(6).

Two years later, when it was time to compensate VDP for the taking, St. Bernard changed its story and argued all the reasons why VDP's Property allegedly could not be used as a large-scale cargo facility, even though that was the reason given to justify the taking. The trial court agreed, finding several significant physical limitations on the ability to use VDP's Property as a large-scale cargo facility, including: (a) the water depths at the docks; (b) "its proximity to school and residential area[s];" (c) the limited amount of uplands available for use for cargo; and (d) the configuration of the Property. Appendix, p. 12. Of course, these physical limitations on VDP's Property existed in 2010 when St. Bernard was explaining why it wanted to take the facility. Nevertheless, the trial court found that the "highest and best use" of VDP's Property "was continued use as layberthing and a limited intermodal container terminal." Appendix, pp. 12-13. In other words, the trial court anticipated that St. Bernard (and its lessee Associated Terminals) would continue to use VDP's Property just as VDP used it before the taking.

Based on its new view (that VDP's Property was not suitable for large scale cargo operations), the trial court valued VDP's Property at just \$16 million, which was the exact amount proposed by both St. Bernard's original appraiser and—"coincidentally"⁵—its subsequent appraiser, which was also the amount deposited by St. Bernard into the Court's registry long before the compensation portion of the trial. Appendix, pp. 9, 12. The trial court refused to award VDP the full (or even depreciated) replacement costs of its docks and facilities, even though St. Bernard's expert, Dr. Flowers, testified that it would cost at least \$37 million to replace them. VDP's experts testified that the replacement costs actually exceeded \$60 million.

As its only explanation as to why it did not award greater compensation to VDP, the trial court stated: "[t]he Court's task in this part of the case was to come to the determination of which side's experts' evaluations were the most reliable[.]" Appendix, p. 9. The trial court believed "it [did] not have the discretion to 'split the baby' and arrive at a valuation in between" the views of the competing experts. *Id.* Accordingly, by choosing St. Bernard's experts over VDP's, the trial court claimed to feel legally constrained to adopt their ultimate conclusion that VDP's Property was worth only \$16 million. Thus, the trial court did not address any of the

⁵ The subsequent appraiser, who admittedly reviewed the original appraisal before arriving at his conclusion, stated that his identical valuation arriving at the same round figure was merely a "coincidence." See R.16-96, V.12, 2757.

methodological errors in St. Bernard's expert's calculations. It also did not explain why it was refusing to award VDP replacement costs as required under this Court's precedents.

VDP appealed, challenging the constitutionality of the taking and the compensation awarded. The Fourth Circuit affirmed in a splintered decision. Judge Belsome wrote the majority opinion, which was joined by Judge Love. Judge Lobrano dissented. On rehearing, Judge Love wrote a concurring opinion that repudiated the basis for the majority opinion. Accordingly, each panel member in the court of appeals wrote an opinion attempting to explain how the Louisiana Constitution should be interpreted. Each judge expressed a different view.

ASSIGNMENT OF ERRORS

1. St. Bernard's taking of VDP's Property was unconstitutional under La. Const. art. I, § 4(B)(6).
2. St. Bernard's taking of VDP's Property was unconstitutional under the Fifth Amendment to the United States Constitution.
3. The trial court and court of appeals erred as a matter of law when awarding VDP only \$16 million in compensation for its Property by: (a) failing to value the Property using a replacement cost methodology, because the Property was "unique and indispensable;" (b) failing to employ the correct "highest and best use" for the Property; and (c) using the wrong standard of review. Each of these errors caused VDP to be awarded less compensation than was required under La. Const. art. I, § 4(B)(5).

SUMMARY OF THE ARGUMENT

Soon after the Louisiana Constitution of 1974 was adopted, this Court confirmed that the government's power to expropriate is narrow and must be strictly construed against the government and in favor of private property owners:

In construing constitutions or statutes granting the power of expropriation, even when the power has been expressly granted, the grant, itself, and the extent thereof will be construed strictly against the grantee. The latter will not be allowed to take the lands of another unless such right comes clearly and unmistakably within the limits of the authority granted. Whatever is not plainly given is to be construed as withheld.

State, Through Dept. of Highways v. Jeanerette Lumber & Supply Co, Ltd., 350 So.2d 847, 855 (La. 1977). That rule remains in place today. *See ExxonMobil Pipeline Co. v. Union Pacific Railroad*, 2009-1629 (La. 3/16/10), 35 So.3d 192, 197. After the United States Supreme Court's 2005 decision in *Kelo*, which many viewed as an unwarranted expansion of government takings

power, Louisiana acted swiftly to adopt additional constitutional amendments to reinforce private property rights and limit government takings powers. *See New Orleans Redevelopment Auth. v. Burgess*, 2008-1020 (La. App. 4 Cir. 7/8/09), 16 So.3d 569, 578-82, *writs denied*, 2009-1981 and 2009-1982 (La. 9/23/09).

The Fourth Circuit turned the carefully-crafted balance between government power and private property rights on its head. Article I, § 4(B)(6), which was adopted in 1974, imposes a clear prohibition against the taking of a business enterprise or its assets for the government to run a similar or competing venture. Nevertheless, the Fourth Circuit Majority found that the 2006 Amendments to the Louisiana Constitution, which were intended to strengthen the protection provided to private property owners, had the opposite effect, enabling St. Bernard to take VDP's Property and docks to run a similar facility (including taking over VDP's long-running contracts with the Navy). The Majority (both Judge Belsome's original opinion and Judge Love's concurring opinion) impermissibly re-writes the Constitution to grant St. Bernard and other government entities authority that was expressly denied to them under the plain language of the Constitution. This Court should grant review, adopt the plain language reading of the Constitution articulated in Judge Lobrano's dissent, and enforce the protections for private property owners that were enacted in Article I, § 4(B)(6) and bolstered by the 2006 constitutional amendments.

St. Bernard's taking also violated the Takings Clause of the United States Constitution. The Fourth Circuit's decision to allow the taking conflicts with authority from the United States Supreme Court and the Rhode Island Supreme Court that establish the limits of government authority. In *Kelo*, the United States Supreme Court recognized limits on takings powers. 545 U.S. at 487. The Court cited *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), as an example of a case involving a taking that crossed the line. See *Kelo*, 545 U.S. at 487 n.17. In *99 Cents Only Stores*, the federal district court held that it was unconstitutional for the government to take a small retail store to enable a larger competitor to expand. *99 Cents Only Stores*, 237 F. Supp. 2d at 1128-29. The Rhode Island Supreme Court similarly found a violation of the United States Constitution when an airport authority attempted to take a neighboring private parking garage to operate it as a public garage. See *Rhode Island Economic Development Corp. v. The Parking Co., L.P.*, 892 A.2d 87, 104-08 (R.I. 2006). St.

Bernard did not have the authority to take VDP's Property to operate it for its own benefit or to lease it to Associated Terminals.

Compounding its legal error in upholding St. Bernard's taking, the Fourth Circuit Majority made three significant errors of law in allowing the trial court's valuation methodology and holding to stand with scarcely a comment.. First, the Majority allowed the trial court to limit VDP's compensation to "fair market value," even though this Court requires a replacement cost valuation for a case like this involving "unique and indispensable" property. *Constant*, 369 So.2d at 706. Second, the Majority erred by approving the trial court's "highest and best use" valuation of VDP's Property despite it being in direct conflict with the findings of use that the trial court made to justify the taking. Third, the Majority deferred to the trial court's valuation findings, even though the trial court legally erred by concluding it was bound to accept only one side's expert testimony *in toto*, without adjustment for any flaws. As a result of these errors, VDP was not awarded compensation to "the full extent of [its] loss," as required under La. Const. art. I, § 4(B)(5).

ARGUMENT

A. Review Should Be Granted to Restore the Protections Guaranteed to Business and Property Owners Under La. Const. art. I, § 4(B)(6).

Instead of strictly construing the scope of the government's expropriation powers, *see ExxonMobil Pipeline Co.*, 35 So.3d at 197, the Fourth Circuit Majority held that St. Bernard had "exceptionally broad" authority to take private property based on language found in La. Const. art. VI, § 21. Appendix, p. 25. The Majority re-writes the Louisiana Constitution, creating an exception to the prohibition enacted under Article I, § 4(B)(6) that does not exist. Judge Love's Concurrence also adds language and imposes limitations that do not appear in § 4(B)(6). The Fourth Circuit Majority's expansion of government takings power is inconsistent with the history and purpose of § 4(B)(6). It also sets a dangerous precedent that should be reversed immediately.

1. *The Fourth Circuit Majority Rewrites the Louisiana Constitution to Create an Exception to Section 4(B)(6) That Does Not Appear in the Constitution's Text.*

The Fourth Circuit Majority's Opinion cannot be reconciled with the Louisiana Constitution's plain language. "The starting point in interpreting a constitutional provision is its language." *Arrow Aviation Co., L.L.C. v. St. Martin Parish Sch. Bd. Tax Sales Dep.*, 2016 WL

7118912, at *3 (La. 12/6/16). “When a constitutional provision is plain and unambiguous and its application does not lead to absurd consequences, its language must be given effect.” *Id.* “An unequivocal constitutional provision should be applied by giving words their generally understood meaning.” *Id.*

Although the Majority cites Section 4(B)(6) twice in the text (when summarizing VDP’s arguments) and quotes it in a footnote, *see* Appendix, pp. 22-23, the Majority never analyzes Section 4(B)(6)’s language, nor does it discuss the facts of this case in light of that language. Instead, the Majority dismisses VDP’s argument under Section 4(B)(6) by a single sentence: “[t]he constitutional rights of Article I, § 4 that VDP maintains were violated, are subject to the exceptions provided in Article VI, § 21.” Appendix, p. 24. Article VI, § 21, however, is not an exception to Article I, § 4(B)(6). There are several reasons why.

First, Article I, § 4(B)(6) has one (and only one) exception: “A municipality may expropriate a utility within its jurisdiction.” La. Const. art. I, § 4(B)(6). During the Constitutional Convention of 1973, opponents of Section 4(B)(6) tried to remove the provision entirely, but they were only able to secure this one exception. *See* 6 Records of the Louisiana Constitutional Convention: Convention Transcripts (hereinafter “Records”) 1045-1067 (Aug. 30, 1973 Transcript); 7 Records 1239-1243 (Sept. 13, 1973 Transcript). Because there is an express exception to Section 4(B)(6), no other exceptions should be implied. *See State v. Neisler*, 633 So.2d 1224, 1235 (La. 1994); *see also* La. Atty. Gen. Op. 04-0160 (July 19, 2004) (strictly construing exception and refusing to extend it to parishes).

Second, when the Constitution’s drafters intended for Article VI, § 21 to serve as an exception to provisions in Article I, § 4, the drafters said so expressly. For example, Article I, § 4(B)(1), which was amended in 2006 following *Kelo*, provides: “*Except as specifically authorized by Article VI, Section 21 of this Constitution*, property shall not be taken or damaged by the state or its political subdivisions (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity.” La. Const. art. I, § 4(B)(1) (emphasis added). The drafters did not provide for any similar exceptions to Section 4(B)(6) based on the language adopted in Article VI, § 21.

Finally, reading Article VI, §21 as an implied exception into Article I, § 4(B)(6) does not make sense. The Fourth Circuit Majority provides no guidance on how such an implied

exception would work. Given that Article VI, §21 is an express exception to the second sentence of Article I, § 4(B)(1), should it also be read as an exception to the first sentence, which requires takings to be for “public purposes and with just compensation paid”? La. Const. art. I, § 4(B)(1). Should Article VI, § 21 be read as an exception to the permissible purposes for a taking as established under La. Const. art. I, § 4(B)(2), or to the prohibition against considering “economic development,” “tax revenue,” or “incidental benefit[s]” when assessing whether a purpose is permissible under La. Const. art. I, § 4(B)(3)? Is Article VI, § 21 an exception to the “right to trial by jury” or the right to compensation “to the full extent of his loss” under Article I, § 4(B)(5)? Of course, the answers to these questions should be “no.” The Fourth Circuit Majority, however, provides a different answer depending on which section is at issue. The Majority appears to recognize that Article VI, § 21 is not an exception to Article I, § 4(B)(5)’s requirement that VDP was entitled to be compensated to the full extent of its loss. Appendix, pp. 25-26. However, the Majority also holds that Article VI, § 21 is an exception to “[t]he constitutional rights of Article I, § 4 that VDP maintains were violated,” correctly noting that VDP challenged the taking under Article I, §§ 4(B)(2), (3), & (6). Appendix, pp. 22-24. The Majority provides no explanation how Article VI, § 21 can be read as an implied exception into Article I, §§ 4(B)(2), (3), & (6) without being read as an exception into other provisions too, such as Article I, § 4(B)(5).

Each of these points confirms what Judge Lobrano says in her dissent—the Majority is rewriting the Constitution. Appendix, pp. 36-38. Article I, §4(B)(6) should be read as an independent limitation on government authority that is not subject to an exception favoring public ports or other political subdivisions.

2. *The Concurrence Also Rewrites Section 4(B)(6) to Add a Limitation that Does Appear in Its Plain Language.*

Perhaps recognizing that the Majority Opinion is deeply flawed, Judge Love wrote a Concurrence on rehearing in which she disavowed a significant part of the Majority Opinion. She wrote: “the majority did not find that La. Const. art. VI, § 21 exempted ‘public port takings from the prohibitions contained in La. Const. art. I, § 4(B)(6).’” Appendix, p. 43. Instead, she explained her decision was that “the trial court was not manifestly erroneous in finding that the Port’s primary motivation was not to operate VDP’s enterprise or halt competition by expropriating VDP’s Property.” *Id.* Judge Belsome did not join in this opinion.

Judge Love’s Concurrence is legally flawed for two reasons: (a) there is no “primary” motivation standard imposed under Article I, § 4(B)(6); and (b) her conclusion is irreconcilable with the trial court’s factual findings. First, when interpreting the Constitution, a Court should not add words that are not there.⁶ *See Caire v. Stassi*, 379 So.2d 1056, 1058 (La. 1980); *Carter v. Duhe*, 921 So.2d 963, 970 (La. 2006). The word “primary” does not appear in Section 4(B)(6). By focusing on the primary motivation of St. Bernard for expropriating property, Judge Love is applying a standard not supported by the Constitution’s text. If adopted, this standard would gut Section 4(B)(6), because an expropriating authority could take impermissible action to seize a business and its assets, and even use those assets to generate revenues—as happened here—so long as the expropriating authority could articulate another legitimate motive that was allegedly the “primary motive” for its action. This exception would be limitless.⁷ For example, there would be nothing to stop the New Orleans Convention Center from expropriating the Hilton Hotel by saying that its “primary motivation” was to acquire extra meeting space, even though the expropriation would bring the added benefit of hundreds of hotel rooms and millions in revenue each year. A test focusing on the subjective “primary motivation” of a government actor is an invitation for abuse.

Second, Judge Love’s “primary motivation” analysis is irreconcilable with the trial court’s factual findings. Judge Love quotes the trial court regarding St. Bernard’s “stated reason” for the expropriation, finding that an expropriation would be a “logical extension of port services in St. Bernard.” Appendix, p. 43. Judge Love never addresses the trial court’s specific factual findings concerning VDP’s Property that would prevent it from becoming a large bulk cargo facility. Appendix, p. 12. The trial court concluded that “the highest and best use for the property was continued use as layberthing and a limited intermodal container terminal.” Appendix, pp. 12-13. The trial court based this conclusion on factual findings regarding the physical limitations of the Property, but those limitations exist regardless of who owns the Property. *Id.* Moreover, the trial court’s findings are supported by St. Bernard’s own admissions

⁶ Adding words to limit the protections provided by Section 4(B)(6) is the opposite of strictly construing expropriation authority. *See ExxonMobil Pipeline Co.*, 35 So.3d at 197.

⁷ Unlike the Majority’s exception to Section 4(B)(6), which is limited to those political subdivisions identified in Article VI, §21, there would be no limitation on the types of expropriating entities that would be able to qualify under a “primary motivation” test.

that: (a) it only had funding for Phase I of its development plan, which was to continue using VDP’s Property as is, with only minor adjustments; and (b) it did not even have engineering drawings showing whether Phases II or III of its plan were even feasible (assuming funding was ever obtained). *See* St. Bernard Appellee’s Br. at 6-7 & n.54.

If Section 4(B)(6) is to mean anything at all, it must prevent an expropriating authority from taking a business’s property and assets with the intent to continue using them for the same or similar purposes for the foreseeable future, including deriving revenues from the contractual opportunity it usurped (*i.e.*, the Navy contract). St. Bernard should not be able to evade the limitations on its expropriation power imposed by Article I, § 4(B)(6) simply by making a bald assertion that it one day hoped to use the Property for a permissible purpose, even though it was uncertain whether or when that allegedly permissible use would occur. *See* 2A NICHOLS ON EMINENT DOMAIN § 7.01[8] (3d ed. 2016) (“[T]he proper exercise of the power is predicated on a promise that within a reasonable period of time it will be devoted to the public use for which it was taken.”).

3. *The Dissent Follows the Language of the Constitution and Is Consistent With the History and Purpose of Section 4(B)(6).*

Judge Lobrano’s Dissent is the only Fourth Circuit opinion that reads Section 4(B)(6) as written, in context, and without adding any additional words or limitations. It is also consistent with Section 4(B)(6)’s history and purpose.

Rep. Jenkins, the co-author and floor sponsor of Section 4(B)(6) at the 1973 Constitutional Convention, explained Section 4(B)(6)’s purposes: “It was clearly intended to counter what delegates perceived as excessive interference by government in the economy and the growing possibility that government would attempt to take over certain business enterprises.” Jenkins, *The Declaration of Rights*, 21 Loy. L. Rev. 9, 24 (1975). Consistent with the rule that the right to expropriate must be strictly construed against the expropriating entity, Rep. Jenkins understood “the provision should be interpreted to prevent both direct and indirect efforts to seize any private industry.” *Id.* Thus, Section 4(B)(6) would apply to an attempt to expropriate property “to create a similar government enterprise.” *Id.* at 25. As an example, he explained that government could not seize a private apartment building for the purpose of creating public housing. *Id.*

The 2006 amendments to the Louisiana Constitution reinforced this point. “[T]he legislators nearly unanimously agreed with Justice O’Connor’s dissent in *Kelo*,” (in which Justice Scalia and Justice Thomas joined), which means that, in Louisiana, it is unconstitutional “to replace [a] Motel-6 with a Ritz Carlton.” *New Orleans Redevelopment Auth. v. Burgess*, 16 So.3d at 578. Contrary to the Fourth Circuit Majority’s opinion, the 2006 amendments did not loosen the restrictions imposed under Article I, § 4(B)(6).

4. *It Is Critically Important for This Court to Address the Proper Balance Between Private Property Rights and Government Authority Under Section 4(B)(6).*

The balance struck in Article I, § 4 between private property rights and government authority was the result of extended debate in the 1973 Constitutional Convention. Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1, 11 (1974). Section 4(B)(6) was an “innovation seen by its backers as important to maintaining the institution of private property.” Lee Hargrave, THE LOUISIANA CONSTITUTION: A REFERENCE GUIDE 28 (1991). Moreover, it was “the first provision in any state constitution to prohibit the government from seizing the means of production.” Jenkins, 21 Loy. L. Rev. at 24. This provision has now been addressed by three appellate court judges who reached three remarkably different interpretations. Review is needed to clarify the proper meaning of Section 4(B)(6) and to restore the private property protections intended by the drafters of the Louisiana Constitution.

B. *Review Should Be Granted, Because the Fourth Circuit’s Decision Upholding St. Bernard’s Taking Under the United States Constitution Conflicts with Precedent from the United States and Rhode Island Supreme Courts.*

St. Bernard’s expropriation of VDP’s Property also violated the Takings Clause of the United States Constitution. There are limits. *See Kelo*, 545 U.S. at 487. For example, a taking will not be allowed “under the mere pretext of a public purpose when its actual purpose was to bestow a private benefit.” *Id.* at 478; *see also id.* at 490 (Kennedy, J., concurring) (“transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden.”). Justice Kennedy (who provided the decisive fifth vote in *Kelo*) explained that some takings require demanding review:

[T]here may be categories of cases in which the transfers are so suspicious, or the procedures employed so prone to abuse, or the purported benefits are so trivial or implausible, that courts should presume an impermissible purpose.

Id. at 493. The *Kelo* Majority also recognized that there are suspicious takings that must be stopped “if and when they occur.” *Id.* 487. This is such a case.

1. *It Was Unconstitutional to Take Private Business Property to Enable the Government and Its Favored Business Partner to Seize the Assets and Revenue Stream that Belonged to VDP.*

Judge Lobrano correctly found that “the record established that [St. Bernard] planned to have Associated Terminals, another private entity, operate VDP’s facility as it was operated by VDP for eight to ten years in order to allow Associated Terminals to raise funds to expand the Property’s dry and liquid bulk capacity.” Appendix, pp. 36-37. Associated Terminals assisted St. Bernard with its pre-takings work to obtain funds from the DOTD. Its Director testified in support of the taking at trial, admitting its intent was to operate the Property for St. Bernard. Contrary to St. Bernard’s claim that the taking was to expand its existing operations, Associated Terminals’ Director testified that it and St. Bernard intended that the Property would “operate independently,” and there would be no “real connection” between the Property and St. Bernard’s other facilities.

Associated Terminals is operating VDP’s Property today, earning revenues that should belong to VDP. The Navy ships that VDP formerly berthed and serviced remain on the Property today. Tellingly, neither the Majority nor the Concurrence disputes this point; they do not even mention Associated Terminals. This is precisely the type of one-to-one private taking, outside of a comprehensive development plan, that Justice Kennedy warned against in *Kelo*. 545 U.S. at 492-93 (Kennedy, J., concurring); *see also id.* at 477 (Majority) (“It has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B.”).

The *Kelo* Majority cited *99 Cents Only Stores v. Lancaster Redevelopment Agency*, as an example of a suspicious taking that should not be allowed. *See Kelo*, 545 U.S. at 487 n.17. In *99 Cents Only Stores*, a local government attempted to take a small retail store to enable Costco to expand. 237 F. Supp. 2d at 1129-30. Costco was involved in the decision to take the property, including the selection of what property to take. *Id.* The court held that the taking was unconstitutional. *Id.*

The present case is similar. Associated Terminals was involved at each stage of St. Bernard’s taking. From the beginning, St. Bernard intended that Associated Terminals would operate the Property. By allowing this taking, the Fourth Circuit Majority’s decision is in conflict with *Kelo*.

St. Bernard cannot avoid this constitutional problem by arguing that it acquired ownership of VDP's Property and is receiving a share of the revenues from it. Even if St. Bernard maintained complete control of the entirety of the Property, it would be unconstitutional.

In *Rhode Island Economic Development Corp. v. The Parking Co., L.P.*, the Rhode Island Supreme Court held a taking unconstitutional under similar facts. *See* 892 A.2d 87, 104-08 (R.I. 2006). The local airport authority was concerned about declining parking revenues. *Id.* at 93. The authority decided to use its takings authority to seize a private parking garage on neighboring property as part of the airport authority's plan to address its revenue issues. *Id.* at 91-93. The Rhode Island Supreme Court found this taking "motivated by a desire for increased revenue" and thus unconstitutional. *Id.* at 104. Although the airport authority intended to make some changes to the way Garage B was used by reducing valet parking, Garage B was still going to be used for parking post-taking, only with the revenues going to the airport authority. *Id.* at 105. The Court held there was no permissible public use served by seizing a private business so that government could make similar use of the property to earn revenues for itself. *Id.* at 108. Here, it was unconstitutional for St. Bernard to take VDP's Property to usurp VDP's revenue stream while continuing to use the Property as VDP did pre-taking. The Fourth Circuit's contrary holding conflicts with that of the Rhode Island Supreme Court.

The fact that St. Bernard and Associated Terminals both benefited from the taking does not change the result. Two wrongs do not make it right.

2. *The Trial Court's Factual Findings Confirm that St. Bernard's Taking Was for a Pretextual Purpose.*

St. Bernard's taking also violated the United States Constitution, because it was for a pretextual purpose—*i.e.*, allegedly to build a large-scale bulk cargo operation, but actually simply to expropriate VDP's business and assets. When St. Bernard articulated its alleged purpose, St. Bernard admitted it did not have funding to build a large-scale cargo operation and speculated it would be at least eight to ten years before it could do so. St. Bernard further admitted it did not have engineering drawings to show that such a facility was even feasible. When it was time to pay for the taking, St. Bernard sang an even bleaker tune, arguing all the reasons why VDP's Property could not be used for a large-scale bulk cargo operation, including its proximity to a school and residences, the lack of available land, inadequate water depth, etc. The trial court accepted St. Bernard's arguments and entered its order explaining the physical limitations on

VDP's Property that limited its best use to "continued layberthing and a *limited* intermodal container terminal." Appendix, pp. 12-13 (emphasis added).

If there is a limit against pretextual takings, as *Kelo* holds, it must prohibit takings like this one, where government asserts one reason to take property but then disavows that reason when it is time to pay the bill. The Fourth Circuit Majority and Concurrence do not reconcile St. Bernard's inconsistent positions, nor do they explain how there can be a permissible public use for a taking when the trial court rejected that stated use due to physical limitations associated with the Property.

The United States Supreme Court has never before approved a taking like this one.

C. Alternatively, Review Should Be Granted to Award VDP Compensation to the Full Extent of Its Loss, as Required by La. Const. art. I, § 4(B)(5).

Because the taking of VDP's Property was unconstitutional, the Court need not reach the valuation issues presented here. Nevertheless, the Fourth Circuit Majority reversibly erred when it upheld the trial court's compensation judgment.

1. *The Fourth Circuit Majority Impermissibly Limited VDP's Recovery to "Fair Market Value" in Conflict with This Court's Precedents.*

Although the Louisiana Constitution requires compensation to a property owner "to the full extent of his loss" following expropriation, *see* La. Const. art. I, § 4(B)(5), the Fourth Circuit held that "just compensation is determined by the fair market value of the property." Appendix, p. 26. This Court, however, has not limited compensation to fair market value. In *Constant*, the Court explained that a property owner must "not only be paid the market value of property taken and severance damages to his remainder, but also that such an owner be put in as good a position pecuniarily as he would have been had his property not been taken." 369 So.2d at 701; *see also Dietrich*, 555 So.2d at 1358 (Section 4(B)(5) "permits a landowner to remain in an equivalent financial position to that which he enjoyed before the taking" without limiting compensation to fair market value).

When expropriated property is considered unique and indispensable to the business operating thereon at the time of expropriation, the proper measure of just compensation is the full replacement cost of the expropriated land and its improvements. *Constant*, 369 So.2d at 706. That standard has been applied many times to award full replacement costs for the taking of property far less unique than VDP's Property. *See, e.g., State v. Hecker*, 493 So.2d 1125 (La.

App. 5 Cir. 1986) (reversing trial court for failure to award full replacement costs for a bulk oil distribution facility constructed decades earlier); *City of Shreveport v. Standard Printing Co. of Shreveport, Inc.* 427 So.2d 1304 (La. App. 1 Cir. 1983) (awarding full replacement costs for a printing and office supply business); *Monroe Redevelopment Agency v. Kusin*, 398 So.2d 1159 (La. App. 2 Cir. 1981) (an “admittedly old” furniture warehouse and showroom); *State v. Ford*, 520 So.2d 774, 777 (La. App. 3 Cir. 1987) (a law office).

Here, VDP’s Property was unique, having one mile of Mississippi River access, five heavy duty docks, rail access, etc. It was also indispensable, because VDP could not continue in business without Mississippi River frontage and multiple, heavy-duty docks built to Navy specifications. The trial court’s and court of appeals’ failure to award VDP its full replacement costs conflicts with this Court’s precedent and decisions from many other circuit courts. The failure to even address this point shows a gross departure from the proper course of judicial proceedings.

2. *The Majority’s “Highest and Best Use” Determination Is Irreconcilable with the Majority’s Holdings on the Use That Allegedly Justified the Taking.*

Not only did the trial court and court of appeals err by limiting their analysis to fair market value (instead of awarding VDP full replacement costs), they also erred in the fair market valuation. The proper determination of fair market value “must be based on a solid understanding of prevalent market conditions and the highest and best use of the property.” Appraisal Institute, THE APPRAISAL OF REAL ESTATE 138 (13th ed. 2008). Highest and best use is defined as “the most favorable employment to which the property is adaptable and may reasonably be put in the not too distant future.” *Natchitoches Port Comm’n v. Deblieux & Kelley Inc.*, 1999-313 (La. App. 3 Cir. 3/22/00), 760 So.2d 393, 403. Highest and best use is the most profitable potential use to which the property may be adapted and is not limited to the owner’s current use of the property. See *W. Jeff. Levee Dist. v. Coast Quality Const. Corp.*, 640 So.2d 1258, 1273 (La. 1994).

VDP advocated that the Property should be valued in accordance with its highest and best use as a bulk cargo facility, which was the purpose articulated by St. Bernard when it expropriated the Property. The trial court rejected that potential use based on physical limitations on the Property, and the court of appeals affirmed. Those physical limitations, assuming they exist, are present no matter who owns the Property. If those limitations exist, then

the taking of VDP's Property necessarily was unconstitutional, because St. Bernard's alleged public purpose was not possible. However, if the taking is valid (*i.e.*, use as a bulk cargo facility is possible), the trial court's highest and best use determination must be reversed. The trial court's rulings are irreconcilable.

3. *The Majority Applied the Wrong Standard of Review.*

The court of appeals also applied the wrong standard of review. As in the present case, "where one or more legal errors interdict the fact finding process, the manifest error standard is no longer applicable," and the courts should conduct a *de novo* review. *Evans*, 708 So.2d at 735. Here, the court of appeals correctly explained that "[w]hen evaluating expert opinions, the fact finder has broad discretion in determining the effect and weight to be given to expert testimony. The fact finder can either accept or reject any or all of an opinion expressed by an expert." Appendix, p. 27. It is also true that "[t]he trier of fact is not required to accept or reject the testimony of each witness *in toto*. The trial judge is not required to accept the precise amount of any expert." *Van Willet*, 386 So.2d at 1028-29. That is, the trial court can render a decision of value that lies somewhere between those to which the experts testify. *See Drennan*, 121 So.3d at 188 n.8.

The trial court applied a contrary standard, concluding that "the Court ... does not have the discretion to 'split the baby' and arrive at a valuation somewhere in between" St. Bernard's and VDP's experts. Appendix, p. 9. As a direct result, the trial court found it was constrained to accept St. Bernard's expert valuations *in toto*, because it said they were more credible than VDP's experts. *Id.*

At trial and on appeal, VDP identified multiple flaws in St. Bernard's experts' opinions. Because the trial court applied the wrong standard for viewing expert testimony, however, the trial court did not address VDP's challenges on the merits. The trial court did not even consider making adjustments to St. Bernard's valuation number to account for the errors VDP raised.

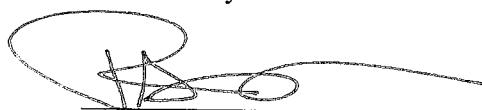
Because VDP's challenges to St. Bernard's experts were rejected based on application of an erroneous legal rule, instead of an evaluation of their merits, the trial court's valuation determinations should not have been entitled to deference. *Evans*, 708 So.2d at 735. By deferring to the trial court's valuation determinations anyway, the Fourth Circuit ignored

decisions from this Court and several circuit courts. Review should be granted to correct this error and confirm the proper role for the courts when evaluating competing expert testimony.

CONCLUSION

For the foregoing reasons, VDP prays that this Honorable Court will grant review and reverse the judgments of the trial court and court of appeals. VDP asks this Court to declare the taking of VDP's Property to be unconstitutional, award VDP recovery of its Property, and remand this case for a determination of any attorneys' fees, costs, and any other relief owed to VDP. Alternatively, VDP prays that this Court will reverse the trial court's and court of appeals' valuation judgment and remand for a redetermination of value with specific instructions to the trial court as to the correct methodology and standards of review.

Submitted by:



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Counsel for Violet Dock Port, Inc., LLC

VERIFICATION

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, personally came and appeared Randall A. Smith, who after being duly sworn, did depose and state that the Original Writ Application of Violet Dock Port, Inc., L.L.C. is true and correct to the best of his knowledge, information, and belief, and that a copy of the above and foregoing has this date been mailed, faxed, and/or emailed to the following:

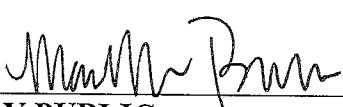
James Garner, Esq.
Joshua Force, Esq.
Ashley Coker, Esq.
Sher Garner Cahill Richter Klein &
Hilbert, LLC
909 Poydras Street, Suite 2800
New Orleans, LA 70112
Counsel for St. Bernard Port, Harbor & Terminal District

Hon. Jacques A. Sanborn
Judge, Division "E"
34th JDC, Parish of St. Bernard
1101 W. St. Bernard Highway
Chalmette, Louisiana 70043

Hon. Justin Woods
Clerk of Court
Louisiana 4th Circuit Court of Appeal
410 Royal Street
New Orleans, Louisiana 70130

RANDALL A. SMITH

SWORN TO AND SUBSCRIBED BEFORE ME,
in New Orleans, Louisiana this 9th day of March, 2017.



NOTARY PUBLIC
Print Name: MARY NELL BENNETT
Louisiana Bar No.: 32339

My commission expires at death.

APPENDIX

Trial Court 2/15/12 Judgment Regarding the Taking	1
Trial Court 3/21/12 Per Curiam Regarding the Taking	3
Trial Court 7/31/15 Judgment Regarding Compensation	5
Trial Court 9/25/15 Reasons for Judgment Regarding Compensation	8
Trial Court 12/1/15 Judgment Regarding Attorneys' Fees and Costs	14
Court of Appeal 12/14/16 Judgment and Opinion.....	17
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OTHER DOCUMENTS (*bound separately*)

Excerpts from Trial Exhibit L-125	1
Excerpts from Trial Exhibit L-143(a).....	17

APPENDIX

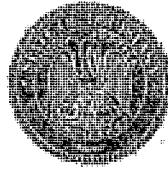
NOTICE OF SIGNING OF JUDGMENT

3660 PC

ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT

VERSUS

VIOLET DOCK PORT, INC., L.L.C.



Case: # 116-860

Division: E

34th Judicial District Court

Parish of St. Bernard
State of Louisiana

FEBRUARY 15, 2012

TO: RANDALL A. SMITH, ATTY.
SMITH & FAWER
201 ST. CHARLES AVE., STE. 3702
NEW ORLEANS, LA 70170

ATTORNEY FOR: VIOLET DOCK PORT, INC., L.L.C.

In accordance with Article 1913 CCP, you are hereby notified that Judgment in the
above entitled and numbered cause was signed on FEBRUARY 15, 2012.

Yours very truly,


CHIEF DEPUTY CLERK OF COURT
34th Judicial District Court
/S/ LENNA T. NUNEZ

LLB/ VIOLET DOCK
www.stbclerk.com

34th JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. BERNARD

STATE OF LOUISIANA

NO. 116-860

DIVISION: "E"

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT

VERSUS

VIOLET DOCK PORT, INC., LLC.

FILED:

FEB 15 2012

CLERK: *J. Loze*

/s/ Gwen S. Loze

JUDGMENT

This matter came to be heard on Wednesday, February 1, 2012, on defendant's, VIOLET DOCK PORT, INC., LLC., Motion to Dismiss Petition for Expropriation.

PRESENT: JAMES M. GARNER & ASHLEY G. COKER, Attorneys for Plaintiff, St. Bernard Port, Harbor & Terminal District

RANDAL A. SMITH & VAL P. EXNICIOS, Attorneys for Defendant, Violet Dock Port, Inc., LLC.

After considering the pleadings, testimony of the witnesses, admitted evidence, and argument of Counsel:

IT IS ORDERED, ADJUDGED AND DECREED that VIOLET DOCK PORT, INC., LLC.'s Motion to Dismiss Petition for Expropriation, is hereby OVERRULED AND DENIED.

READ, RENDERED AND SIGNED this 15th day of February, 2012
in Chalmette, Louisiana.

Judge Jacques A. Sanborn
JUDGE JACQUES A. SANBORN
DIVISION "E"

PLEASE SERVE ALL PARTIES:

A TRUE COPY

Lena R. Torres

CLERK OF COURT

PARISH OF ST BERNARD

STATE OF LOUISIANA

Lena R. Borden
By Lena R. Borden FEB 15 2012
DEPUTY CLERK
/s/ Lena L. Borden

34th JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. BERNARD
STATE OF LOUISIANA

NO. 116-860

DIVISION "E"

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT

VERSUS

VIOLET DOCK PORT, INC. L.L.C.

FILED: _____ DEPUTY CLERK

PER CURIAM

St. Bernard Port, Harbor & Terminal District ("St. Bernard Port") is a public corporation and political subdivision created by the State of Louisiana to regulate domestic, coastwise and intracoastal traffic in St. Bernard Parish. La.R.S. 34:1701; 1703(A). Violet Dock Port, Inc., L.L.C. ("Violet") is a limited liability company that owns about seventy (70) acres of property located about six (6) miles from St. Bernard Port's existing facility. Violet has contracted a portion of the property for use as berths by United States Navy vessels operated by the Military Sealift Command ("MSC"), a civilian branch of the United States Navy. MSC possesses the option to renew that contractual agreement.

On December 22, 2010, after failed negotiations to acquire the property consensually, St. Bernard Port filed and served Violet with a petition to expropriate Violet's facility pursuant to La. R.S. 19:2, and paid estimated compensation of sixteen million (\$16,000,000.00) into the Court's registry. The St. Bernard Port's stated reason for expropriation was to build and operate a terminal to accommodate transport of liquid and solid bulk commodities into national and international commerce to and from St. Bernard.

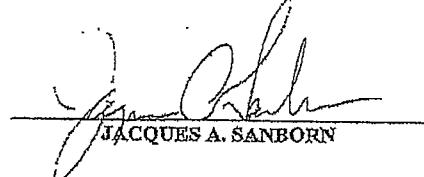
Export of goods and commodities through the port is one of the basic industries of St. Bernard Parish. The acquisition of the Violet terminal would be a logical extension of port services in St. Bernard. The port would acquire heavy duty docks and forty two hundred (4200 LF) linear feet of Mississippi River frontage available for immediate use. Thirty eight (38) acres of presently undeveloped uplands would be available for cargo storage. The contemplated construction and use of the property would bring needed revenues into the community which is still recovering from the effects of the 2005 hurricanes and provide needed employment to its citizens. The predominant use for the property would be by the public, not for use by, or for

transfer of ownership to any private person or entity. The Court is apprised that the expropriation will not affect the use by MSC for its vessels should MSC elect to continue that use.

In accord with the foregoing, the Court finds St. Bernard Port's petition for expropriation of the Violet facility well founded in fact and warranted by law, La. R.S. 34: 1705; 1708. The Court OVERRULES the motion to dismiss filed by Violet, and GRANTS the said Petition.

The Court declines to stay the expropriation. Sec, La. R.S. 9:13; 114 ("no party to an expropriation shall be entitled to or granted a suspensive appeal"); 19:148 ("[T]he plaintiff shall be entitled to enter upon and take possession of the property upon the deposit of the estimated compensation. If any building is located wholly or partially upon the property described in the petition, the court may postpone the right of entry for any period not to exceed thirty days from the date on which the last of any party defendant was served with the notice.")

READ, RENDERED AND SIGNED on this 21st day of March, 2012 at Chalmette, Louisiana.



JACQUES A. SANBORN

NOTICE OF SIGNING OF JUDGMENT

ST. BERNARD PORT, HARBOR, AND
TERMINAL DISTRICT

VERSUS

VIOLET DOCK PORT, INC., L.L.C.

Case: #116-860

Division: "E"

34th Judicial District Court

Parish of St. Bernard

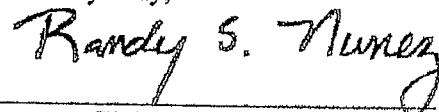
State of Louisiana

TO: RANDALL A. SMITH
SMITH & FAWER, L.L.C.
201 ST. CHARLES AVE, SUITE 3702
NEW ORLEANS, LA 70170

ATTORNEY FOR VIOLET DOCK PORT, INC., L.L.C.

In accordance with Article 1913 CCP, you are hereby notified that Judgment in the
above entitled and numbered cause was signed on JULY 31, 2015, and received
on JULY 31, 2015.

Yours very truly,



CLERK OF COURT
34th Judicial District Court
/S/ RANDY S. NUNEZ

EAC/VIOLET DOCK PORT

www.stbclerk.com

34th JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. BERNARD

STATE OF LOUISIANA

NO. 116-860

DIVISION "E"

ST. BERNARD PORT, HARBOR, AND TERMINAL DISTRICT

VERSUS

VIOLET DOCK PORT, INC., L.L.C.

JUL 31 2015

FILED:

CLERK: *Wm. L. Johnson*

JUDGMENT

This matter came before the court on December 16, 2014, for final conclusion of all aspects of trial. Trial had begun on September 24, 2013, and was tried in parts due to scheduling conflicts among counsel and the Court.

PRESENT FOR PLAINTIFF: James Garner, et al for St. Bernard Port, Harbor, and Terminal District

PRESENT FOR DEFENDANT: Randall Smith, et al for Violet Dock Port, Inc., L.L.C.

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment herein, in favor of Violet Dock Port, Inc., L.L.C. and against St. Bernard Port, Harbor, and Terminal District in the full sum of **SIXTEEN MILLION AND NO/100THS (\$16,000,000.00) DOLLARS**. This sum is subject to a credit to St. Bernard Port, Harbor, and Terminal District of any sums of money deposited into the registry of this Court with Clerk of Court in anticipation of judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment in favor of the St. Bernard Port, Harbor, and Terminal District against Violet Dock Port, Inc., L.L.C. in the full sum of **THIRTY SEVEN THOUSAND AND NO/100THS (\$37,000.00) DOLLARS** plus legal interest thereon from date of judicial demand in regards to its claim for rental value of the property by Violet Dock Port, Inc., L.L.C. for a period of approximately three (3) months.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that legal interest from date of judicial demand, shall be due by St. Bernard Port, Harbor, and Terminal District to Violet Dock Port, Inc., L.L.C. on any sums deposited by St. Bernard Port, Harbor, and Terminal District into the registry of this Court with the Clerk of Court that were ordered to remain in the registry pending the outcome of this trial.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that St. Bernard Port, Harbor, and Terminal District's claim for removal of construction debris or fill was not sufficiently proven and is therefore **DENIED**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claim of Violet Dock Port, Inc. L.L.C. for any scrap metal remaining on the property was not proven sufficiently to the Court's satisfaction and is therefore **DENIED**.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any claim for attorney fees and/or costs of the Parties shall be determined at a hearing on a Rule to Show Cause filed on behalf of either Party.

CHALMETTE, LOUISIANA, this 31 day of July 2015.


JUDGE

PLEASE SERVE ALL PARTIES

A TRUE COPY
KAREN S. WATSON
CLERK OF COURT
ST. BERNARD PARISH
STATE OF LOUISIANA
EMILY A. CARIN

34th JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. BERNARD

STATE OF LOUISIANA

NO. 116-860

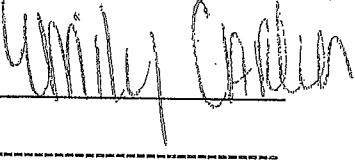
DIVISION: "E"

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT

VERSUS

VIOLET DOCK PORT, INC. L.L.C.

1FILED: SEP 25 2015

CLERK: 

REASONS FOR JUDGMENT

VIOLET DOCK PORT, INC., LLC was the owner of the property which is the basis of this case. The property, approximately seventy five acres of land (including uplands, levee, and batture), lies on the east bank of the Mississippi River in St. Bernard Parish. During the many years Violet Dock Port Inc. (VDP) owned the property, VDP had constructed several docks or piers on the river for docking, or berthing, of ships. Mr. Joseph Ruppel, the president of VDP for about thirty years was also the president of Boland Marine Manufacturing Co., a maritime repair business operating throughout the New Orleans area down to the mouth of the Mississippi River. Boland Marine leased docks from VDP at the subject property to perform repairs on vessels docked there. VDP also leased several docks to the US Navy for layberthing of its ships.

Most of the shareholders of VDP, besides Mr. Ruppel, were also associated with or worked for Boland Marine. As such, the owners of VDP were very familiar with, and relatively sophisticated, as to general maritime industry on the lower Mississippi River.

The St. Bernard Port, Harbor & Terminal District (The Port) became interested in the subject property in the late 1990's and early 2000's. This interest by The Port increased to the point to where The Port had some discussions with a representative of VDP about a sale of the property.

In late 2006, early 2007, The Port had an appraisal (with approval of VDP) completed resulting in an offer by the Port to purchase the property for ten million dollars. In March 2007, VDP rejected the ten million dollar offer. However, in April

2007, VDP communicated to the Port that it wanted 14 million dollars for the property nonnegotiable. Within a month The Port agreed to the 14 million dollar figures. VDP demanded a non-refundable deposit to secure an agreement. The Port could not legally agree to the non-refundable deposit.

There was another appraisal performed in 2010 and The Port offered \$16,000,000.00, which was eventually rejected by VDP, who then asserted a sale price of \$35,000,000.00.

These two appraisals were performed by Mr. Michael Truax who was initially agreed upon by VDP.

The Port then initiated these expropriation proceedings. The Port deposited the \$16,000,000.00 in funds into the registry of the Court, and the case proceeded to trial on the expropriation, which was eventually granted by this Court.

The Court's task in this part of the case was to come to the determination of which side's experts' evaluations were the most reliable based upon the facts and proper analyses. The valuations of the plaintiff's experts differed greatly from the evaluations of the defendant's experts. It is the opinion of this Court that it does not have the discretion to "split the baby" and arrive at a valuation somewhere in between. The Court, after weighing all the evidence, testimony, opinions, and reports has come to a conclusion that the Port of St. Bernard's experts and appraisers performed a more credible analysis (based upon real facts and data) than did those experts of VDP.

The Court was bound to the legal concept that the subject property be assessed at its "highest and best use" considering the size, location, improvements, but importantly, whether the highest and best use was: (1) legally permissible; (2) physically possible; (3) financially feasible; (4) maximum productivity.

VDP's experts testified that the property could be used as a dry or liquid bulk facility. Because of the property's close proximity to an elementary school and a residential area, any such use as a liquid tank terminal or dry bulk cargo terminal which included toxic or semi-toxic materials would be automatically eliminated.

Additionally, there is a "cut out" portion of property, several acres in size that sits in the middle of the subject property which was not owned by VDP, and therefore would

greatly hinder the development of the property as a whole, due to this somewhat fragmentation.

The trial of this case was long in duration and required to be completed piecemeal over an extended period of time. There were a few important factual issues, but predominately was a contest of expert opinions and differing analyses.

Some factual issues included the actual condition of the docks, the amount of landfill deposited on the site, the actual water depth of the river at the fender line of the docks, and whether VDP's offer to sell the property for \$14,000,000.00 was a serious offer to sell.

VDP relied on several experts, including Mr. Joseph Jacquet (engineer), economist Loren Scott, and appraisers Dr. Wade Ragas and Heyward Cantrelle.

In the end, Dr. Ragas and Mr. Cantrelle, after using several different analyses, arrived at valuations of the property between \$ 51,000,000.00 and \$ 67,437.449.00.

The Port's expert appraisers, Mr. Oubre and Mr. Truax testified at trial the property's value to be \$16,000,000.00.

Both sides' experts, as part of their analyses, cited many "comparables." None of the comparables closely matched the subject property (approximately 39 acres of uplands and 4200 linear feet along the Mississippi River). There were one or two comparables somewhat close in proximately on the river. One property, the AMAX property, was located down river from the subject property, in Plaquemines Parish.

AMAX differed from the subject property in that it had only one dock, but included other infrastructure for industrial use. But AMAX included about 350 acres of uplands available for variable uses. This property sold for \$11,500,000.00 in 2012.

Most of the other comparables varied greatly in size, configuration and allowable uses.

Also, VDP's own 2009 "balance sheet" reflected a value of approximately \$8,000,000.00 for the land and docks - minus depreciation of approximately \$5,000,000.00.

The real question became which experts' opinions were based upon solid analysis, given the condition and possible use of the property and economic

considerations. Importantly, the question was which experts were more credible based upon facts and /or credible presumptions.

The Court's Judgment was that Mr. Jacquet's testimony and opinions were seriously flawed. For example, his estimates for an open, dilapidated workshed and an office constructed from an old house placed on top of shipping containers were \$600,000.00 and \$200,000.00, respectively. Mr. Jacquet's opinion also included other inventory, such as a boiler valued at \$300,000.00. The boiler should not have been included in the property, and VDP sold it for \$50,000.00 (one-sixth of Jacquet's valuation). Jacquet also included other items that were not present or items on the adjacent Meraux property.

The credibility of Mr. Jacquet's analysis and opinions was therefore questionable.

VDP's expert appraiser, Dr. Ragas, relied heavily upon Mr. Jacquet's findings, including in his valuation moveables (included in Jacquet's opinion) that did not form part of the property. By not performing a more thorough investigation or review, Dr. Ragas' analysis was flawed.

The Court noted that Dr. Ragas evaluation was revised and reduced several times before trial after he was made aware that several of his extraordinary assumptions were not accurate, or did not exist (dredging of the lower Mississippi River to 50ft, extension of the Meraux lease, the structural soundness of the docks to berth Panamax or Post Panamax vessels).

Dr. Ragas also did not take into account the functional obsolescence of the property having five (5) docks servicing approximately forty (40) acres of uplands. In plain terms, there are far too many docks for so little land. No large-scale operation could be developed at this site to service the number of docks - other than layberthing.

VDP's other appraiser, Mr. Cantrell, included in his analysis and opinion comparables which had larger uplands - which are obviously not present at this site. Mr. Cantrell also changed his opinion from his original report after being supplied with Mr. Oubre's opinion. Mr. Cantrell also relied upon Mr. Jacquet's inventory, which, in this Court's opinion is discredited. Mr. Cantrell even admitted that if items included by

Jacquet (and considered within his own valuation) were not part of the property, then his opinion would be incorrect.

The Court came to several conclusions:

- 1) The Mississippi River may not be dredged to 50 ft. in the foreseeable future (or not at all), thus excluding deeper-draft ships (Panamax and Post Panamax) from utilizing the property's docks.
- 2) Use of this property as a liquid bulk or dry bulk terminal is limited because of its proximity to school and residential area.
- 3) The limited amount of uplands of the property would not support a large scale cargo terminal.
- 4) The configuration of the property with the inset of the non-owned parcel ("cut out") limits the uses of the property.
- 5) The "Meraux lease" adjacent to dock 1 may or would not be renewed, thereby greatly reducing the uses of dock 1.
- 6) An extraordinary amount of capital investment in infrastructure in the property would be needed to justify a value of \$51,000,000.00
- 7) The property could be used partially as some type of "container" terminal, but it would probably require enlargement of the ramps and docks to accommodate the loading/unloading of the containers.
- 8) There are too many docks for such a limited amount of land which results in a serious functional obsolescence.
- 9) The Court should only consider those uses that are reasonably to occur in the not too distant future.

The Court decided that the valuation opinions of the Port's experts (\$16,000,000.00) were more reliable than those of the experts of VDP and that the highest and best use for the property was continued use as layberthing and a limited

intermodal container terminal.

READ, RENDERED AND SIGNED IN CHALMETTE, LOUISIANA THIS
23 DAY OF September, 20 15



JUDGE JACQUES A. SANBORN
34TH JUDICIAL DISTRICT COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

PLEASE SERVE ALL PARTIES:

ST. BERNARD PARISH, LOUISIANA
CLERK OF COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA
By DEPUTY CLERK
Emily A. Carlin

NOTICE OF SIGNING OF JUDGMENT

*ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT*

VERSUS.

VIOLET DOCK PORT, INC., L.L.C.

Case: #116-860

Division: "E"

34th Judicial District Court

Parish of St. Bernard

State of Louisiana

TO: RANDALL SMITH, T.A.
SMITH & FAWVER, L.L.C.
201 ST. CHARLES AVENUE, SUITE 3702
NEW ORLEANS, LOUISIANA 70170

ATTORNEY FOR VIOLET DOCK PORT, INC., LLC

In accordance with Article 1913 CCP, you are hereby notified that Judgment in the above entitled and numbered cause was signed on **DECEMBER 4, 2015**.

Yours very truly,

Randy S. Niney
CLERK OF COURT
34th Judicial District Court
S/ RANDY S. NINEY

EAC/STB PORT

www.stbclerk.com

hereby certify that a copy of the foregoing Notice with attached copies of pleadings have been served upon counsel for all parties herein by mailing the same to each by Certified ^{Return} Receipt Mail on this 20 day of July 2001.

Deputy Cle

34TH JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. BERNARD

STATE OF LOUISIANA

NO. 116-860

DIVISION: "E"

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT

VERSUS

VIOLET DOCK PORT, INC., L.L.C.

DEC 03 2015

FILED:

CLERK: Wm. C. Johnson

JUDGMENT

This matter came before the Court on September 15, 2015, on Motions for Attorneys Fees and Costs.

PRESENT: JAMES GARNER, Attorney for St. Bernard Port, Harbor, and Terminal District

RANDALL SMITH, Attorney for Violet Dock Port, Inc., L.L.C.

This Court, in reviewing the motions by both parties for attorney fees and costs, denies both parties' motions for the following reasons:

The Court awarded Violet Dock Port, Inc., L.L.C., the amount of \$16,000,000.00 for the expropriated property which is the value the Port's experts testified as to their opinion of the value of the property. However, one of the Port's experts had, in a previous report, indicated a value of several million dollars more (although still only a fraction of the value of that of Violet Dock's experts' values).

Obviously, Violet Dock was aware of, and received, a copy of this report from St. Bernard Port, and, therefore, had at least some basis, other than their own, to refuse to accept the \$16,000,000.00 offer.

Absent this report, the Court could have easily concluded that Violet Dock's behavior of continuously increasing their sale price demands as arbitrary and in bad faith.

Conversely, Violet Dock's behavior of continually "upping the ante" impressed the Court as significant signs of bad faith.

An original offer of \$10,000,000.00 was eventually met by Violet Dock's response of \$14,000,000.00.

After St. Bernard Port went through the process of obtaining the approval of funding by the State, Violet Dock responded with a new demand of over Thirty (30) million dollars. That figure was eventually doubled to approximately Sixty (60) million dollars. Violet Dock's actions could easily be conceived of as arbitrary or in bad faith.

The Court is of the opinion that Violet Dock had some basis to refuse the \$16,000,000.00 offer and proceed to trial, therefore the Court denies St. Bernard Port's motion for attorney's fees and costs.

The Court is further of the opinion that because the Court decided the case in favor of St. Bernard Port, Violet Dock's motion for attorney's fees and costs is denied.

IT IS ORDERED, ADJUDGED AND DECREED that the motions for attorney fees and costs submitted by both parties are **DENIED**.

CHALMETTE, LOUISIANA, this 1st day of December, 2015.



JUDGE JACQUES A. SANBORN

PLEASE SERVE ALL PARTIES

A TRUE COPY

Mandy S. Nunez
CLERK OF COURT
CLERK OF THE JUDICIAL
DISTRICT OF NEW ORLEANS
EMILY A. Caffin

ST. BERNARD PORT, * NO. 2016-CA-0096
HARBOR & TERMINAL
DISTRICT *
VERSUS * COURT OF APPEAL
VIOLET DOCK PORT, INC., * FOURTH CIRCUIT
LLC * STATE OF LOUISIANA

CONSOLIDATED WITH: CONSOLIDATED WITH:

ST. BERNARD PORT, HARBOR & NO. 2016-CA-0262
TERMINAL DISTRICT

VERSUS

VIOLET DOCK PORT, INC., LLC

CONSOLIDATED WITH: CONSOLIDATED WITH:

ST. BERNARD PORT, HARBOR & NO. 2016-CA-0331
TERMINAL DISTRICT

VERSUS

VIOLET DOCK PORT INC., LLC

APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 116-860, DIVISION "E"
Honorable Jacques A. Sanborn, Judge

Judge Roland L. Belsome

(Court composed of Judge Terri F. Love, Judge Roland L. Belsome, Judge Joy Cossich Lobrano)

LOBRANO, J., DISSENTS AND ASSIGNS REASONS

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AFFIRMED AS AMENDED

December 14, 2016

Ph
JM

This appeal arises from the trial court proceedings of a quick-take expropriation of Violet Dock Port, L.L.C.'s ("VDP") property initiated by and for the benefit of the St. Bernard Port, Harbor & Terminal District ("the Port"). The subject property consists of approximately 75 acres of land; 22 acres of batture, 38.5 acres of upland property, and 4,238 linear feet of frontage along the Mississippi River as well as a 4-acre parcel across La. State Hwy. 46 ("the Property").

VDP was a privately owned industrial port facility with one mile of water frontage on the Mississippi River in St. Bernard Parish. VDP built the facility, which included five heavy-duty docks and related infrastructure. VDP's improvements were designed to berth and service ocean-going ships for the United States Navy. VDP had held contracts with the Navy for many years. The docks were also used for topside repair, and commercial vessel layberthing.

Procedural History

In 2007, the Port offered to purchase the Property and VDP declined. After years of failed negotiations, the Port expropriated the Property on December 22, 2010, and deposited the estimated just compensation of \$16,000,000 into the

registry of the court. In response, VDP challenged the public purpose of the expropriation. After conducting an evidentiary hearing, the trial court found that the taking served a public purpose.¹ Later, the Port filed an Amended Petition for Expropriation in which it added claims against VDP alleging damages for debris material being buried on the Property, among other things. Based on those claims, the trial court ordered that \$1,900,000 of the \$16,000,000 was to remain in the registry of the court. VDP withdrew the balance of the funds.

The matter proceeded to trial to determine the value of the Property as well as the Port's claim for damages on the allegations that debris had been dumped and buried on the Property after the expropriation date. The trial court rendered its judgment finding that the value of the Property was \$16,000,000, the trial court denied the Port's claim for damages for debris removal, and VDP was awarded judicial interest on the \$1,900,000 in funds that had remained in the registry of the court.² Subsequent to the judgment being issued, both the Port and VDP filed motions to recover attorney's fees and costs. The trial court denied both parties' motions.³ This appeal and cross-appeal followed. The appeals challenge each of the three judgments.

Assignments of Error

On appeal VDP maintains that the trial court erred in finding that the taking was constitutional and thereafter finding the value of the Property to be \$16,000,000. In addition, VDP asserts that if this Court were to overturn either of those rulings by the trial court it would be statutorily eligible for attorney's fees and costs.

¹ March 21, 2012 Judgment.

² July 31, 2015 Judgment.

The cross-appeal filed by the Port contends that the trial court erred in denying its claims for damages regarding buried debris, erred in awarding judicial interest on the \$1,900,000 that remained in the registry of the court, erred in excluding testimony of an expert economist, and also erred in failing to award costs and attorney's fees.

Standard of Review

In an expropriation case, the trial court's factual determinations are subject to the manifest error standard of review, while legal determinations are reviewed *de novo*, and evidentiary rulings are subject to the abuse of discretion standard.⁴

March 21, 2012 Judgment (Public Purpose)

Through the Louisiana Constitution and state statutes, the Port is granted the express right to expropriate private property.⁵ For the taking to be constitutional it must be for a public purpose and the landowner must be paid just compensation.⁶ After conducting an evidentiary hearing on the issue of public purpose only, the trial court determined that the Port had established a valid public purpose for the expropriation of the Property pursuant to La. R.S. 34:1705 and 1708. More specifically, the trial court found that the "[e]xport of goods and commodities through the port is one of the basic industries of St Bernard Parish. The acquisition of the Violet terminal would be a logical extension of port services in St. Bernard." The trial court also reasoned that the contemplated construction and use of the property would bring employment to the citizens of St. Bernard Parish.

³ December 1, 2015 Judgment.

⁴ See *State, DOTD v. Restructure Partners, L.L.C.*, 07-1745 (La.App. 1 Cir. 3/26/08), 985 So.2d 212.

⁵ See, La. Const. Art. I, §4 and Art. VI, §21.

⁶ La. Const. Art. I, § 4.

VDP argues that the Port's expropriation was not for a public purpose and therefore violated its constitutional protections as a private landowner. Specifically, it maintains that the trial court erred in upholding the Port's taking of the Property because the expropriation was in violation of La. Const. Art. I, §§4(B)(1), (2), (3), and (6),⁷ La. R.S. 34:1708⁸ and U.S. Const. amend. V.⁹

⁷ The pertinent provisions of § 4. Right to Property read as follows:

(B)(1) Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. *Except as specifically authorized by Article VI, Section 21 of this Constitution* property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity.

(2) As used in Subparagraph (1) of this Paragraph and in Article VI, Section 23 of this Constitution, "public purpose" shall be limited to the following:

* * *

(vi) *Public ports and public airports to facilitate the transport of goods or persons in domestic or international commerce.*

* * *

(3) Neither economic development, enhancement of tax revenue, or any incidental benefit to the public shall be considered in determining whether the taking or damaging of property is for a public purpose pursuant to Subparagraph (1) of this Paragraph or Article VI, Section 23 of this Constitution.

* * *

(6) No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise. However, a municipality may expropriate a utility within its jurisdiction.

La. Const. Art. I, § 4 (emphasis added).

⁸ La. R.S. 34:1708 states:

A. The board is authorized to acquire by purchase, donation, expropriation, appropriation, or otherwise any lands in the district needed for railways, wharves, sheds, buildings, canals, channels, and other facilities required for the operation of the board and to be owned and operated by the board except those pipelines in operation on May 1, 2008. The board may also provide that payments for such lands be made out of funds under its control not otherwise specifically appropriated.

B. The board is further authorized to receive by gift, grant, donation or otherwise, any sum of money, aid or assistance from the United States, the state of Louisiana, or any of the political subdivisions thereof, for the purpose of carrying out the objects and purposes of this Chapter.

C. In addition to its power to acquire such property in the various modes set out hereinabove, the board shall also have power to expropriate property within the district in the same manner applicable to Louisiana State University and Agricultural and Mechanical College and the Department of Transportation and Development under the provisions of R.S. 19:141 *et seq.*

VDP cites to several constitutional violations, but more specifically contends that the taking did not meet a public purpose and the Port was not authorized to expropriate the property. VDP argues that the real purpose for the taking was so the Port could continue to operate its layberthing and cargo facility and obtain the Navy contracts in violation of La Const. art. I §4(B)(6). For these reasons, VDP claims the taking was unconstitutional. We disagree.

The State of Louisiana created the Port as a public corporation and political subdivision to regulate domestic, coastwise, and intercoastal commerce and traffic.¹⁰ La. R.S. 34:1705¹¹ establishes the authority and jurisdiction of the Port, and 1708¹² provides the manner in which the Port can acquire property. The

⁹ Amendment V of the takings clause mandates that just compensation be paid for private property taken for public use.

¹⁰ La. R.S. 34:1701.

¹¹ La. R.S. 34:1705 reads:

A. (1) The board of commissioners of the St. Bernard Port, Harbor and Terminal District shall have the sole power to regulate, pursuant to R.S. 34:1703, the domestic, coastwise, and intercoastal commerce and traffic of said district and all commerce and traffic within the district including cargo bound for and/or in, and/or coming out of international commerce where such commerce and traffic is conducted by or through a facility wholly owned by the district.

(2) The board of commissioners of the St. Bernard Port, Harbor and Terminal District shall also have and exercise the powers granted to deep water port commissions pursuant to R.S. 9:1102.1 in all cases where riparian owners of property on navigable rivers, lakes, or streams within said district desire to construct wharves, buildings, or improvements on the batture or banks owned by them, which are designed for and/or used for such commerce and traffic domestic, coastwise, or intercoastal commerce, including cargo bound for and/or in and/or coming out of international commerce where such is conducted by or through a facility wholly owned by the district.

B. The board of commissioners of the St. Bernard Port, Harbor and Terminal District shall have the right to enter into any and all contracts and agreements with the parish of St. Bernard, the board of commissioners of the Port of New Orleans, and any other public subdivisions or authorities relative to any and all matters which lie within the jurisdiction of the district and the board of commissioners thereof.

¹² La. R.S. 34:1708 states:

A. The board is authorized to acquire by purchase, donation, expropriation, appropriation, or otherwise any lands in the district needed for railways, wharves, sheds, buildings, canals, channels, and other facilities required for the operation of the board and to be

Legislature has bestowed broad discretion and authority upon the Port to support its efforts to maintain and further development of its operations.¹³

The constitutional rights of Article I, § 4 that VDP maintain were violated, are subject to the exceptions provided in Article VI, § 21. Section 21 provides in pertinent part:

(A) Authorization. *In order to* (1) induce and encourage the location of or addition to industrial enterprises therein which would have economic impact upon the area and thereby the state, (2) provide for the establishment and furnishing of such industrial plant, (3) *facilitate the operation of public ports*, or (4) provide movable or immovable property, or both, for pollution control facilities, the legislature by law may authorize, subject to restrictions it may impose, any political subdivision, *public port commission, or public port, harbor, and terminal district to:*

* * * *

(b) *acquire, through purchase, donation, exchange, and expropriation, and improve industrial plant buildings and industrial plant equipment, machinery, furnishings, and appurtenances, including public port facilities and operations which relate to or facilitate the transportation of goods in domestic and international commerce; and*

(c) *sell, lease, lease-purchase, or demolish all or any part of the foregoing*

La. Const. Art. VI, § 21 (emphasis added).

The trial court was presented evidence of the Port's intention to maintain the current use of the Property initially, with a comprehensive plan to expand the

owned and operated by the board except those pipelines in operation on May 1, 2008. The board may also provide that payments for such lands be made out of funds under its control not otherwise specifically appropriated.

B. The board is further authorized to receive by gift, grant, donation or otherwise, any sum of money, aid or assistance from the United States, the state of Louisiana, or any of the political subdivisions thereof, for the purpose of carrying out the objects and purposes of this Chapter.

C. In addition to its power to acquire such property in the various modes set out hereinabove, the board shall also have power to expropriate property within the district in the same manner applicable to Louisiana State University and Agricultural and Mechanical College and the Department of Transportation and Development under the provisions of R.S. 19:141 *et seq.*

¹³ See, La. R.S. 34:1701 *et seq.*

facility to include a dry and liquid bulk cargo operation. In *Board of Comm'rs of Port of New Orleans v. City of New Orleans*, this Court acknowledged the important role that ports fulfill for the State and the local communities stating, "a healthy port generates local jobs and industry and associated local consumption."¹⁴ This Court further recognized that the health of the Port rests with its ability to be competitive and the maintenance and development of the Port provides "a great public benefit to the people of Louisiana."¹⁵

Although the authority granted to the ports of Louisiana in the expropriation of private property is exceptionally broad, it is supported by the constitution and statutes of the State. Accordingly, we do not find that the trial court was manifestly erroneous or committed legal error in determining that the Port's expropriation of the Property was for a public purpose.

July 31, 2015 Judgment (Property Valuation/Debris Damages)

VDP asserts that the trial court erred when it awarded only \$16,000,000 for the Property. Additionally, the Port argues that the trial court erred by not awarding damages for the debris removal and further erred in limiting expert testimony and awarding interest on the funds that were held in the registry of the court.

Property Valuation

Once the trial court found that the expropriation served a public purpose, it then had to determine the valuation that would provide just compensation to the landowners. In accordance with the constitutional provisions governing expropriations, a property owner must be "compensated to the full extent of his

¹⁴ 15-0768, p. 8 (La. App. 4 Cir. 3/16/16), 186 So.3d 1282, 1287.

¹⁵ *Id.*

loss".¹⁶ Commonly in expropriation cases, just compensation is determined by the fair market value of the property.

When making a fair market value determination in an expropriation case, the highest and best use of the property must be established. Several factors are considered in a highest and best use analysis including:

Market demand, proximity to areas already developed in a compatible manner with the intended use, economic development in the area, specific plans of business and individuals, including action already taken to develop the land for that use, scarcity of the land available for that use, negotiations with buyers interested in the property taken for a particular use, absence of offers to buy the property made by the buyers who put it to the use urged, and the use to which the property was being put at the time of the taking.¹⁷

Additionally, the presumption is that the use at the time of expropriation is the highest and best use. However, that presumption can be overcome if the landowner proves that the property could realistically be used in a more valuable way in the not too distant future.¹⁸

The trial court's reasons for judgment outlined the evidence relied upon to determine the appropriate value to place on the Property, starting with the ongoing negotiations between the Port and VDP. The first offer made by the Port in 2007 was for \$10,000,000, which was based on an appraisal that was performed on behalf of the Port and with VDP's approval. VDP rejected that offer and eventually countered with \$14,000,000, and the Port accepted that price. There were some issues on VDP's conditions and terms which prevented the Port from moving forward. Then in 2010, after another appraisal was performed, the Port offered \$16,000,000, and VDP countered with \$35,000,000.

¹⁶ La. Const. Art. I § 4

¹⁷ *Exxon Pipeline Co. v. Hill*, 00-2535, 00-2559, p. 8 (La. 5/15/01), 788 So.2d 1154, 1160 (citations omitted).

¹⁸ *Id.*

At trial several expert opinions were presented regarding the value of the Property. VDP's experts valued the property from \$51,000,000 to \$67,437,449,¹⁹ while both of the Port's appraisers arrived at a market value of \$16,000,000. Generally, fair market value is considered the price a buyer is willing to pay based on all likely uses of the property, but those uses cannot be "speculative, remote or contrary to law."²⁰ In assessing the experts' opinions and reports, the trial court noted that VDP's experts' analysis proved to be "questionable," "flawed," and at times "inaccurate." When evaluating expert opinions, the fact finder has broad discretion in determining the effect and weight to be given expert testimony.²¹ The fact finder can either accept or reject any or all of an opinion expressed by an expert.²²

In further evaluation of the evidence presented, the trial court considered the physical constraints of the Property.²³ Taking into account the condition of the Property at the time of the expropriation and the possible uses that were realistic in the "not too distant future," the Port's appraisers testified that their appraisals took into account the highest and best use of the Property as being a layberthing facility, with some topside repair, and limited cargo operations. The trial court concluded that the Port's experts presented a solid analysis based on credible facts and presumptions.

¹⁹ These values were based on the property being developed into a multimodal, heavy-cargo, international trade facility.

²⁰ *Exxon Pipeline*, 788 So.2d at 1160 (citing *West Jefferson Levee Dist. v. Coast Quality*, 93-1718 (La. 5/23/94), 640 So.2d 1258).

²¹ *Cooper v. Bouchard Transp.*, 12-0868, p.6 (La.App. 4 Cir. 3/27/13), 140 So.3d 1, 7 (citations omitted).

²² *Id.*

²³ The trial court stated, among other things, that limitations exist as to the type of cargo that could be stored due the Property's proximity to a school and residential area. The trial court also found that the Property was limited due to its configuration, which included several acres of land that was not owned by VDP.

The appropriate review of the trial court's factual findings in civil cases is the manifest error-clearly wrong standard.²⁴ On appeal, it is this Court's function to review the record in its entirety to see if the trial court's factual conclusions were reasonable.²⁵ If the record supports the factual determinations, this Court cannot reverse those findings merely because we would have found differently.²⁶ Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong.²⁷ Thus, upon a thorough review of this record, we cannot find that the trial court was manifestly erroneous or clearly wrong in its ruling that \$16,000,000 was just compensation for the Property.

Exclusion of Expert Economist's Testimony

In this assignment, the Port seeks to have this Court overrule the trial court's decision to exclude Dr. Timothy Ryan's expert opinion, regarding the market value of VDP's business and earnings. Evidentiary rulings by the trial court are reviewed under an abuse of discretion standard.²⁸

In ruling to limit the testimony, the trial court referred to an earlier ruling made in the case where it was determined that Dr. Ryan, an economist, could not testify as to the valuations and appraisals of the Property. The record indicates that Dr. Ryan's testimony was to be limited to his area of expertise which did not

²⁴ *Hayes Fund for First United Methodist Church of Welsh, LLC v. Kerr-McGee Rocky Mountain, LLC*, 14-2592, p. 8-9 (La. 12/8/15), 193 So.3d 1110, 1115-16 (citations omitted).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *727 Toulouse, L.L.C. v. Bistro at the Maison De Ville, L.L.C.*, 12-1014, p. 19 (La.App. 4 Cir. 8/21/13), 122 So.3d 1152, 1163 (citing *In re Succession of Holzentahl*, 12-0211, p. 8 (La.App. 4 Cir. 9/26/12), 101 So.3d 81, 87).

include evaluating the value of businesses or real estate. Therefore, we do not find that trial court abused its discretion in limiting the testimony.

Damages for Debris Removal

The Port sought damages for the removal of what was characterized as debris under La. C.C. art. 2315.

The record contains substantial testimony and photographic evidence regarding the fill on the Property. VDP did not dispute the fact that fill had been spread throughout the property dating back to the 1980s. Donald Dieudonne, the corporate representative for VDP, testified that VDP had been receiving fill for decades and using it to raise some of the lower areas of the Property. He claimed that after the expropriation the practice of receiving fill continued until the Port objected in June of 2012. Mr. Dieudonne's testimony was that once the Port objected VDP did not authorize any further fill to be deposited.

Mr. Dieudonne's statements were not directly contradicted. A review of the testimony and evidence presented, failed to establish with any certainty the quantity of fill that was deposited after the expropriation or that VDP continued to authorize such activity after the Port objected. Additionally, there was no evidence indicating the Property was damaged or that removal was required.

Further there is no precedent set for allowing the Port to offset its purchase price for the remediation of the Property after the purchase. To the contrary, in *State, DOTD v. Todd*, the court denied DOTD's cause of action for reimbursement for a remediation required by the Department of Environmental Quality to remove contaminated soil and ground water on expropriated property.²⁹

²⁹ 01-0374 (La.App. 3 Cir. 12/4/02), 834 So.2d 1114.

Consequently, this Court cannot find error with the trial court's determination that the Port did not prove its claims for damages against VDP.

Interest

The Port maintains that the trial court erred in awarding VDP judicial interest on the funds that remained in the registry of the court. The Port relies on La. R.S. 19:155, to argue that the award of judicial interest on funds deposited in the registry of the court, in an expropriation case, is statutorily prohibited.³⁰ Under the facts of this case, we disagree.

Although the Port deposited the estimated just compensation of \$16,000,000, it later requested that the trial court withhold \$1,900,000 of the deposit pending the outcome of a claim against VDP for an offset. It was approximately three years later that the trial court determined that the Port could not prove it was owed an offset. The landowners were deprived of the use of funds that were deposited as estimated just compensation for the expropriation, due to the Port's filing of a claim for offset. Effectively, it was as if the money was never deposited. As such, it is subject to the statutory 5% annual interest provided for by La. R.S. 19:155, less any interest accrued while on deposit. Accordingly, the trial court's ruling in this respect is amended.

December 1, 2015 Judgment (Costs and Attorney's Fees)

The Port challenges this judgment arguing that the trial court erred in not awarding costs to the Port because it offered the true value of the Property prior to

³⁰ La. R.S. 19:155 reads:

The judgment rendered therein shall include, as part of the just compensation awarded, interest at the rate of five per centum per annum on the amount finally awarded as of the date title vests in the plaintiff to the date of payment; but interest shall not be allowed on so much thereof as has been deposited in the registry of the court.

the beginning of the litigation. Further, the Port argues that the trial court erred in denying attorney's fees based upon VDP's bad faith litigation.

For the Port's argument regarding its entitlement to costs including expert costs, it relies on La. R.S. 19:12. At the time of the filing for expropriation, in 2010, La. R.S. 19:12 provided that "[i]f a tender is made of the true value of the property to the owner thereof, before proceeding to a forced expropriation, the costs of the expropriation proceedings shall be paid by the owner."

The amended version of the statute which went into effect on August 1, 2012, reads, "[i]f the highest amount offered prior to the filing of the expropriation suit is equal to or more than the final award, the court may, in its discretion, order the defendant to pay all or a portion of the costs of the expropriation proceedings."

The obvious difference in the two versions of the statute is the discretion given to the trial court. However, for this case we need only focus on the condition that is consistent in both, which is that a tender must occur "prior to" or "before" the filing of the expropriation.

The jurisprudence is clear, because the assessment of costs pursuant to La. R.S. 19:12 impacts the landowner's guaranteed right to just compensation under La. Const. Art. 1, § 4, the statute must be strictly construed.³¹ According to Black's Law Dictionary, a tender is defined as an unconditional offer of money.³² Although it is undisputed that there were ongoing negotiations for the Property over many years, all offers prior to the \$16,000,000 offer are irrelevant to the assessment of costs. Also, undisputed is that the deposit of \$16,000,000 in the

³¹ See, *South Central Bell Tel. Co. v. Marsh Inv. Corp.*, 344 So.2d 6 (La.App. 4th Cir. 1977); *Southern Natural Gas Co. v. Poland*, 406 So.2d 657 (La.App. 3rd Cir. 1989); and *Louisiana Gas Purchasing Corp. v. Sincox*, 368 So.2d 816 (La.App. 2nd Cir. 1979).

³² Black's Law Dictionary 1606 (9th ed. 2009).

registry of the court was not made prior to the institution of the suit. In reviewing the record and more specifically the testimony of Mr. Dieudonne, the offer from the Port for \$16,000,000 contained numerous conditions and terms favoring the Port, including the ability to withdraw from the sale with a full refund of the deposit. A strict reading of the statute together with the applicable jurisprudence and the facts surrounding the offer to purchase in this case, we find it was not a tender for the purpose of assessing costs.

Attorney's Fees

In addition to requesting costs, the Port also seeks to recover attorney's fees pursuant to La. C.C.P. art. 863(B).³³ The Port maintains that VDP pursued the litigation in bad faith because they were well aware that the Property was only worth \$16,000,000.

The trial court, in its discretion, declined to award costs to the Port in accordance with La. R.S. 19:12. Additionally, the trial court specifically found that VDP did not act in bad faith by pursuing this litigation. Therefore, there was no violation of article 863, and attorney's fees were denied. We find no error in the trial court's ruling.

³³ La. C.C.P. art. 863 (B) reads:

B. Pleadings need not be verified or accompanied by affidavit or certificate, except as otherwise provided by law, but the signature of an attorney or party shall constitute a certification by him that he has read the pleading, and that to the best of his knowledge, information, and belief formed after reasonable inquiry, he certifies all of the following:

- (1) The pleading is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation.
- (2) Each claim, defense, or other legal assertion in the pleading is warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law.
- (3) Each allegation or other factual assertion in the pleading has evidentiary support or, for a specifically identified allegation or factual assertion, is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Conclusion

For the reasons discussed, the trial court's ruling regarding judicial interest on VDP's \$1,900,000 that remained in the registry of the court at the Port's request is affirmed as amended to reflect that interest is due in accordance with La. R.S. 19:155 with an offset for any interest already received. In all other respects the rulings of the trial court are affirmed.

AFFIRMED AS AMENDED

(4) Each denial in the pleading of a factual assertion is warranted by the evidence or, for a specifically identified denial, is reasonably based on a lack of information or belief.

ST. BERNARD PORT, HARBOR & TERMINAL DISTRICT	*	NO. 2016-CA-0096
VERSUS	*	COURT OF APPEAL
VIOLET DOCK PORT, INC., LLC	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA
	*	
	*	

CONSOLIDATED WITH:

ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT

VERSUS

VIOLET DOCK PORT, INC., LLC

CONSOLIDATED WITH:

NO. 2016-CA-0262

CONSOLIDATED WITH:

ST. BERNARD PORT, HARBOR &
TERMINAL DISTRICT

VERSUS

VIOLET DOCK PORT INC., LLC

CONSOLIDATED WITH:

NO. 2016-CA-0331

 LOBRANO, J., DISSENTS AND ASSIGNS REASONS.

I respectfully dissent from the majority's opinion. Because expropriation laws must be strictly construed against the expropriating authority,¹ and the Louisiana Constitution expressly prohibits the taking of a business enterprise,² I find that the Port's taking of VDP's Property is clearly unconstitutional. Thus, I would remand this case to the district court for a return of title and determination of necessary compensation for the time the Port has possessed VDP's Property as required by La. R.S. 19:160.

¹ *State, through the Dep't of Transp. and Dev. v. Estate of Davis*, 572 So.2d 39, 42 (La. 1990).

² La. Const. art. I, §4(B)(6).

The majority interprets La. Const. art. VI, §21's authorization allowing public ports to exercise eminent domain to be an unrestricted exception to La. Const. art. I, §4's protections from the unchecked use of eminent domain. This interpretation is fundamentally incorrect. La. Const. art. I, §4 grants private property rights to every person subject to reasonable statutory restrictions and the reasonable exercise of the police power. *See New Orleans Redevelopment Auth. v. Burgess*, 2008-1020, p. 10 (La. App. 4 Cir. 7/8/09), 16 So.3d 569, 577. La. Const. art. VI, §21 serves only to authorize public ports to exercise eminent domain to accomplish their public purpose, "*subject to restrictions it [the Legislature] may impose.*" Nothing in La. Const. art. VI, § 21 grants public ports unfettered and unrestricted exercise of their eminent domain power.

This misreading appears to result from improperly applying La. Const. art. I, §4(B)(1) to the business enterprise exception provided in (B)(6). La. Const. art. I, §4(B)(1) reads as follows:

(B)(1) Property shall not be taken or damaged by the state or its political subdivisions except for public purposes and with just compensation paid to the owner or into court for his benefit. *Except as specifically authorized by Article VI, Section 21 of this Constitution property shall not be taken or damaged by the state or its political subdivisions: (a) for predominant use by any private person or entity; or (b) for transfer of ownership to any private person or entity* (emphasis added).

This provision prohibits the taking of property for predominant use by any private person or entity or for transfer of ownership to any private person or entity unless that taking is "authorized" by La. Const. art. VI, §21.

La. Const. art. VI, §21, entitled "Assistance to Local Industry," begins with the word "Authorization." It reads, in relevant part, as follows:

A) Authorization. In order to (1) induce and encourage the location of or addition to industrial enterprises therein which would have economic impact upon the area and thereby the state, (2) provide for the establishment and furnishing of such industrial plant, (3) facilitate the operation of public ports, or (4) provide movable or immovable property, or both, for pollution control facilities, the legislature by law

may authorize, subject to restrictions it may impose, any political subdivision, public port commission, or public port, harbor, and terminal district to:

- (b) acquire, through purchase, donation, exchange, and expropriation, and improve industrial plant buildings and industrial plant equipment, machinery, furnishings, and appurtenances, including public port facilities and operations which relate to or facilitate the transportation of goods in domestic and international commerce; and
- (c) sell, lease, lease-purchase, or demolish all or any part of the foregoing.

Together, La. Const. art. I, §4(B)(1) and La. Const. art. VI, §21 authorize the Legislature to allow public ports to exercise eminent domain powers that may include the taking of private property for use or transfer of ownership to another private entity, which but for La. Const. art. VI, §21 would be prohibited.

However, both of these articles are subject to the business enterprise exception provided in La. Const. art. I, §4(B)(6), which reads, in relevant part:

- (6) No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise....

Whereas La. Const. art. I, §4(B)(1) specifically references La. Const. art. VI, §21 as an exception, La. Const. art. I, §4(B)(6) contains no exceptions. The majority, by finding that La. Const. art. VI, §21 is an exception to La. Const. art. I, §4(B)(6), treats (B)(6) as a subpart of (B)(1) rather than as the separate provision it clearly is. There is simply nothing in La. Const. art. VI, §21 that abrogates or otherwise limits La. Const. art. I, §4(B)(6). Given that (B)(6) is not a subpart of (B)(1), I am bound to consider the restrictions imposed by La. Const. art. I, §4(B)(6) in determining whether the Port acted constitutionally in its taking of VDP's property. I find it did not.

As acknowledged by the majority, "[t]he trial court was presented with evidence of the Port's intention to maintain the current use of the Property initially...." In actuality, the record establishes that the the Port planned to have Associated Terminals, another private entity, operate VDP's facility as it was

operated by VDP for eight to ten years in order to allow Associated Terminals to raise funds to expand the Property's dry and liquid bulk cargo capacity. The taking of VDP's business enterprise in order for the Port's favored business, Associate Terminals, to use VDP's Property to produce the same revenue VDP was previously generating is a clear violation of La. Const. art. I, §4(B)(6). The taking of a business enterprise in order for government or its chosen beneficiaries to produce revenue is exactly the kind of violation of property rights La. Const. art I, §4(B)(6) exists to prevent. Should the majority's interpretation stand, a public port convinced that it can make better use of a private business enterprise's assets will be empowered to usurp that private business enterprise and fashion it into a revenue maker for government. One practical effect of that decision would be to stifle future port development by private businesses, who would be unwilling to take the risk that a public port could, at any time, take that private investment by expropriation.

The Port argues that La. Const. art. I, §4(B)(6) is not violated because VDP's business enterprise allegedly will not be operated by Associated Terminals in perpetuity. This argument fails to render the taking constitutional. Expropriation proceedings are in derogation of the right of individuals to own property, and as a result, the laws governing these proceedings must be strictly construed against the expropriating authority. *Davis*, 572 So.2d at 42. Interpreting La. Const. art. I, §4(B)(6) strictly against the Port, because the expropriation plan involved operating VDP's business to generate funds to finance a future dry and liquid bulk cargo facility, I must find that the Port seized VDP's business enterprise for the purpose of operating VDP's business enterprise.

Any interpretation of La. Const. art. VI, § 21 that grants public ports unfettered rights to expropriate private property exceeds the authority that has been bestowed by the Legislature and the citizenry of this State. The Louisiana

Constitution was carefully crafted to balance the needs of public ports to facilitate the transport of goods or persons in domestic or international commerce with the right of Louisiana's citizens to be secure in their ownership of private property. To undo this balance from the bench is to reach beyond the authority of a judge.³

For these reasons, I respectfully dissent from the majority opinion.

³ As explained in *Hoag v. State*, 2004-0857, p. 4 (La. 12/1/04), 889 So.2d 1019, 1022:

Our state constitution divides governmental power into separate legislative, executive and judicial branches and provides that no one branch shall exercise powers belonging to the others. La. Const., art. II, §§ 1, 2. This trichotomous branching of authority furnishes the basis for the existence of an inherent judicial power which the legislative and executive branches cannot abridge. *Singer, Hurner, Levine, etc. v. LSBA*, 378 So.2d 423 (La. 1979); *Saucier v. Hayes Dairy Products*, 373 So.2d 102, 109, 114 n. 3 (La. 1979). Likewise, the judicial branch is prohibited from infringing upon the inherent powers of the legislative and executive branches. *LaBauve v. Louisiana Wildlife and Fisheries Comm'n*, 289 So.2d 150, 151 (1974).

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HARBOR & TERMINAL
DISTRICT *
VERSUS * COURT OF APPEAL
VIOLET DOCK PORT, INC., * FOURTH CIRCUIT
LLC * STATE OF LOUISIANA
* * * * *

CONSOLIDATED WITH: CONSOLIDATED WITH:

ST. BERNARD PORT, HARBOR & NO. 2016-CA-0262
TERMINAL DISTRICT

VERSUS

VIOLET DOCK PORT, INC., LLC

CONSOLIDATED WITH: CONSOLIDATED WITH:

ST. BERNARD PORT, HARBOR & NO. 2016-CA-0331
TERMINAL DISTRICT

VERSUS

VIOLET DOCK PORT INC., LLC

APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 116-860, DIVISION "E"
Honorable Jacques A. Sanborn, Judge
* * * * *

Judge Roland L. Belsome

* * * * *

(Court composed of Judge Terri F. Love, Judge Roland L. Belsome, Judge Joy Cossich Lobrano)

LOVE, J., CONCURS AND ASSIGNS REASONS

LOBRANO, J., DESENTS AND ASSIGNS REASONS

ON REHEARING

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REHEARING DENIED**FEBRUARY 8, 2017**


Rehearing Denied.

ST. BERNARD PORT,
HARBOR & TERMINAL
DISTRICT * NO. 2016-CA-0096
VERSUS * COURT OF APPEAL
VIOLET DOCK PORT, INC.,
LLC * FOURTH CIRCUIT
* STATE OF LOUISIANA
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CONSOLIDATED WITH: CONSOLIDATED WITH:

ST. BERNARD PORT, HARBOR &
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VERSUS

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CONSOLIDATED WITH:

ST. BERNARD PORT, HARBOR &
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VERSUS

VIOLET DOCK PORT INC., LLC


LOVE, J., CONCURS AND ASSIGNS REASONS

I respectfully concur in the majority's decision to deny rehearing. I find the following:

VDP is correct in stating in its Application for Rehearing that La. Const. art. I, §4(B)(6) provides that "No business enterprise or any of its assets shall be taken for the purpose of operating that enterprise or halting competition with a government enterprise . . . a municipality may expropriate a utility within its jurisdiction." However, the trial court found that "the purpose of operating that enterprise or halting competition" was not the Port's primary motivation in expropriating VDP's property.

This Court previously found that La. Const. art. I, §4(B)(1) was designed

“merely” to prevent “expropriations **initiated** with the goal of transferring private property to a specific recipient, rather than as a bar to expropriation with a legitimate basis that may include a subsequent transfer.” *New Orleans Redevelopment Auth. v. Burgess*, 08-1020, p. 21 (La. App. 4 Cir. 7/8/09), 16 So. 3d 569, 584. This Court found that “[t]he potential subsequent transfer of the blighted property to third parties who are private entities is incidental to the duty of a municipality to remove a public threat to the health and safety of its occupants.” *Id.* Accordingly, this Court held that the expropriation of blighted property that would later be sold to a private party for rehabilitation was not violative of La. Const. art. I, §4(B). *Id.*, 08-1020, p. 23, 16 So. 3d at 585.

Likewise, the trial court in the present matter found that “[t]he St. Bernard Port’s stated reason for expropriating was to build and operate a terminal to accommodate transport of liquid and solid bulk commodities into national and international commerce to and from St. Bernard.” Further, the trial court reasoned that the expropriation was a “logical extension of port services in St. Bernard.” The majority then held that the trial court was not manifestly erroneous for so finding.

Therefore, the majority did not find that La. Const. art. VI, § 21 exempted “public port takings from the prohibitions contained in La. Const. art. I, §4(B)(6)” as VDP claims. Rather, we found that the trial court was not manifestly erroneous in finding that the Port’s primary motivation was not to operate VDP’s enterprise or halt competition by expropriating VDP’s property. We did not “render Section 4(B)(6) meaningless through judicial interpretation,” as asserted by VDP. Rather, we found the facts and circumstances presented by this case simply did not satisfy the requirements of the restrictions of La. Const. art. I, §4(B)(6).

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LOBRANO, J., DISSENTS AND ASSIGNS REASONS.

I respectfully dissent from the denial of rehearing for the reasons I previously assigned when dissenting in *St. Bernard Port, Harbor & Terminal Dist. v. Violet Dock Port, Inc., LLC*, 2016-0096, p.15 (La. App. 4 Cir. 12/14/16), -- So.3d--, 2016 WL 7238987, at *1, *8. I would grant the rehearing.