

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

No.3-10-0865

Order filed June 3, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE DEPARTMENT OF TRANSPORTATION)	
OF THE STATE OF ILLINOIS, FOR AND ON)	
BEHALF OF THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 12th Judicial Circuit,
)	Will, Illinois,
)	
Plaintiff-Appellant,)	
)	
v.)	No. 07-ED-20
)	
JAMES F. HALEY, SR.; ROBERT A HALEY,)	
JR.; JOHN HALEY, SR.; KATHRYN ANN)	
McGEE; MARY HALEY; JEAN M. PICKERING;)	
SUSAN E. HALEY; MICHAEL HALEY;)	Honorable
HARRIETTE E. HALEY; JOSEPH HALEY; CBS)	Susan T. O’Leary,
OUTDOOR ILLINOIS; and UNKNOWN)	Judge Presiding.
OWNERS,)	
)	
Defendants-Appellees.)	

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Carter concurred in the judgment.
Justice Lytton specially concurred.

ORDER

Held: The trial court did not abuse its discretion by denying IDOT’s motions *in limine* and subsequent motion to strike testimony at the close of the evidence. The jury’s award

is upheld.

The Illinois Department of Transportation (IDOT) filed a complaint to condemn and acquire 20.5 acres from a larger 55-acre parcel of land pursuant to the laws of eminent domain. The landowners (Haley's) filed a cross-petition requesting a jury to determine the value of the 20.5 acres taken by IDOT and the amount of compensation for any depreciation to the Haley's divided remainder property.

The trial court denied IDOT's pretrial motions *in limine*. During the trial, the Haley's witnesses testified that the highest and best use for the 55-acre parcel before the taking was commercial and, after the taking, the highest and best use for Haley's divided remainder was industrial. The Haley's experts testified the fair market value for the commercial use before the taking ranged from \$3.75 to \$4.10 per square foot and the fair market value for industrial use after the taking ranged from \$1.25 to \$1.90 per square foot.

In contrast, IDOT's witnesses testified that the highest and best use for the 55-acre parcel before taking was light industrial and, after the taking was light industrial or limited commercial/warehouse. The IDOT experts testified the fair market value for the light industrial use before the taking ranged from \$1.58 to \$1.72 per square foot and the fair market value for industrial/commercial use after the taking ranged from \$2.00 to \$2.30 per square foot.

Following the testimony of the witnesses, IDOT made a motion to strike portions of the testimony of Michael Haley and Joseph Zgonina on the basis that this testimony was not causally linked to the depreciation of the remainder's value and was unfairly prejudicial to IDOT's case. The court denied the motion to strike, but ordered the parties to prepare a curative instruction to address concerns raised in the motion to strike.

The jury awarded \$3,527,614.60 as the value for the 20.5 acres taken (\$3.95 per square foot) and awarded \$3,075,292.50 as compensation for depreciation to the remainder. The court denied a motion for new trial and entered judgment on the verdicts. We affirm.

BACKGROUND

On April 26, 2007, IDOT filed a Complaint for Condemnation to acquire the property rights to the 20.504 acres of the Haley's 55-acre parcel located in unincorporated Will County, Illinois, adjacent to Shorewood, Illinois. IDOT also filed a "Motion for Immediate Vesting of Title." The purpose of the taking was to construct new, elevated access ramps to the interstate interchange for I-55 and IL Rt. 59, located along the eastern perimeter of the Haley's property. Additionally, IDOT planned to relocate the existing frontage road, which bordered the Haley's parcel, by repositioning the frontage road to run directly down the middle of the remaining property owned by Haley's (the remainder property) after the taking. This proposed project also involved modifying and elevating the intersection at Seil Road in anticipation of a future overpass over I-55.

On July 23, 2007, the court entered an order vesting title to the property taken by eminent domain in IDOT. After the partial taking, the Haley's divided remainder consisted of 23.741 acres situated to the west of the new frontage road (west remainder) and 11.209 acres situated to the east of the new frontage road (east remainder) (collectively referred to as the divided remainder). The court entered an order for "preliminary just compensation for fee simple title" in the amount of \$1,600,000. IDOT took possession of the property on September 17, 2007.

On November 7, 2007, the Haley's filed a cross-petition challenging the preliminary

amount of just compensation for the property taken by IDOT (taken property) and requested damages for depreciation to the divided remainder property.

I. Pretrial Proceedings

The Haley's filed a motion *in limine* asking the court to allow Arthur Sheridan to testify as a valuation expert. IDOT opposed this motion because Sheridan was not a licensed appraiser. The court granted the motion *in limine*, ruling that Sheridan had sufficient knowledge and expertise to give his valuation opinion as an expert. The court indicated that IDOT would have an opportunity to cross examine Sheridan regarding the fact that he was not a licensed appraiser at the time of trial.

The Haley's also filed a second motion *in limine* requesting the court to bar IDOT's witnesses from making references to the Heartland industrial development as it existed in 2005 for purposes of IDOT's comparable sales analysis because, at the time of the Heartland sale in 2005, the unimproved property did not include sewer, water, or access roads and resulted in the 2005 sale to show a deflated value due to the absence of these improvements.¹ Thus, the Haley's argued the 2005 sale of land for the Heartland industrial development was not a suitable comparable property to their property. The court denied the Haley's motion *in limine* on the grounds that the IDOT witnesses relied on the Heartland development as comparable sales, based on their own expertise, the Haley's could cross-examine witnesses about this issue, and denied the request to preclude IDOT's experts from referring to the Heartland industrial development

¹The Haley's motion *in limine* alleged Mary Haley was the landowner who sold the land for the Heartland development at a somewhat reduced price because her remainder property benefitted the improved access roads the sewer and water improvements resulting from changes made by the Heartland developers following the sale in 2005.

during their testimony.

Prior to trial, IDOT filed multiple motions *in limine* seeking to exclude evidence.² IDOT's motion *in limine* No. 3 requested the court to preclude the Haley's valuation witnesses from testifying about the Village of Shorewood's 2007 Comprehensive Plan when discussing their valuation opinions regarding the value of the property at the time of the partial taking, and the value of the divided remainder after the taking. The court denied IDOT's motion *in limine* No. 3.

IDOT's motion *in limine* No. 6 requested the court to prohibit Michael Haley from testifying about flooding he observed on his farmland after the project began and the damage his 2009 crops suffered due to the flooding. The court allowed IDOT's motion *in limine* No. 6, in part, and prohibited Michael Haley from testifying about the amount and value of damaged crops, but the court allowed Haley to generally describe his personal observations of the flooded condition of his land.

IDOT's motion *in limine* No. 7 asked the court to bar evidence regarding the estimated \$1,695,000 cost to raise the elevation of the divided remainder property to develop the property on the grounds that this testimony was "purely speculative." The court denied IDOT's motion *in limine* No. 7.

IDOT's motion *in limine* No. 8 sought to bar the testimony regarding highest and best use and comparable sales based on acquisitions related to the Bridge Street Town Centre development, because the Bridge Street Town Centre had not yet been built and IDOT claimed the plan factored in the completed IDOT project. Experts' depositions and reports referred to the

² Only IDOT's motions *in limine* Nos. 3, 6, 7, and 8 are at issue in this appeal.

sale of this property and proposed development as a factor in determining the best use of the Haley's property before the IDOT's reconstruction project. The court denied IDOT's motion *in limine* No. 8.

II. Trial

The jury trial began on June 7, 2010. During the early stages of the trial, the court reminded the parties that it would need specific objections during the testimony concerning its previous rulings on motions *in limine* to preserve those issues for appeal.

IDOT responded they would be making a continuing objection on their motion *in limine* No. 3, regarding reference to Shorewood's 2007 comprehensive plan; motion *in limine* No. 6, regarding reference to any flooding on the remainder property; motion *in limine* No. 7, regarding the \$1,695,000 cost to remove dirt and add fill for use of the property; and motion *in limine* No. 8, regarding reference to using comparable sales involving the proposed Bridge Street Town Centre. Similarly, the Haley's renewed their objection regarding references to the Heartland development as a continuing objection throughout the trial.

After addressing these preliminary concerns regarding standing objections, the judge and attorneys agreed the jury would be transported to the site to view the property during the first few days of trial.³

III. Haley's witnesses

A. Michael Haley

Micheal Haley briefly testified that his family owned and farmed the 55 acres of property

³ Since the jury would view the property before hearing all of the evidence, IDOT called a first witness, Jose Rios, out of order to explain the layout of the land and the details of the IDOT construction project, along with photograph exhibits, to give the jury an overview of the location.

since 1949 and, prior to 2007, the property had never flooded. After the construction started, Michael Haley observed flooding or standing water on 90 to 95 percent of the east remainder property and on 70 to 75 percent of the west remainder property beginning on June 17, 2009. This flooding took two weeks to dry up. He testified that there were other times the remainder property flooded, but not to the extent it did in 2009.

B. Joseph Zgonina

Joseph Zgonina, a registered professional civil engineer testified that the Haley's property originally consisted of 55 acres of land which abutted and was situated parallel to the existing frontage road providing safe ingress and egress to the Haley's property. Zgonina discussed nearby property, "the Heartland Development," a large industrial heavy truck development, built before 2007, located across River Crossing Drive from the Haley's parcel.

Zgonina testified that, before the rezoning for the construction of the Heartland Development was approved by the Village of Shorewood, the Village required the Heartland developers to make off-site roadway improvements to the intersection of IL Rt. 59 and Seil Road (also referred to as Heartland Road) which would create safe access to the Heartland development from IL Rt. 59 via Seil Road. The Seil roadway improvement had been made by the Heartland developers at grade level and allowed convenient and safe access to the Heartland development, which also benefitted the Haley's land and others.

Zgonina explained that IDOT's new construction project increased the elevation of the intersection of Rt. 59 and Seil Road and eliminated the benefits of the previous Heartland road improvements after raising the Seil Road/IL Rt. 59 intersection by 22 feet. Thus, the Haley's no longer had convenient and safe access from both Seil Road and the frontage roads because of the

steeper grade required for connecting driveways. In addition, Zgonina testified that the two smaller remainder parcels would no longer have the same visibility for those traveling on the highways due to the elevation and placement of the new highway ramps. Consequently, Zgonina felt the traffic patterns adjacent to the Haley property would be greatly reduced after the IDOT project was completed.

Additionally, Zgonina testified that the Haley's 55-acre parcel had not flooded before IDOT's reconstruction but, after the project, 95 percent of the east remainder parcel flooded and 75 percent of the west remainder parcel flooded.⁴ Zgonina explained, in his opinion, unnatural accumulation of surface water after the project began was created by the improper location of drainage culverts and because IDOT paved more than 4 acres of the 20.5 acres acquired by eminent domain. These conditions resulted in excess runoff water that otherwise would have percolated into the ground. According to Zgonina, the relocated and elevated West Frontage Road acted like a dam by trapping water on the east remainder property, resulting in the flooding observed by Michael Haley. Zgonina stated the IDOT project did not construct any retention or detention ponds to handle the excess runoff of surface water flowing onto other adjacent properties.

Based on Zgonina's calculations, due to the drainage design by IDOT, the remainder properties would need to remove a foot of topsoil and add two feet of clay fill to increase the elevation of the property to bury new storm sewers, keep the remainder dry, allow for less steep driveways, and make the divided remainder property suitable for use. In his opinion, Zgonina

⁴ Zgonina said he obtained these estimated percentage amounts from the deposition of Michael Haley regarding the flooding to the property.

testified that it would cost \$1,695,000 to correct the elevation of the Haley's remainder parcels of property to resolve the drainage issues.

C. Arthur Sheridan⁵

Arthur Sheridan testified that he was a real estate broker, a realtor, a developer and a consultant to municipalities on development and, prior to the change in the law effective January 1, 2010, he was also a real estate appraiser. Sheridan said he obtained his Illinois realtor's license in 1953. He prepared the "Valuation and Impact Study," marked as Defendant's Exhibit 69.

_____ In Sheridan's opinion, the highest and best use of the Haley property, before the taking, was for commercial use due the following factors: (1) the Village of Shorewood listed the property for annexation and commercial zoning in its 2007 comprehensive plan; (2) Haley's property had utilities immediately available, was highly visible for all traffic traveling on I-55 and IL Rt. 59 and had frontage road access; and (3) there had been no flooding prior to the IDOT construction project.

Sheridan stated the fair market commercial value of the whole 55-acre parcel before the taking was \$4.10 per square foot totaling \$9,903,148. Sheridan testified that the property condemned by IDOT, 20.502 acres, should be valued at \$3,661,575 at \$4.10 per square foot. Sheridan valued the total combined remainder property before the taking at \$6,241,573 at \$4.10 per square foot.

⁵ During oral appellate arguments, counsel for IDOT conceded they were not complaining that there was error in the Haley's valuation experts' testimony and agreed the basis of Haley's valuation testimony was consistent with eminent domain law. Later, IDOT's appellate counsel stated they had no specific objection to the testimony of Haley's valuation experts or "the way it came in."

Sheridan testified that, when determining these values, he reviewed several comparable sales of commercial properties. One comparable sale property, the Bridge Street property, sold for \$32,967,213 for 261.88 acres or a unit price of \$2.89 per square foot in May of 2005, but he said he adjusted the value for the Haley property upward because “generally a larger piece of property will sell for less dollars per square foot than a smaller piece of property.” Sheridan testified that he considered three other sales of comparable commercial properties in addition to the Bridge Street property.

Since the increased elevation resulting from the IDOT project created problematic access to either parcel of the divided remainder, Sheridan testified that the highest and best use for the total combined remainder property was industrial use rather than commercial. After reviewing comparable sales of industrial parcels, Sheridan formed the opinion that the value of the combined remainder was \$2,892,602 at \$1.90 per square foot. Sheridan opined the depreciation of value to the combined remainder property was \$3,348,971.

D. Dale Kleszynski

Dale Kleszynski testified that he was a professional appraiser and was the president of Associated Property Counselors since 1984, which is a real estate appraisal and consulting firm, and he had been in the appraisal business since 1977. Kleszynski said that one of the major considerations influencing the value of the Haley’s property prior to the taking, in his opinion, was the proposed Bridge Street development which was located across the interstate from the Haley’s property. Based upon Shorewood’s 2007 comprehensive plan, Kleszynski stated that there was a reasonable probability that Shorewood would annex the Haley’s original 55-acre parcel of farmland and rezone it for commercial use. Kleszynski testified that it was his opinion

that highest and best use of the 55 acres before the taking was commercial development, in accordance with the comprehensive plan and area development patterns.

Using comparable commercial sales, Kleszynski testified commercial property values in the area ranged from \$3.87 per square foot to \$5.47 per square foot. Using \$4.00 per square foot value as his unit price, Kleszynski opined that the value of the whole 55-acre parcel, as commercial property before the taking, was \$9,650,000.⁶ Kleszynski testified the value of the commercial property taken by IDOT for its construction project, approximately 20.5 acres or 893,067 square feet, was \$3,000,575 also calculated based on \$4.00 per square foot. Since the *combined* area of both remaining parcels after the taking equaled 1,522,422 square feet, Kleszynski testified that the value of the remainder before the taking by IDOT was \$4.00 per square foot or \$6,000,075.

Kleszynski testified that he concluded the highest and best use for the combined remainder property after the taking was for industrial use valued at \$1.25 per square foot rather than the previous value of \$4.00 per square foot. Accordingly, Kleszynski valued the two combined remainder parcels of 1,522,422 square feet at \$1,900,000, based upon the value of the property now being \$1.25 per square foot for industrial use.

Kleszynski testified that he subtracted the remainder property's value after the IDOT taking from the remainder property's value before the taking to determine compensation owed in the amount of \$4,175,000. Therefore, in Kleszynski's opinion, the Haley's should receive the value for the property taken by IDOT plus depreciation to the value of the remainder for a total

⁶ Kleszynski's 63-page appraisal report is part of the record, Defendant's Exhibit 76, and lists the actual numbers and the rounded numbers Kleszynski used for his final calculations to which he testified.

amount of compensation of \$7,750,000.

E. Jury's Viewing of the Property

The court and attorneys worked out arrangements for the jury to travel to the location of IDOT project and Haley's property during the afternoon session of the third day of trial, which fell in the middle of Kleszynski's testimony. A bus transported the judge, jury, a bailiff, the attorneys, and Jose Rios (an IDOT employee and witness). The parties agreed that once the jurors arrived on site, Mr. Cinquini (the Haley's attorney), would identify the roads, and Mr. Rios would explain the boundaries of the property before and after the condemnation.

The court and attorneys agreed that, if the jury had questions, the jurors would be directed to write down the questions at the scene and give them to the bailiff; the bailiff would give the questions to the judge; the judge and lawyers would decide whether answers should be provided to the jury and, if so, would agree on the language contained in the answers delivered by the judge to the jury while at the location of the property. When the judge and lawyers returned to the courtroom, the court read the jurors' questions and recited the answers given by the court into the record. Five out of nine of the juror's questions were regarding drainage and indicated the jurors observed standing water at the site.

F. Allen Kracower

Allen Kracower, testified that he was a "planning, zoning, and real estate consultant" and also licensed as a landscape architect in Illinois. Kracower testified he inspected the whole 55-acre property, reviewed various maps of the location, obtained local ordinances, and reviewed the Village of Shorewood's comprehensive plan of 2007, because the Haley's property was "right next to the boundary of Shorewood." In Kracower's expert opinion, he stated the highest and

best use of the subject property, before the IDOT taking on April 26, 2007, was for commercial use. According to Kracower, the combined remainder property, now divided by an elevated frontage road after the IDOT project, resulted in several negative factors that changed the potential use of the property, and the highest and best use for the remainder property was now “a lower tier of industrial type uses.”

G. Patricia McGarr

Patricia McGarr testified that she was the director of the firm, Integra Realty Resources, in the Chicago metro office, and that she was a professional real estate appraiser and consultant. McGarr testified in detail regarding the steps she took to reach an opinion as to the property’s values, which was documented in an 85-page appraisal report with several addendum pages marked as Defendant’s Exhibit 77. McGarr testified to the population growth and development trends in the area and the Shorewood 2007 comprehensive plan.

McGarr determined that the Haley’s whole property value, before the taking, was \$3.75 per square foot as commercial property. Based on the square footage of the whole 55-acre parcel, 2,415,401 square feet, McGarr opined that the fair market value of the whole property before the taking was \$9,060,000.⁷ Accordingly, McGarr said the fair market value of the portion of the property taken, 20.502 acres, or 893,067 square feet, at \$3.75 per square foot was rounded to \$3,349,000. Thus, the value of the combined remainder property, 1,522,422 square feet, as commercial property before the taking was \$5,711,000.

McGarr concluded the highest and best use for the remainder property after the taking was not commercial but, rather, industrial development. Using the sales comparison approach,

⁷ McGarr’s report stated \$9,060,000 was the rounded number from the actual \$9,057,758.

McGarr determined the value for the combined remainder property ranged from \$0.87 to \$1.97 per square foot based on industrial use. In her opinion, McGarr stated the combined remainder property after the taking had a fair market value of \$1.50 per square foot, resulting in a value of \$2,284,000 for the combined remainder property as industrial, rather than \$5,711,000 as commercial. The difference between the values of the combined remainder before and after the taking was \$3,427,000.

In conclusion, McGarr testified that the fair market value of the property taken by IDOT was \$3,349,000 and diminution of the value of the remainder property after the taking was \$3,427,000. Thus, the total compensation due to the Haleys, adding those two figures, in McGarr's opinion, was \$6,776,000.

IV. IDOT's Witnesses

A. Nancy Roman

Nancy Roman testified she served as the economic director for the Village of Shorewood since 1998 and managed all new real estate developments for the Village. She said she was involved with the Village's comprehensive development plan created in 2007 which addressed the potential future economic development for the Village of Shorewood. Roman explained that there had been rapid growth in the area and the 2007 plan included potential land that could be annexed to the Village of Shorewood which included additional commercial zoning that was planned to address that growth. Roman also testified to the 1993 and 2001 comprehensive plans for Shorewood. Roman stated that the Village of Shorewood, by virtue of its close proximity to I-55 and I-80 along IL Rt. 59, makes the area ideal for commercial developments.

B. Andrew Lee

Andrew Lee, testified that he had been a civil engineer for 13 years and he was a licensed professional engineer in Illinois. He said he currently worked for Teng & Associates, which is an architecture and engineering firm in Chicago. Lee stated that his company was retained by IDOT to design the roadway project on the Haley's property in this case. In the acquisition justification report Lee prepared for this project, Lee said one of the reasons to redesign this intersection was because access to IL Rt. 59 off I-55 was not available to the portion of Shorewood located south on Seil Road. Lee explained that this interchange, even after the project, remained a partial interchange and only exited north off I-55 onto IL Rt. 59 and entered from IL Rt. 59 onto southbound I-55. Lee explained that the new construction project required elevated roads and an elevated intersection of Seil Road and IL Rt. 59 in anticipation of a future overpass over I-55 and stated the project's drainage design was appropriate even after the elevation for Seil Road was changed after the project began.

C. Jose Rios

Jose Rios, the bureau chief of the Bureau of Land Acquisition, testified that he was a registered professional civil engineer, and had been employed by IDOT for over 10 years. Rios identified IDOT's aerial photographs depicting the intersection of IL Rt. 59 and Seil Road before and after the construction project (Plaintiff's Exhibit 2 and 3). Rios also identified photographs of the Haley's entire property in the fall of 2007, before construction began, showing a preexisting accumulation of water in one depression area on what is now the west remainder parcel of the Haley's property along River Crossing Road.

D. Tom Liliensiek

Tom Liliensiek testified that he was the water resource manager for Teng & Associates,

and had worked in this field for 17 years. Liliensiek stated, in his opinion, that the drainage for the roadway improvement has been designed adequately without any adverse effects to the Haley's remainder property. He noted the area of the west remainder property near River Crossing Drive ponded before the construction project began. According to Liliensiek, the culverts in Seil Road did not impact the "profile of the west frontage road or any of the existing topography in the area that drains to those culverts. Liliensiek stated that the water volume flowing from the project across the combined remainder property would be the same before and after the construction project. Liliensiek believed, to develop the remainder property in the future, a new drainage system would have to be developed on that remainder property, but the current culverts' placements would not prevent a new storm water detention system.

On cross examination, Liliensiek admitted, if a large percentage of the west remainder parcel near River Crossing Road was under water, the standing water would not be solely attributable to the preexisting low depression spot on the Haley's west remainder property that existed before the IDOT project, as shown in the photographs from 2007.

E. Louis Haussmann

Louis Haussmann testified that he was a civil engineer and specialized in transportation engineering and had been Shorewood's primary engineer for roadwork since 2002. In Haussmann's opinion, the IDOT road project improved the access to the both the east and west remainder parcels because traffic northbound on I-55 could now exit the interstate nearer the remainder property and increased traffic on Seil Road was anticipated. Haussmann stated that whoever developed Haley's east remainder property would need to obtain a right of way over Heartland property to have access to River Crossing Drive.

F. Rodney Tonelli

Rodney Tonelli testified that he was a professional city planner and served as a consultant for the Village of Shorewood when the Village prepared the 2007 comprehensive plan. In his opinion, Tonelli testified that the highest and best use of the Haley's original 55-acre property, before the IDOT construction project, was "limited industrial" use. He stated that he believed there was a reasonable probability that the Village of Shorewood would annex and rezone the property accordingly.

Tonelli testified that, in his opinion, the placement of the frontage road up the middle of the combined remainder property actually improved accessibility to the east and west remainders. Referring to the 2007 comprehensive plan for the Village of Shorewood, Tonelli testified that he felt the highest and best use for the subject property, after the construction project was completed, was still light industrial along with warehousing and office uses. Tonelli also referred to a planned commercial development across I-55 from the Haley's property, the Bridge Street development, but felt its value factored in the completion of the new IDOT interchange when assessing its commercial value.

G. Joseph Batis

Joseph Batis testified that he had been a real estate appraiser and consultant for 27 to 28 years. Batis explained "the highest and best use analysis actually is probably considered is [*sic.*] to be the most critical step in this whole process because, once the highest and best use of the property is determined, it pretty much sets the foundation for what's called the valuation approach or the next several steps." Batis said, in his opinion, the highest and best use of the whole 55-acre property, before the April 2007 taking by IDOT, was light industrial or business

park use. Under this use category, Batis testified that the whole property's value, before the project, was \$4,148,050 or \$1.72 per square foot. Using these standards, the total value of the property taken by IDOT, the 20.5 acres, was \$1,567,800, the appraised value of the combined remainder property before the IDOT project was \$2,621,250, using the same \$1.72 per square foot amount.

Batis said the highest and best use of the combined remainder property, after the construction project, was for mixed use development, including some component of commercial, light commercial, light industrial, and even some office buildings or office condos. Again, this was dependent upon Shorewood annexing the property and rezoning it. After the completion of the IDOT project, it was Batis' opinion that the fair cash value of the combined remainder property would be \$3,495,050 or \$2.30 per square foot. Batis stated the value increased because there would be easier access from the subject property to interstate after the project's completion than existed before the project. Based upon his analysis, Batis testified that the combined remainder would suffer no compensable damages as a result of the IDOT construction project, and that the just total compensation due to the Haley's pursuant to these condemnation proceedings was \$1,567, 800 for the 20.5 acres taken.

Batis testified that the 55-acre property, physically and topographically, did not have any characteristics that would limit the use of the property for commercial, residential, or industrial uses. Based upon Shorewood's comprehensive plan, Batis said he felt confident in saying that Shorewood would very likely have annexed the Haley property and would have rezoned it to permit any one of those three identified potential uses in 2007. Batis stated, when he looked at the financial feasibility of developing the property under all three categories before the IDOT

taking, in his opinion, it had more potential for industrial use rather than commercial use.

H. David White

David White, a real estate appraiser and consultant, testified that, in his professional opinion, the highest and best use for the whole 55-acre parcel, before the IDOT project, was light industrial and warehouse use and indicated there was a reasonable probability that the property would have been annexed into Shorewood and be rezoned for warehouse and industrial uses in 2007. He estimated the property's fair market value at \$1.58 per square foot for a total of \$3,844,000 for the whole property in 2007. Based upon that valuation before the taking, White said the fair market value of the property taken by IDOT, 20.5 acres, was \$1,439,000 and the value of the combined remainder property at \$1.58 per square foot was \$2,405,000.

White determined that the highest and best use for the property after the completion of the IDOT construction project had shifted to light industrial and smaller office type uses, based upon better access to the property. White said the value of the combined remainder parcels after the taking was \$3,045,000 at an average of \$2.00 per square foot; \$2.21 per square foot for the east parcel and \$1.90 per square foot for the west parcel.

White said he felt there were no limitations to the use of the original whole 55-acres parcel, prior to the taking, in regards to its size and shape or the legal issues such as annexation and rezoning. However, White stated that he did not believe commercial use was economically feasible, prior to the IDOT construction project, because of a lack of direct access between the Haley's property and IL Rt. 59 or I-55. White agreed Shorewood was one of the fastest growing communities in Will County from 2003 to 2006.

V. IDOT's Motion to Strike

IDOT filed a motion to strike at the close of the evidence but before closing arguments, In this motion, IDOT asked the court to strike the following: (1) Michael Haley's testimony relating to his observations of standing water on the property; and (2) Zgonina's testimony relating to damages resulting from the project concerning drainage, the ability to place driveways off the relocated West Frontage Road, and the need to raise the property at a cost of \$1,695,000 after the project. IDOT claimed that Zgonina's testimony as to the cost to raise the property was not tied into the Haley's valuation experts' opinions in arriving at their opinions of value and was, therefore, irrelevant. IDOT asked the court for a jury instruction telling the jury to disregard that portion of Zgonina's testimony because damages allowed in an eminent domain case must relate to the diminution in the value of the remainder property. IDOT argued they would be prejudiced by Zgonina's and Michael Haley's testimony.

The Haley's attorney, Cinquino, argued that the witnesses for both sides testified that they reviewed Zgonina's reports. According to Cinquino, IDOT's experts testified to evidence addressing Zgonina's position regarding the flooding and drainage, driveway access to the property, and the elevation of the property. Additionally, Cinquino contended that IDOT did not raise this motion to strike properly or in a timely manner. IDOT responded that their motion was timely and proper because Zgonina's testimony needed to be linked to the values of the property, before and after, and IDOT did not know until the close of rebuttal that the Haley's would not properly tie up the evidence.

The court found that the testimony was presented to the jury without objection and there had been a lot of testimony that the experts relied on Zgonina's report. The court denied the motion to strike, but ordered the attorneys to draft an added jury instruction telling the jury that

the \$1,695,000 is not a separate cost that they can consider in awarding compensation.

VI. Jury Award and Posttrial Proceedings

At the close of the trial, the jury returned its verdicts finding that the just compensation to be paid to the Haley's for IDOT's taking of their property, 20.5 acres, was \$3,527,614.60.⁸ In a second verdict form, the jury found that damages occurred to the combined remainder property by diminishing its value as a result of the fee simple taking, and awarded compensation in the amount of \$3,075,292.50.

On October 6, 2010, the court denied IDOT's motion for a new trial. First, the court found that it did not err in giving the jury instruction regarding circumstantial evidence because some of the evidence was, in fact, circumstantial. With regard to the IDOT's objection, raised as a continuing objection from motion *in limine* No. 3, to the admission of Shorewood's 2007 comprehensive plan, the court found that Shorewood's comprehensive plan was relevant to the determination of the reasonable probability of annexation or rezoning for the best use of the Haley's property and hence, constituted admissible evidence.

With regard to IDOT's standing objection based on motion *in limine* No. 8, regarding testimony referring to the undeveloped Bridge Street commercial project, some evidence indicated the Bridge Street plans allegedly took into account the IDOT construction project. The court concluded that IDOT tried to bar evidence of the Bridge Street commercial complex and the Haley's tried to bar evidence regarding the Heartland industrial complex. The court

⁸ Upon our review of the facts, this amount is apparently derived from the average of the three Haley valuation witnesses opinions regarding the value of the whole property before the IDOT taking, \$3.95 per square foot, times the square footage of the 20.5 acres of taken property, or 893,067 square feet, which comes to \$3,527,614.65.

noted that both the Heartland industrial complex and the planned Bridge Street commercial complex were located closest in proximity to the Haley's property. The court found, due to the proximity of each complex, the complexes were relevant factors for all the experts to determine the best use of the Haley's property and, therefore, the jury properly received evidence concerning both complexes when reaching its verdicts.

The court specifically noted that the jury was presented with many factors regarding damage to the remainder property, including: visibility from the highways, configuration, size, shape, access to the frontage road, as well as any flooding conditions. The court determined that, after sitting through the trial, it did not believe that Zgonina's testimony regarding the flooding issue "was particularly important," because the valuation experts did not seem to emphasize or heavily rely on the flooding issue when reaching their valuation opinions.

Regarding IDOT's motion for new trial, the court addressed IDOT's jury instruction No. 19, a non-I.P.I. jury instruction tendered by IDOT, that provided: "In determining whether there is damage to the remainder caused by the taking, measure of that damage may not include the alleged \$1,695,000 cost to remove dirt from and import fill to the property as a separate item of damage." The court noted that the experts for both sides testified, "over and over again," that compensation involved the difference between the fair market value of the remainder immediately before the taking and the fair market value of the remainder after the taking. The court noted that the experts also "did allude to various issues regarding elevation," which linked to Zgonina's report. The court said it was convinced that the jury did not award an additional \$1,695,000 in addition to what they were required to do in the instructions.

Finally, regarding IDOT's allegation contained in the motion for new trial that the jury

was prejudiced by the fact that Haley's experts' calculated damages to the remainder that were over \$3 million more than the damage to the remainder calculated by IDOT's experts. The court found that IDOT was not prejudiced by Haley's experts' valuation of the damage to the remainder. The court stated:

“[IDOT], I think, frankly, and I think this is what the jury did, grossly under-valued the damage to the remainder as zero. And that was simply not, in my view, accepted by the jury and was not an indication that the Department was prejudiced by the testimony that it claims was improperly admitted during the course of this trial.”

The court found that the jury accepted the explanations of highest and best use and the corresponding valuations presented by the Haley's experts rather than accepting the testimony of IDOT's experts. The court found the jury verdict was clearly within the range of the valuations presented by the expert testimony presented during trial.

After denying IDOT's motion for new trial, the court entered a written order entering judgment on the jury's verdicts on July 30, 2010. IDOT filed a timely notice of appeal.

ANALYSIS

On appeal, IDOT claims the trial court erred by denying their motions *in limine* Nos. 3 and No. 8, and allowing testimony regarding comparable sales of property planned for proposed future commercial developments based on Shorewood's 2007 comprehensive plan and the undeveloped Bridge Street Town Centre plan. IDOT contends this testimony unfairly inflated the value of the Haley's 55-acre property as of April 26, 2007, before the Haley's property had either been rezoned for commercial use or annexed to the Village.

IDOT also argues that the trial court abused its discretion by denying IDOT's motions *in*

limine Nos. 6 and 7, and allowing Zgonina and Michael Haley, who were not valuation witnesses, to present testimony concerning flooding and the cost to fill the remainder property with clay to reduce potential future flooding. IDOT submits the Haley's evidence at trial did not establish a causal connection between the IDOT project and the flooding to the remainder, thus, the cost of fill was not related to the purported reduction in the value of the remainder and should not have been introduced to the jury for their consideration. Finally, IDOT argues that the cumulative effect of these multiple errors require a new trial.

The Haley's submit that the trial court did not err in its rulings on the parties' motions *in limine* or the subsequent motion to strike. The Haley's maintain that since the jury's determination of depreciated value for the combined remainder was well within the estimated range of values established by the evidence, IDOT's contention regarding unfair prejudice must fail.

I. Standard of Review

This court has previously determined that “[t]he standard of review applicable to eminent domain proceedings is whether the trial court abused its discretion, acted arbitrarily, exceeded the bound of reason, and ignored the applicable law.” *Department of Transportation v. Bolis*, 313 Ill. App. 3d 982, 985 (2000). This is true for both evidentiary rulings and jury instructions. *Bolis*, 313 Ill. App. 3d at 985.

In an eminent domain proceeding, the only question for a jury to determine is the just compensation to be paid to the owner of the property sought to be condemned. *Bolis*, 313 Ill. App. 3d at 985; *City of Chicago v. Anthony*, 136 Ill. 2d 169, 174 (1990). The *Anthony* court defined “just compensation” as “the fair cash market value of the subject property at its highest

and best use on the date of the filing of the complaint to condemn.” *Anthony*, 136 Ill. 2d at 174.

In a partial condemnation case, where only part of the whole property is taken, the determination of the amount of just compensation is calculated using the “before-and-after” method of appraisal. *City of Springfield v. West Koke Mill Development Corp.*, 312 Ill. App. 3d 900, 904-05 (2000). This method involves the following three steps: the appraiser should value the entire parcel as it existed prior to the condemnation; the appraiser should value the remainder parcel after the condemnation; and then the appraiser should arrive at the value of the area condemned by subtracting the value of the remainder after the condemnation from the value of remainder as part of the original entire parcel before the condemnation. *West Koke*, 312 Ill. App. 3d at 905.

II. Motions *in Limine* and Evidentiary Rulings

A. Motions *In Limine* Nos. 3 and No. 8

We begin by first reviewing the court’s ruling on IDOT’s motions *in limine* No. 3 and 8. IDOT argues that the denial of IDOT’s motion *in limine* No. 3 improperly allowed the jury to receive evidence regarding the Village of Shorewood’s 2007 Comprehensive Plan to rezone and annex the property to the Village as commercial property. Additionally, IDOT contends the trial court improperly denied its motion *in limine* No. 8, thereby improperly allowing Haley’s expert witnesses to discuss comparable sales involving the Bridge Street Town Centre when forming their highest and best use opinions, because the Bridge Street Town Centre was in the planning stages at the time of the taking.

Any evidence relevant to the value of the remainder property before and after the condemnation or taking of the property is admissible. *Department of Transportation v.*

McGovern, 103 Ill. App. 3d 461, 464 (1982). A trial court has broad discretion to grant or deny a motion *in limine* as part of its inherent power to admit or exclude evidence, and we will not reverse the trial court's decision to grant or deny a motion *in limine* absent a clear abuse of discretion. *City of Quincy v. Diamond Construction Co.*, 327 Ill. App. 3d 338, 342-43 (2002). When expert opinions differ as to highest and best use, generally, the issue is a question of fact for the jury unless the evidence regarding the highest and best use is so inherently improbable it should be excluded from the jury as a matter of law. *Quincy*, 327 Ill. App. 3d at 343; *Forest Preserve Dist. Of Cook County v. Lehmann Estate*, 388 Ill. 416, 426-27 (1944).

In this case, pre-trial discovery established that the expert witnesses for each side formulated divergent opinions regarding the highest and best use for the property both before and after the taking. IDOT expert's concluded that the highest and best use of the land at the time of IDOT's 2007 condemnation complaint was industrial, in part, because the Heartland *industrial* complex was situated in very close proximity to the Haley's intact 55-acre parcel. In contrast, pre-trial discovery revealed the Haley's expert witnesses focused on the high growth in the area and Shorewood's 2007 comprehensive plan indicating the Haley's intact parcel of land was slated to be rezoned as *commercial* property and annexed to the Village.

At trial, the record shows the experts for each side testified that they relied on the local ordinances and trends of future growth when considering the highest and best use for the Haley's parcel of property for purposes of deriving their valuation opinions. The Haley's experts relied on the proposed Bridge Street Town Centre and Shorewood's 2007 comprehensive plan, over IDOT's continuing objections, to show the trends in the area's development which supported their opinions that the highest and best use of the Haley property, prior to the taking in 2007, was

commercial use. IDOT's witnesses focused on an existing industrial complex and lack of immediate highway access to determine the highest and best use while minimizing the significance of the proposed annexation contemplated in Shorewood's 2007 comprehensive plan or the planned Bridge Street commercial complex.

The comprehensive plans prepared by the village, the existing *industrial* complex and the planned future *commercial* complex located in close proximity to the IDOT project, provided conflicting, but relevant, information for the jury to consider. The valuation experts for both sides were subject to rigorous and extensive cross-examination regarding the different factors each expert considered when forming their separate valuation opinions. Therefore, we agree that the trial court did not abuse its discretion in allowing the admission of this conflicting evidence in order to assist the jury when evaluating the expert testimony and deciding the highest and best use for the property to ultimately determine the amount of just compensation to be paid to the Haley's. See *Anthony*, 136 Ill. 2d at 174.

B. Motions *in Limine* Nos. 6 and 7

Next, IDOT claims that the trial judge abused its discretion by denying IDOT's motion *in limine* No. 6 and allowing Michael Haley and Zgonina to testify about the flooding he observed on the remainder. In addition, IDOT claims it was error to deny their motion *in limine* No. 7, regarding testimony concerning the necessity to add fill to the remainder because the Haley's evidence at trial did not provide a casual connection linking the design of the IDOT construction project to the unnatural accumulation of water after the project.

First, we address IDOT's claims that Michael Haley and Zgonina should not have been allowed to testify about the flooding on the remainder property. The record shows Michael

Haley testified that water accumulated on the remainder after the project began and Zgonoina's testimony described the standing water and drainage problems he observed.

It must be noted that the court allowed the jury to be transported to the site of the project without objection. At the site, the jurors themselves observed standing water and raised five out of a total of nine questions regarding drainage and/or the standing water the jurors observed on the day they were present at the site. Thus, we conclude Haley's and Zgonina's testimony, even if improper, was harmless since the jurors personally observed standing water on the property during the visit to the site approved by both sides.

Next, we address IDOT's contention regarding the court's denial of motion *in limine* No. 7 and its decision to allow Haley's engineer, Joseph Zgonina, to testify about the cost of \$1,695,000 to remove topsoil and replace it with clay. IDOT correctly asserts the the case law provides that any costs related to adapting the remainder, following a taking, cannot be considered by the trier of fact in a compensatory context. *Department of Transportation v. Galley*, 12 Ill. App. 3d 1072, 1077-78 (1973) (citing *Department of Public Works and Buildings v. Bloomer*, 28 Ill. 2d 267, 273 (1963)). However, *Department of Transportation v. Galley*, also clearly holds that the "measure of recovery for damages to land not taken is the reduction of its value resulting from the improvement, and that expenditures made and costs incurred in adapting the land to use after the improvement are relevant, if reasonable and economical, as evidence of the depreciation in value, but not as recoverable items in themselves." *Department of Transportation v. Galley*, 12 Ill. App. 3d at 1077-78 (citing *Department of Public Works v. Bloomer*, 28 Ill. 2d at 273).

The Haley's first contend that IDOT has waived this argument because the motion *in*

limine No. 7 specifically asserted Zgonina’s testimony regarding the cost to add fill was founded on *speculative* information. Further, the Haley’s argue that IDOT’s failure to raise the specific relevance objection, either in motion *in limine* No. 7 or during trial, constitutes forfeiture since the continuing objection at trial was based only on the “speculative” argument set out in motion *in limine* No. 7.

The law in Illinois is well established that denial of a motion *in limine* does not preserve an objection to disputed evidence later introduced at trial, and the moving party is obligated to object contemporaneously when the evidence is offered at trial. *Illinois State Toll Highway Authority v. Heritage Standard Bank & Trust Co.*, 163 Ill. 2d 498, 502 (1994). Following denial of a motion *in limine*, there is not always a need to repeat the objection each time similar evidence is presented, but the party must nonetheless object the first time the evidence is introduced. *Heritage*, 163 Ill. 2d at 502. Absent the requisite objection, the right to raise the issue on appeal is “waived.” *Heritage*, 163 Ill. 2d at 502; *Lehmann*, 388 Ill. At 429. Illinois Rule of Evidence 103(a), adopted by the Supreme Court September 27, 2010, and effective January 1, 2011, is consistent with the case law discussed above.

Here, the trial court clearly advised the parties that any basis for an objection omitted from the pretrial motions *in limine* must be raised at trial by specific objection. Yet, IDOT did not object to Zgonina’s testimony on the grounds that the cost to fill the remainder should not be presented to the jury based on existing case law.

We agree that IDOT’s standing objection to Zgonina’s testimony based on their motions *in limine* Nos. 6 and 7 did not eliminate the need to contemporaneously object to Zgonina’s testimony on the additional basis that the cost to add fill was not relevant to the jury’s

determination of the value of the remainder. IDOT did not contest the relevancy of the cost to add fill until after the close of evidence for both sides when IDOT filed a motion to strike. IDOT's failure to raise any objection during Zgonina's testimony, on the basis that the costs he described were not only speculative but also irrelevant, constitutes forfeiture. See *Lehmann*, 388 Ill. at 429.

Moreover, IDOT's instruction No. 19 clearly instructed the jury, "In determining whether there is damage to the remainder caused by the taking, the measure of that damage may not include the alleged \$1,695,000 cost to remove dirt from and import fill to the property as a separate item of damages." In addition, the court gave the jury a separate instruction that provided, "If you find there will be damage to the remainder caused by the taking, the measure of that damage will be the difference between the fair cash market value of the remainder immediately before the taking and the fair cash market value of the remainder immediately after the taking." Therefore, we conclude that the jury instructions provided to the jury in this case cured any potential prejudice from Zgonina's testimony as a non-valuation witness.

Finally, even if the jury instructions did not cure the error because, as IDOT contends, the instructions tendered did not instruct the jury to disregard the evidence but instructed the jury it could only factor it in as it related to depreciation in fair market value of the remainder, we conclude the error, if any, does not warrant a new trial. In Illinois it is well established that, in eminent domain cases, the improper admission or exclusion of value evidence does not constitute reversible error when there are other witnesses who testify and evidence presented as to value on both sides, and the jury had the opportunity to view the property and weigh the conflicting evidence. *Bolis*, 313 Ill. App. 3d at 985-86; *Heritage Standard Bank*, 250 Ill. App. 3d at 686.

Moreover, during oral appellate arguments, counsel for IDOT clearly stated that IDOT was not claiming on appeal that the Haley's valuation experts' testimony was improper or inconsistent with the laws of eminent domain and advised this court that IDOT did not object to the "way" the Haley's valuation experts' opinion evidence "came in" at trial.

Finally, during the hearing on the motion for new trial, the court specifically noted that the valuation experts presented the jury with many proper factors to consider regarding damage to the remainder property, including: visibility from the highways, its configuration, its size, its shape, its access to the frontage road, as well as any flooding. See *Anthony*, 136 Ill. 2d at 184-85. The court concluded Zgonina's testimony regarding the flooding issue was not particularly important, since valuation experts did not seem to emphasize or heavily rely on the flooding or need for fill when reaching their valuation opinions. There is no indication in the record that suggests Zgonina's testimony prejudiced this jury. Therefore, we conclude the jury reached an appropriate compensation amount for the combined remainder based on this record.

C. Driveway Access to Remainder Property

IDOT claims that the trial court erred in allowing Zgonina to present testimony to the jury describing the difficulty associated with constructing driveways from an elevated roadway to the combined remainder parcels. IDOT claims this testimony was not relevant to the issue of the amount of depreciation to the property. The Haley's submit that IDOT's failure to object to this testimony during trial constitute waiver or forfeiture based on the *Lehmann* case. *Lehmann*, 388 Ill. at 429. We agree this issue has been forfeited or waived based on the reasoning of the case law set forth above.

D. Cumulative Errors Causing Prejudice

Finally, IDOT claims that the cumulative effect of the multiple errors raised on appeal resulted in undue prejudice warranting a new trial. Having determined the issues raised by IDOT either are not meritorious or have been forfeited, we conclude error did not occur and therefore cumulative error does not exist in this case.

In this case, the jury's award for compensation for the taking was well within the range of evidence offered by Haley's valuation experts. See *Bolis*, 313 Ill. App. 3d at 985. Therefore we will not disturb the jury's verdict based on our careful review of this record.

CONCLUSION

Accordingly, for the reasons stated above, the judgment of the circuit court of Will County is affirmed.

Affirmed.

JUSTICE LYTTON, specially concurring:

I concur with the majority's decision in this case but write separately to make clear that the trial court erred in allowing Zgonina to testify about the cost to regrade the remainder after the taking. Nevertheless, I find that the error was harmless and, thus, concur with the majority's decision to affirm.

In a condemnation case, costs incurred in adapting land to use after a taking are not recoverable as items of damage in and of themselves. See *Department of Transportation v. First Bank of Schaumburg*, 260 Ill. App. 3d 490, 495 (1992); *Department of Transportation v. Hsueh*, 117 Ill. App. 3d 945, 947 (1983); *Department of Transportation v. Galley*, 12 Ill. App. 3d 1072, 1078 (1973). Allowing testimony of "costs to cure" as a separate element of damage in a condemnation

case is "manifestly improper." See *First Bank of Schaumburg*, 260 Ill. App. 3d at 498. Nevertheless, the improper admission of such testimony is harmless where the jury's verdict was within the range of testimony, and there is no showing that the improper evidence affected the verdict. See *id.* at 499; *Hsueh*, 117 Ill. App. 3d at 948.

Here, although the trial court erred in allowing Zgonina to testify about the specific cost of regrading the remainder, there is no evidence that jury's verdict was affected by the error. The jury was given an opportunity to view the property and awarded damages within the range of the properly admitted expert witness testimony. Moreover, the jury was expressly instructed that it could "not include the alleged \$1,695,000 cost to remove dirt from and import fill to the property as a separate item of damage." Thus, the trial court's error in allowing Zgonina's testimony does not require reversal.