THE PROPERTY OWNER RULE:
VALUATION ISSUES IN EMINENT DOMAIN & BEYOND

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THE PROPERTY OWNER RULE: VALUATION ISSUES IN EMINENT DOMAIN & BEYOND

I. INTRODUCTION TO THE PROPERTY OWNER RULE

A. Property Valuation in Eminent Domain Cases

Article 1, Section 17, of the Texas Constitution provides: "No person's property shall be taken, damages, or destroyed for or applied to public use without ***adequate compensation*** being made . . . ." (emphasis added). Adequate compensation in the case law is interpreted as market value of the property. Market value is defined as "the price the property will bring when offered for sale by one who desires to sell, but is not obligated to sell, and is bought by one who desires to buy, but is under no necessity of buying." *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 182 (Tex. 2001) (quoting *State v. Carpenter*, 89 S.W.2d 979, 980 (Tex. 1936)). In the case of a partial taking, "the proper measure of damages . . . is the market value of the land actually appropriated and the difference, if any, in the market value of the remainder immediately before and immediately after the taking." *Taub v. City of Deer Park*, 882 S.W.2d 824, 827 (Tex. 1994). As the Texas Supreme Court explained in *Carpenter*, all evidence touching on market value should generally be admitted:

> Generally, it may be said that it is proper as touching the matter of the value and depreciation in value to admit evidence upon all such matters as suitability and adaptability, surroundings, conditions before and after, and all circumstances which tend to increase or diminish the present market value. Evidence should be excluded relating to remote, speculative, and conjectural uses, as well as injuries, which are not reflected in the present market value of the property.

State v. Carpenter, 89 S.W.2d 194, 200 (Tex. 1936).

"The three traditional approached to determining market value are the comparable sales method, the cost method, and the income method." *Id.* (citing *Religious of Sacred Heart Tex. v. City of Houston*, 836 S.W.2d 606, 615–17 & n.14 (Tex. 1992)). In almost all cases, this type of testimony is provided by an expert witness, such as an appraiser, real estate broker, or other professional.

B. Origins of the Property Owner Rule

The property owner rule "is an exception to the requirement that a witness must otherwise establish his qualifications to express an opinion on land value." *Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 157 (Tex. 2012); *Porras v. Craig*, 675 S.W.2d 503, 505 (Tex. 1984) ("[T]he owner of the property can testify to its market value, even if he could not qualify to testify about the value of like property belonging to someone else."). Simply stated, the property owner rule provides "that an owner is qualified to testify about the market value of his property." *Porras*, 675 S.W.2d at 505. The rule's basis is the simple notion that the average property owner is familiar with his or her own property and its value. *See Reid Road Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 853 (Tex. 2011).

Even though the property owner rule "fulfills the same role" as expert testimony, the rule "falls under Texas Rule of Evidence 701, which allows a lay witness to provide opinion testimony if it is (a) rationally based on the witness's perception and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." *Justiss*, 397 S.W.3d at 157.

1. *Porras v. Craig*

The Texas Supreme Court's first major decision adopting this evidentiary principle was *Porras v. Craig*, 675 S.W.2d 503 (Tex. 1984). In a trespass and title dispute between neighbors, Porras allegedly cleared land, including many large trees, and put up a fence on land belonging to Craig. *Id.* at 504. The trial court awarded land title, $7,000 in actual damages, and $50,000 in exemplary damages to Craig. *Id.* On appeal, Porras complained that there was no evidence to support the award of actual damages. *Id.*

At trial, both parties presented testimony about damages to the property. *Id.* at 505. Porras presented an expert witness who testified that the land was actually enhanced by the clearing. *Id.* Craig, as the property owner, testified that his land suffered a $20,000 diminution in value. *Id.* When asked to explain the diminution, Craig testified that he had bought the property to build a retirement home, but that he and his wife were now afraid because Porras used his neighboring property for exotic game hunting, the fence was patrolled with guns, the fence had signs warning trespassers would be shot, and there was recently a grass fire on his property. *Id.*

The Texas Supreme Court agreed with Porras that Craig's testimony provided no evidence of market value. *Id.* Although "Mr. Craig was qualified to give an opinion of the market value of land; he simply failed to do so." *Id.* Particularly fatal to his testimony, Craig only "referred to the personal, rather than the market value" of his property. *Id.* Thus, even though Porras failed to object to Craig's testimony at trial, the evidence itself was insufficient to support the award of actual damages, and thus the exemplary damages as well. *Id.*

Porras sets the initial standard for the admissibility of property owner testimony:

> In order for a property owner to qualify as a witness to the damages to his property, his testimony must show that it refers to market, rather than intrinsic or some other value of the property. This requirement is usually met by asking the witness if he is familiar with the market value of his property.

Id. at 504–05. Thus, under *Porras*, the predicate questions for property owner testimony appeared to be: (1) are you the owner of the subject property, and (2) are you familiar with the market value of your property?

2. *Natural Gas Pipeline Co. of America v. Justiss*

The Texas Supreme Court's next significant explication of the property owner rule was in *Natural Gas Pipeline Co. of America v. Justiss*, 397 S.W.3d 150 (Tex. 2012). In *Justiss*, several landowners sued a pipeline company complaining that the noise and odors from a nearby compressor station caused a permanent nuisance. *Id.* at 152. A jury sided with the landowners and awarded them $1,242,500 in lost property value. *Id.* at 152–53. On appeal, the pipeline company argued, among other things, that insufficient evidence supported the nuisance finding and damage award. *Id.* at 153.

At trial, several of the landowners testified that their property value was decreased because of the noise and odors from the compressor station, and many provided damage figures by which their "market value" had decreased. *Id.* at 159–61. However, the court ultimately concluded that none of their testimony provided evidence of diminished value, reasoning that their testimony was conclusory, speculative, and lacked sufficient explanation for their opinions of value. *Id.* at 161. Even a witness's general reference to "what the price of land is bringing" was considered speculative, without more. *Id.*

Quoting from *Porras*, the Texas Supreme Court explained that even if the property owner rules means "an owner is *qualified* to testify to property value, we insist that the testimony meet the 'same requirements as any other opinion testimony.'" *Id.* at 156 (quoting *Porras*, 675 S.W.2d at 504). The court referred to its recent decision in *Coastal* explaining "when expert testimony will support a judgment." *Id.* (citing *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227 (Tex. 2004)). In *Coastal*, the court held that an expert's bare conclusions, even if the expert is otherwise qualified, are insufficient; there must be a reasoned basis and support for the witness's opinions, not a mere *ipse dixit*. *Id.*

> Because property owner testimony is the functional equivalent of expert testimony, it must be judged by the same standards. Thus, as with expert testimony, property valuations may not be based solely on a property owner's *ipse dixit*. An owner may not simply echo the phrase "market value" and state a number to substantiate his diminished value claim; he must provide the factual basis on which his opinion rests. This burden is not onerous, particularly in light of the resources available today. Evidence of price paid, nearby sales, tax valuations, appraisals, online resources, and any other relevant factors may be offered to support the claims. But the valuation must be substantiated; a naked assertion of 'market value' is not enough. Of course, the owner's testimony may be challenged on cross-examination or refuted with independent evidence. But even if unchallenged, the testimony must support a verdict, and conclusory or speculative statements do not.

Id. at 159. Recognizing the *Coastal* standard as something more than the predicate suggested in *Porras*, the Texas Supreme Court remanded the case for a new trial. *Id.* at 162. Thus, after *Justiss*, any witness testifying under the property owner rule must have a sufficient factual basis to support his or her opinion of market value.

II. THE PROPERTY OWNER RULE IN PRACTICE

A. What kind of testimony should be presented under the property owner rule?

To be sure, any witness offering testimony under the property owner rule must be familiar with: (1) the subject property, and (2) the market value of the subject property. *See Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664, 669 (Tex. 1988). Because intrinsic or personal value in not market value, a witness should not testify as to what property "is worth to them." *See Porras*, 675 S.W.2d at 505; *Redman*, 920 S.W.2d at 669 (concluding property owner rule testimony is not probative if based on "intrinsic value or other value such as replacement cost"); *see also Matheus v. Sasser*, 164 S.W.3d 453, 464 (Tex. App.—Fort Worth 2005, no pet.) ("Intrinsic value, in contrast [to market value], is an inherent value not established by market forces, but based upon sentimental or personal value.").

And, particularly in light of *Justiss*, any practitioner planning to rely on owner testimony under the property owner rule must be sure that the witness's testimony is supported by underlying facts, as discussed above. 397 S.W.3d at 159; *see also Smirl v. State*, No. 01-12-00989-CV, 2014 WL 2507639, at *5 (Tex. App.—Houston [1st Dist.] June 3, 2014, no pet.) (mem. op.) ("An opinion cast in terms of approximation and unsupported by any relevant facts leading to or

supporting such approximations is conjectural."). Using the phrase "market value" will not make an otherwise unsupported opinion valid, and vice versa. *See Justiss*, 397 S.W.3d at 161 ("[A]lthough a landowner need not use the phrase 'market value' in describing his valuation, merely invoking that phrase does not make otherwise conclusory or speculative testimony legally sufficient."). Instead, the Texas Supreme Court lists numerous potential evidentiary support for property owner testimony, including: (1) sales price, (2) comparable sales; (3) tax valuations, (4) appraisals, (5) online resources, and (6) "any other relevant factors." *Id.* at 159. Like expert testimony generally, property owner rule testimony may be based on hearsay. *Justiss*, 397 S.W.3d at 160–61.

In practice, post-*Justiss*, some courts appear to apply more stringent standards than others for the type of underlying support they will require from property owners. *Compare Tuttle v. Builes*, ___ S.W.3d ___, 2019 WL 1301881, at *7–*8 (Tex. App.—Eastland 2019, no pet.) (tenant testimony insufficient even though he said his testimony about fair rental value was based on a comparison with other rental properties because he did not provide enough detail about the differences/similarities between the properties); Wood v. Kennedy, 473 S.W.3d 329, 338–39 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (property owner testimony insufficient where witnesses failed to make specific explanations for their adjustments to comparable rental rates); *DMZ, Inc. v. Garren*, 467 S.W.3d 700, 703–04 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (property owner who valued personal property based on purchase price and who had experience with auctions and internet auctions, but did not testify he conducted research into current value and did not consider condition of used property at time of conversion, was insufficient); *with State v. Speedway Grapevine I, LLC*, 536 S.W.3d 858, 871 (Tex. App.—Fort Worth 2017, pet. denied) (rejecting State's contention that property owner failed to show comparable sales were truly comparable); *Oncor Elec. Delivery Co. LLC v. El Halcon Investments*, No.11-14-00164-CV, 2016 WL 4710445, at *4 (Tex. App.—Eastland July 29, 2016, pet. denied) (mem. op.) (property owner testimony about diminution in value of property based on power line admissible in light of his familiarity with ranch property in area, even though he could point to no comparable sales).

B. Who is an owner under the property owner rule?

A property owner does not have to be a natural person to take advantage of the property owner rule. *See Cabot Capital Corp. v. USDR, Inc.*, 346 S.W.3d 634, 639 (Tex. App.—El Paso 2009, pet. denied) (noting that principals and sole shareholder/president of closely held corporations have been allowed to testify under the property owner rule (citing *Maxey v. Texas Commerce Bank of Lubbock*, 571 S.W.2d 39, 46 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e) & *Bower v. Processor & Chem. Serv., Inc.*, 672 S.W.2d 30, 32 (Tex. App.—Houston [14th Dist.] 1984, no writ))).

In *Reid Road Mun. Utility Dist. No. 2 v. Speedy Stop*, the Texas Supreme Court clarified that "when an entity's agent testifies to the market value of the organization's property, the legal effect is that the actual owner of the property is testifying." 337 S.W.3d 846, 853 (Tex. 2011). Reasoning that "entities are as capable of knowing the market value of their property as are individuals," the court saw "no good reason to conclude that business organizations are any less familiar with the value of their property than are individual property owners." *Id.* But not every employee or agent is necessarily qualified to testify on an entity's behalf. Rather than a blanket rule based solely on the representative's position in the entity, *Reid Road* allows property owner rule testimony "only from an officer in a management position with duties that at least in some way relate to the property at issue, or an employee of the entity in a substantially equivalent position." *Id.* at 854–55.

C. What else can the property owner rule be used for?

Obviously, the property owner rule allows an owner to present testimony about the value of his or her property; but what else? The first most obvious extension is that the property owner rule can be used to show damages to land, a diminution in value. *See, e.g., Porras*, 675 S.W.2d at 504; *Waste Disposal Ctr., Inc. v. Larson*, 74 S.W.3d 578, 583 (Tex. App.—Corpus Christi-Edinburg 2002, pet. denied). The property owner rule can also be applied to testimony about fair rental value, under the same reasoning and standards. *See, e.g., A.G.E., Inc. v. Buford*, 105 S.W.3d 667, 677 (Tex. App.—Austin 2003, pet. denied). It has also been used to value partnership interests. *See Red Sea Gaming, Inc. v. Block Investments (Nevada) Co.*, 338 S.W.3d 562, 572–73 (Tex. App.—El Paso 2010, pet. denied.). Likewise, a business owner may testify to the value of his business, "'if he has a basis of knowledge of the business.'" *Banker v. Banker*, 517 S.W.3d 863, 871 (Tex. App.—Corpus Christi 2017, pet. denied) (quoting *Sharifi v. Steen Auto.*, L.L.C. 370 S.W.3d 126, 150 (Tex. App.—Dallas 2012, no pet.)). The property owner rule can also apply to personal property. *See Sierad v. Barnett*, 164 S.W.3d 471, 484 (Tex. App.—Dallas 2005, no pet.) (valuing household furnishings).

The property owner rule does not typically allow an owner to testify about repair costs or costs to cure. *See Wortham Bros., Inc. v. Haffner*, 347S.W.3d 356, 361 (Tex. App.—Eastland 2011, no pet.) ("This presumption [that an owner is familiar with his property and knows its value] does not extend to the reasonable

cost of repairing the owner's property particularly when those repairs are of a technical or specialized nature."); *Pjetrovic v. Home Depot*, 411 S.W.3d 639, 649 (Tex. App.—Texarkana 2013, no pet.). However, an owner may be able to reasonably rely on a professional estimate for repair work. *See Pjetrovic*, 411 S.W.3d at 648 (citing *Bernstein v. McDaniel*, 298 S.W.3d 817, 826 (Tex. App.—Dallas 2009, no pet.)).

D. What types of cases can the property owner rule be used in?

Obviously, the property owner rule frequently arises in eminent domain cases. *See, e.g.*, *Speedway Grapevine*, 536 S.W.3d at 858. However, the property owner rule can come up in, and be useful, in many different types of cases, including but not limited to:

- Divorce. *See, e.g.*, *Banker v. Banker*, 517 S.W.3d 863, 871 (Tex. App.—Corpus Christi 2017, pet. denied).
- Nuisance. *See,* e.g., *Justiss*, 397 S.W.3d at 159.
- Trespass. *See,* e.g., *Porras*, 675 S.W.2d at 503–04.
- DTPA. *See, e.g.*, *Zhu v. Lam*, 426 S.W.3d 333, 341 (Tex. App.—Houston [14th Dist.] 2014, no pet.).
- Breach of fiduciary duty. *See, e.g.*, *Sierad v. Barnett*, 164 S.W.3d 471, 484 (Tex. App.—Dallas 2005, no pet.).
- Conversion. *See, e.g.*, *Khorshid, Inc. v. Christian*, 257 S.W.3d 748, 760 (Tex. App.—Dallas 2008, no pet.).
- Breach of warranty. *See, e.g.*, *Ford Motor Co. v. Cooper*, 125 S.W.3d 794, 799 (Tex. App.—Texarkana 2004, no pet.).

E. What disclosure requirements apply to property owner rule witnesses?

Even if offering the equivalent of expert testimony, a property owner rule witness is still a lay witness under Texas Rule of Evidence 701. As a result, expert designation of the property owner rule witness is not required. *See Red Sea*, 338 S.W.3d at 572.

However, practitioners should be aware of the risk of failing to disclose property owners as experts if the owner is otherwise a real estate expert and would like to offer broader opinions about the market or other relevant issues on which he or she has expertise or if the owner is an entity and there is any question about the representative's status. *C.f.*, *Reid Road*, 337 S.W.3d at 855 (concluding witness was qualified to testify about real estate, he was not personally familiar with the subject property and was an officer of a holding company of the entity, and thus was not timely disclosed as an expert).

III. CONCLUSION

The property owner rule can be an important tool in the lawyer's tool box. It can be cost effective, potentially defraying expert costs. Furthermore, testimony from actual property owners, particularly in a property rights friendly state, can be impactful. On the other hand, relying on an interested witness has its risks. The property owner may appear biased and lacking in expertise that the other side may offer through its own expert testimony. Moreover, to the extent the property owner's testimony is the only evidence of value, there is risk on appeal that the testimony will be considered no evidence and thus the judgment unsupported.