NO. 11-08-00248-CV

IN THE COURT OF APPEALS
ELEVENTH DISTRICT OF TEXAS
EASTLAND, TEXAS

MONTE J. LAND, CAROLYN J. LAND, ROBERT ADLRICH, SCOTT WHEATLEY, HEATHER WHEATLEY, ALVIS H. JACKSON AND DEANA G. JACKSON

APPELLANTS

VS.

PALO PINTO APPRAISAL DISTRICT

APPELLEE

BRIEF OF AMICI CURIAE PATTERSON PK LAND PARTNERSHIP, LTD.

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ORAL ARGUMENT REQUESTED

IDENTITY OF AMICI CURIAE

Amici Curiae adopt the designation of the identities of the parties and their counsel as set forth in the Parties' Appellants' and Appellee's Brief. The following party is the Amici Curiae: Patterson PK Land Partnership, Ltd., ("Patterson Ltd.") a Texas limited partnership. Its general partner is Patterson PK Land Management GP, LLC, a Texas limited liability company. Patterson Ltd. is paying the fees associated with the preparation of this Amicus Brief. Patterson Ltd. will be affected by the outcome of this appeal. Patterson Ltd. is on contract to purchase real property that is subject to leases similar to those made the basis of this suit. Further, Patterson Ltd. is contractually required to offer that real estate for sale to the leaseholders at a percentage of the tax appraised value. It is Patterson Ltd.'s position that the trial court correctly determined the values of the Appellants' leasehold interests.

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STATEMENT OF THE CASE

Nature of the Case:	This is an appeal of a judgment affirming a taxing authority's appraisal of leasehold interests. After a bench trial, the trial court determined that the taxing authority correctly used comparable sales to determine the market value of the interests. Further, despite their burden to do so, the Appellants did not present any evidence of fair market value or excessiveness, and they have otherwise waived any challenge to the trial court's judgment.
Trial Court:	The trial court was the 29th Judicial District Court of Palo Pinto County, Texas, the Honorable Jerry D. Ray presiding. The Plaintiffs were Monte J. Land, Carolyn J. Land, Robert Aldrich, Scott Wheatley, Heather Wheatley, Alvis H. Jackson and Deana G. Jackson. The Defendant was Palo Pinto Appraisal District.
Trial Court's Disposition:	The trial court heard evidence in a bench trial on April 21, 2008. On June 24, 2008, the trial court entered judgment for the Palo Pinto Appraisal District.

ISSUES PRESENTED

ISSUE I Generally, the best method to determine market value is the use of comparable sales. The PPAD used comparables – evidence of the sale of similar leasehold interests – to determine the market value of the Appellants' leasehold interests. The trial court reviewed voluminous evidence from PPAD that supported that valuation method and had no evidence submitted from the Appellants to support an alternative, superior method. The trial court's judgment correctly affirmed the PPAD's valuation of the Appellants' property.

ISSUE II A party appealing a trial court's judgment after a bench trial has the duty to specifically challenge findings of fact using legal and factual sufficiency challenges. Here, the Appellants failed to challenge any finding of fact or to raise any legal or factual sufficiency challenge in their issues. The Appellants waived their ability to challenge the trial court's judgment.

ISSUE III A holder of a leasehold interest has the burden of proof to establish the market value of his interest and show how the appraisal district's valuation was excessive. Despite being warned about their burden by the trial court, the Appellants did not present any evidence at trial that established the market value of their interests or how the PPAD's valuation was excessive. The trial court's judgment is supported by the evidence and should be affirmed.

STATEMENT OF FACTS

The Amici Curiae adopts the statement of facts in the Appellee's Brief filed by the Palo Pinto Appraisal District ("PPAD").

SUMMARY OF THE ARGUMENT

The trial court correctly affirmed the PPAD's valuation of the Appellants' leasehold interests. This Court should affirm the trial court's judgment because it was correct both factually and procedurally. The trial court based its findings and judgment on three expert witnesses' testimony — two were PPAD's witnesses and one was the Appellants' witness. This testimony confirmed the values of those interests and the methodologies used in arriving at the values. All experts confirmed that the best way to value a leasehold interest is to use comparable sales when that information is available. In fact, a leading treatise in real estate appraisal confirms that fact. Moreover, the case law from Texas and elsewhere and the Texas Tax Code confirms that comparables should be used in valuing leasehold interests. Therefore, the trial court correctly determined the leasehold interests' values based on relevant comparable sales. Because the trial court's judgment is correct, this Court should affirm it.

Importantly, the Appellants have not taken the necessary procedural steps to challenge the trial court's findings. Despite having the burden to establish fair market value and the amount of any excessiveness of PPAD's valuation, the Appellants offered no evidence of fair market value or excessiveness. Additionally, although the Appellants essentially challenge the trial court's admission and reliance on PPAD's experts' testimony at trial, they did not object to any of that testimony at trial and have not

challenged the legal or factual sufficiency of that evidence to support the trial court's findings and judgment on appeal. Because the Appellants waived any complaint about the trial court's judgment, this Court should affirm that judgment in all things.

ARGUMENT

A. The Trial Court Correctly Determined Market Value Of The Leasehold Interests Using Comparables

The trial court correctly found in favor of PPAD based on PPAD's expert evidence regarding the value of the Appellants' leasehold interests. This lengthy and detailed expert testimony evidenced that the PPAD used sales of comparable leasehold interests in determining the market values for the Appellants' leasehold interests. Of course, PPAD was statutorily required to assess the Appellant's leasehold interests at market value: "A taxable leasehold . . . is appraised at the market value of the leasehold or other possessory interest." TEX. TAX CODE ANN. § 23.13. *See also* TEX. TAX CODE ANN. § 23.1(a) ("all taxable property is appraised at its market value as of January 1."). The Texas Legislature has statutorily defined "market value":

> "Market Value" means the price at which a property[1] would transfer for cash or its equivalent under prevailing market conditions if: (A) exposed for sale in the open market with a reasonable time for the seller to find a purchaser; (B) both the seller and the purchaser know of all the uses and purposes to which the property is adapted and for which it is capable of being used and of the enforceable restrictions on its use; and (C) both the seller and purchaser seek to maximize their gains and neither is in a position to take advantage of the exigencies of the other.

Id. at § 1.04(7). Therefore, the Texas Legislature intended for tax appraisal districts to tax leasehold interests and to assess their value at the market value, which is the value

that a willing buyer and a willing seller could agree on to transfer the interest. Therefore, as applied to this case, the trial court had the duty to determine what amount a willing seller and a willing buyer would agree to transfer the Appellants' leasehold interests.

There are various methods to calculate market value: "[t]he three traditional approaches to determining market value are the comparable sales method, the cost method, and the income method." *Religious of the Sacred Heart v. City of Houston*, 836 S.W.2d 606, 615-17 & n.14 (Tex. 1992). Where available, the best evidence of "market value" is comparing the interest to sales of similar interests:

> If the goal of an appraisal is to ascertain market value, then logically there can be no better guide than the prices that willing buyers and sellers actually negotiate in the relevant market. Under a comparable sales analysis, the appraiser finds data for sales of similar property, then makes upward or downward adjustments to these sales prices based on differences in the subject property.

City of Harlingen v. Estate of Sharboneau, 48 S.W.3d 177 (Tex. 2001). *See also Bauer v. Lavaca-Navidad River Auth.*, 704 S.W.2d 107, 110 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e); *County of Bexar v. Cooper*, 351 S.W.2d 956, 958 (Tex. Civ. App.—San Antonio 1961, no writ).

The Fifth Circuit agrees: "In general, comparable sales constitute the best evidence of market value." *U.S. v. 320.0 Acres of Land*, 605 F.2d 762, 798 (5th Cir. 1979) (holding that courts should liberally admit evidence of comparable sales and allow the fact-finder to evaluate them); *Great Plains Equip. v. Koch Gathering Sys.*, 45 F.3d 962 (5th Cir. 1995). *See also El Paso Nat. Gas Co. v. Federal Energy Regulatory Comm'n*, 96 F.3d

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[1] The Legislature defines "property" as "any matter or thing capable of private

1460, 1464 (D.C. Cir. 1996). Comparable sales are "sales from a willing seller to a willing buyer of similar property in the vicinity at or about the same time [as the valuation]." *U.S. v. 320.0 Acres of Land*, 605 F.2d at 798 (quoting *U.S. v. Trout*, 386 F.2d 216, 223 (5th Cir. 1967)).

In other words, the best evidence of what a willing buyer of the Appellants' leasehold interests would spend is looking to what other willing buyers actually spent in purchasing similar leasehold interests. Consistent with this precedent, PPAD used comparables to determine the market value for the Appellants' leasehold interests. Moreover, all of the experts that testified at trial agreed that PPAD's use of comparables was the best way to value the Appellants' leasehold interests (3 R.R. at 97-100, 131; 4 R.R. at 93-95). Therefore, this Court should affirm the trial court's judgment based on the use of comparables as the superior method of valuation.

Appellants argue that only the "equity method" may be used to determine the value of leasehold interests. *See Tarrant Appraisal Dist. v. Am. Airlines, Inc.,* 826 S.W.2d 767 (Tex. App.—Fort Worth 1992, writ denied). The "equity method" compares the actual rent to the market rent for that leasehold interest. *See id.* Because PPAD did not utilize the "equity method," the Appellants argue that the trial court had to find that the value of their interests was equal to one year's rent payment under their leases. Of course, there is no evidence that one year's rent is anywhere near equivalent to the market value of the interests.

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ownership," which would include a leasehold interest. *Id.* at § 1.04(1).

The Appellants do not provide any basis for their argument that the use of comparables would arrive at a value that was in excess of true "market value." There is no such argument. In fact, the equity theory, which is apparently the gold standard to the Appellants, necessarily uses "comparables." (3 R.R. at 23-24). The equity method requires a finding of "market rent" for a leasehold interest (*Id.*). How does one discern "market rent"? By looking to comparables: what other comparable leases have as rent on the free market. Therefore, as evidenced by the "equity method," the use of comparables is the best way to determine "market value."

Appellants also argue that the Fort Worth Court of Appeals's opinion in *Tarrant Appraisal District* forecloses the ability of appraisal districts using comparables in determining the fair market value of a leasehold interest. *See id.* This argument is misleading, at best. In *Tarrant Appraisal District*, the court did *not* hold that the equity method was the *only* valuation method that can ever be used in calculating the amount of a taxable leasehold. *See id.* At the time *Tarrant Appraisal District* was decided, the issue was a matter of first impression in Texas. *See id.* at 768. The court even noted that "market value, although defined by statute, may be calculated by various methods as illustrated by the arguments of the parties to this lawsuit. Thus, we are left to decide which method is appropriate and consistent with the laws of this State." *Id.* at 770.

In that case, the parties only submitted two valuation methods to the court. *See id.* at 768. The taxpayer promoted the equity method, which required a comparison of actual rent to market rent. *See id.* The taxing authority promoted the "possessory interest method," which involved capitalizing the rent for the remainder of the lease. *See id.*

Notably, the use of comparables was not presented to the court. The court determined that out of the two choices provided, the equity method was proper. *Id.* at 770. Had the parties presented the use of comparables, the court certainly could have, and likely would have, selected that valuation method as superior. In fact, the method chosen by the court (the equity method) was more in line with the use of comparables than the other proffered method. The equity method utilizes the market rent in its calculation, which necessarily requires an inquiry into comparable market rates for the rent. The "possessory interest method" did not involve any comparables or any review of market conditions. Therefore, out of the two valuation methods that the court had to choose from, the court selected the one most in line with using comparables sales and true market conditions.

In a case that is on point where a court of appeals had the option of choosing the comparable sales method of valuing a leasehold interest, the court chose comparables as the best method. *See Panola County Appraisal District v. Panola County Fresh Water Supply,* 69 S.W.3d 278 (Tex. App.—Texarkana 2002, no pet.). Appellants argue that the court's discussion of how to arrive at the market value of a leasehold is mere dicta. In truth, however, the court stated the following:

> A tax-exempt entity cannot be taxed; neither can a tax lien be placed on its interest in property. If this had been the sole purpose of the judgment below or this appeal, then this opinion would end here, giving the Water District this relief. *However, this was not the relief granted by the trial court's judgment. The judgment is limited to fixing the value for the leasehold property and requiring a correction of the tax rolls on the leasehold property.*

Id. at 283-84 (emphasis added). Certainly, the court's discussion of how to properly calculate the value of the leasehold property is not mere dicta that should be disregarded.

The court rejected the trial court's holding that the appraisal district had to revalue the leasehold estates at their market value as determined by the equity method based solely on the rent paid on each lot. *See id.* at 281, 287. The court held that although it was true that the Texas Property Code did not allow the appraised value of the leasehold to be less than the total rent paid, this simply constituted a minimum taxable value for the property. *Id.* The leasehold may be taxed at a higher amount. *Id.* In permitting the use of comparables and capitalization, the court stated that:

> the Property Tax Code does not prohibit the use of comparables to value the leasehold interest... The Property Tax Code does not prohibit a methodology which involves capitalization, as long as that capitalization involves only the leasehold interest.

Id. at 283. It also stated:

> On remand, the trial court should require all comparables of fee simple interests to be eliminated from the data used in establishing the fair market value of the leaseholds, but it should not limit the appraisal to the amount of annual rent being paid on the property.

Id. at 287. The court reversed and remanded the trial court's ruling that fixed the value to the time of the contract because that amount would not necessarily reflect the fair market value and "was a clear violation of the Texas Property Tax Code." *Id.* at 285. The court also held that proper comparables could be used. *See Id.* at 286.

Moreover, as advocated by the *Panola County* case, the use of comparables for leasehold interests is in line with the Texas Tax Code. The Texas Tax Code expressly favors the use of market data comparisons in appraising real property:

> If the chief appraiser *uses the market data comparison method* of appraisal to determine the market value of real property, the chief appraiser shall use

> *comparable sales data* and shall adjust the *comparable sales* to the subject property.

See TEX. PROP. TAX CODE § 23.013 (emphasis added). Likewise Section 23.0101 states:

> In determining the market value of property, the chief appraiser *shall* consider the cost, income and *market data comparison methods* of appraisal and use the most appropriate method.

Id. (emphasis added).

Other jurisdictions also accept, and even prefer, the use of comparables in valuing taxable leasehold estates. For instance, in *United Airlines, Inc. v. Pappas,* the court stated that the income capitalization and replacement cost methodologies are acceptable, but "[t]he *sales comparison approach,* however, *is the preferred method* and should be used when market data is available." 348 Ill. App. 3d 563, 569, 284 Ill. Dec. 169, 809 N.E.2d 735, 743 (2004) (emphasis added). The relevant market data is the fair cash value of the leasehold interest which is the "amount a willing lessee will pay a willing lessor, in a voluntary transaction, for the right to use and occupy the premises." *Id.* at 744. The existence of other leases "demonstrates the existence of a market for such property." *Id.* Although no two pieces of property are identical, in that case, evaluating the value of leased property at O'Hare International Airport, the court determined that the gross rent for a taxpayer at O'Hare, gross rent for other major airlines, and gross rent for taxpayers at other airports should be considered. *Id.* "The appraisal of the leasehold interest should have been based in whole or in part on the sales comparison approach, especially in light of the disparity between the monthly rental of $606,000 computed by the taxpayer's expert and the actual monthly rent paid by the taxpayer of $4,300,000." *Id. See also*

Rosewell v. Bulk Terminals Co., (1979), 73 Ill. App. 3d 225, 230, 28 Ill. Dec. 704, 390 N.E.2d 1294, 1305 ("Bulk has failed to establish that the fair cash value of its leasehold interest, as determined from the current market rental of similarly improved property, is such that the original assessment is excessive.").

In California, *De Luz Homes, Inc. v. County of San Diego,* is controlling. 45 Cal. 2d 546, 290 P.2d 544 (1955). *De Luz* held that capitalization of anticipated net earnings of a prospective assignee or buyer of the lease should be used. *Id.* at 562. The court noted that assessors generally estimate value by analyzing market data on sales of similar property, replacement costs, and income from the property. *Id.* at 563. Because not one of these methods alone can be used to estimate value of all property, the assessor, subject to requirements of fairness and uniformity, may exercise discretion in using one or more of them. *Id. See also Host Int'l, Inc. v. County of San Mateo,* (1973) 35 Cal. App. 3d 286, 110 Cal. Rptr. 652, 656 (court stated "[t]axpayer's expert conceded there were no sales of comparable leases.")

In *Frontier Airlines, Inc. v. State Tax Commission,* the court held that the value of the leasehold should be determined from the testimony of qualified experts as the value which a buyer under no compulsion to purchase would pay to a seller with no compulsion to sell. 528 S.W.2d 943, 947 (Mo. 1975). The period of the lease yet to run (including an unexercised right of renewal), favorable and unfavorable factors, the location type and construction of the building, the tenant's business, "comparable properties in similar neighborhoods," present market conditions, future market trends and all other material factors should be considered. *Id.*

The laws of this State and of other jurisdictions permit and prefer the use of comparable data in establishing the value of a taxable leasehold estate. Appellants fail to cite to any authority to support its claim that the use of comparables is prohibited. Instead, they wholly rely on *Tarrant Appraisal District*, which is a case that did not discuss or even mention the use of the comparable sales method, and chose the valuation method that came the closest to using comparable market data. Thereafter, the Texarkana Court of Appeals approved using comparable market data. The Texas Tax Code favors the use of sales market comparison data. Similarly, other states such as Illinois, California and Missouri, accept and prefer using comparable market data. The trial court correctly followed this precedent and used comparable market data in determining the value of the taxable leaseholds. This Court should affirm this correct fact finding.

B. The Trial Court Correctly Entered Judgment For The Palo Pinto Appraisal District Because The Appellants Failed To Procedurally Challenge The Trial Court's Judgment.

This Court should affirm the trial court's judgment because the Appellants have not properly challenged the evidence admitted in the trial or the trial court's factual conclusions. After a multi-day bench trial, the trial court found in favor of PPAD based on voluminous evidence concerning the value of the Appellants' leasehold interests. Because the Appellants have not properly challenged the trial court's judgment from a procedural respect, this Court should affirm the judgment.

1. Standard Of Review Is Deferential To Fact Finder's Decision

The fact finder is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *See Leyva v. Pacheco*, 163 Tex. 638, 641, 358 S.W.2d 547,

549 (1962). The fact finder may believe one witness and disbelieve another and resolve inconsistencies in any testimony. *See McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986). A court of appeals cannot substitute its opinion for that of the fact finder and determine that it would have weighed the evidence differently or reached a different conclusion. *See Hollander v. Capon*, 853 S.W.2d 723, 726 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

2. Appellants Have Not Properly Challenged The Legal Or Factual Sufficiency Of The Evidence, And The Judgment Should Therefore Be Affirmed.

From a procedural perspective, the Appellants should have challenged the sufficiency of the evidence that supports the trial court's judgment for this appeal. But the Appellants have not done so and have not challenged the trial court's judgment or its findings of fact via no-evidence or factual insufficiency issues or points of error. Complaints that are not asserted by points of error or issues in the court of appeals are waived. *See San Jacinto River Auth. v. Duke*, 783 S.W.2d 209, 209-210 (Tex. 1990); *Russell v. Hankerson*, 771 S.W.2d 650, 654 (Tex. App.—Corpus Christi 1989, writ denied) (complaint regarding erroneous exclusion of evidence was rendered harmless by failure to attack the ultimate issue to which the evidence related). The Appellants' issues do not raise any legal or factual sufficiency issues. Instead, they ask: whether the trial court's decision to use comparables was erroneous, whether the trial court disregarded the law by allegedly ignoring lease terms, whether the trial court misapplied the law by approving of the use of a location modifier for improvements, and whether the Appellants are entitled to their attorney's fees.

Instead, the Appellants should have challenged the trial court's decision to admit PPAD's expert evidence on valuation, and should have specifically challenged the legal and/or factual sufficiency of the evidence to support the trial court's findings and judgment. They did not do this. They did not challenge the trial court's admission of expert evidence, and they did not even use the terms "legal sufficiency" or "factual sufficiency" at any point in their brief. They have therefore waived any complaint regarding the legal or factual sufficiency of the evidence, and this Court should affirm the judgment.

Further, a party appealing from a bench trial has the obligation to specifically challenge the trial court's findings of fact. Findings of fact may be challenged for legal or factual sufficiency of the evidence. *See Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994); *Beasley v. Hub City Tex., L.P.*, No. 01-03-00287-CV, 2003 Tex. App. LEXIS 8550 * 12 (Tex. App.—Houston [1st Dist.] September 29, 2003, no pet.). Unless the trial court's findings are challenged by a point of error on appeal, they are binding upon the appellate court and the parties. *See Northwest Park Homeowners Ass'n, Inc. v. Brundrett*, 970 S.W.2d 700 (Tex. App.—Amarillo 1998, pet. denied); *Whitehead v. Univ. of Tex.*, 854 S.W.2d 175, 178 (Tex. App.—San Antonio 1993, no writ). If a party fails to challenge the findings of fact that support the judgment, the court of appeals should summarily affirm the judgment. *See Brundrett*, 970 S.W.2d at 704; *Carter v. Carter*, 736 S.W.2d 775, 777 (Tex. App.—Houston [14th Dist.] 1987, no writ). A broad challenge to the sufficiency of evidence without identifying the specific finding of fact

that is being challenged preserves nothing for review. *See Bransom v. Standard Hardware, Inc.*, 874 S.W.2d 919, 927 (Tex. App.—Fort Worth 1994, writ denied).

Here, the trial court entered specific factual findings to support its judgment. But the Appellants have not specifically challenged any of the trial court's findings or conclusions. The Appellants have therefore waived any complaint regarding the judgment, and this Court should affirm the judgment in all things.

3. The Legal Or Factual Sufficiency Of The Evidence Standards Of Review Support The Trial Court's Judgment

Even if the Appellants had raised legal and factual sufficiency issues, those standards support the trial court's judgment. In analyzing a legal sufficiency challenge, a court must determine whether the evidence at trial would enable reasonable and fair minded people to reach the factual finding under review. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). In reviewing a legal sufficiency point, a reviewing court must view the evidence in a light that tends to support the finding of the disputed fact. *See id.* Under this standard, there is legally sufficient evidence to support the trial court's judgment in this appeal.

If a party is attacking a judgment via a factual sufficiency ground on an issue on which he had the burden of proof, he must demonstrate that the adverse finding is against the great weight and preponderance of the evidence. *See Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983); *Murphey v. Fannin County Elec. Coop., Inc.*, 957 S.W.2d 900, 903 (Tex. App.—Texarkana 1997, no pet.). If the party is attacking a finding on which his opponent had the burden of proof, he must show that the evidence that

supported the finding is so weak, or that the evidence contrary to the finding is so overwhelming, that the finding should be set aside and a new trial ordered. *See, e.g., Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965). In either case, the court of appeals must first examine the record to determine if there is some evidence to support the finding; if such is the case, then the court of appeals must determine, in light of the entire record, whether the finding is so contrary to the overwhelming weight and preponderance of the evidence as to be clearly wrong and manifestly unjust, or whether the great preponderance of the evidence supports its nonexistence. *See Traylor v. Goulding*, 497 S.W.2d 944, 945 (Tex. 1973). Under these standards, this Court should affirm the trial court's judgment.

4. Competent Valuation Evidence Supports The Trial Court's Judgment

This Court should affirm the trial court's judgment because it is supported by competent valuation evidence. The PPAD set a value on the Appellants' leasehold interests. After an administrative appeal, the Appellants filed suit challenging the PPAD's valuation. The Texas Tax Code provides that the district court "shall try all issues of fact and law raised by the pleadings in the manner applicable to civil suits generally." *See* TEX. TAX. CODE ANN. § 42.23(a). As the plaintiff, a property owner may designate a cause of action either under the tax code section providing a remedy for excessive appraisal or under the tax code section providing a remedy for unequal appraisal. *Id.* at §§ 42.25, 42.26, 42.23(e). Here, the Appellants were plaintiffs in the

trial court, and their sole cause of action was challenging the excessiveness of the appraised value of the leasehold interests.

a. Appellants Had Burden Of Proof To Establish Excessiveness, And They Failed To Meet That Burden.

If a court determines that the value of property according to the appraisal roll exceeds the appraised value required by law, the property owner is entitled to a reduction of the appraised value on the roll to the appraised value determined by the court. *See* TEX. TAX CODE ANN. § 42.25. The taxpayer must assume the burden of proving excessiveness and must show that the appraisal worked to his or her substantial injury, along with the extent of that injury. *See Wilson v. City of Port Lavaca*, 407 S.W.2d 325 (Tex. Civ. App.—Corpus Christi, 1966, writ ref'd n.r.e.); *Bass v. Aransas County Indep. Sch. Dist.*, 389 S.W.2d 165 (Tex. Civ. App.—Corpus Christi 1965, writ ref'd n.r.e.); *Milligan v. Corsicana Indep. Sch. Dist.*, 381 S.W.2d 97 (Tex. Civ. App.—Waco 1964, no writ). Specifically, "[e]vidence of the market value of plaintiffs' properties, which it was plaintiffs' burden to tender, is a prerequisite to a finding that plaintiffs' property was valued excessively, or that the plan worked to plaintiffs' substantial injury." *Milligan*, 381 S.W.2d at 99. *See also Jackson v. Maypearl Indep. Sch. Dist.*, 392 S.W.2d 892 (Tex. Civ. App.—Waco 1965, no writ).

Here, Appellants had the burden to establish the fair market value of their leasehold interests and to show that the appraised value was excessive. Despite being warned about their burden (2 R.R. at 38-40), the Appellants did not offer any evidence of the market value of their leasehold interests or how those values exceeded PPAD's

appraised values. Based on this complete lack of evidence, at the end of the Appellants' case in chief, PPAD correctly moved for a directed verdict that the trial court took under advisement (3 R.R. at 123-24). The trial court could have correctly granted PPAD's directed verdict motion, but decided to hear PPAD's case in chief.

b. Even Though The Burden Never Shifted To The PPAD, It Produced Overwhelming Evidence Of The Market Value Of The Appellants' Leasehold Interests.

PPAD offered expert testimony on the market value of the Appellants' property. PPAD offered the testimony of their chief appraiser, Donna Rhodes, who is a registered professional appraiser (3 R.R. at 86). She has been an appraiser for over twenty years and has extensive experience in valuing leasehold interests (*Id.* at 87-88). She described how the PPAD is required by statute to value leasehold interests at true market value, and that the State tests PPAD's values (*Id.* at 89-90). Rhodes explained in detail the system that the PPAD used to value leasehold interests (*Id.* at 97-104). The Appellants did not object to this testimony as being unreliable (*Id.*). That system uses comparables of other similar leasehold interests – the PPAD did not use the sale of fee interests as comparables (*Id.* at 100). PPAD looked at the relationship between the individual lease terms and the sales prices (*Id.* at 116, 121). Rhodes stated that PPAD tested whether the individual terms of the leases impacted the value of the leasehold interests, and that PPAD concluded that those terms did not affect the value (*Id.* at 93, 97). This testimony established the market value of the Appellants' leasehold interests as found by the trial court.

PPAD also called another expert that was not associated with the PPAD – James Daniels (*Id.* at 126). Daniels has been an appraiser for over forty-five years (*Id.*). He is a licensed real estate appraiser, holds the MAI designation from the Appraisal Institute, and has experience in valuing leasehold interests (*Id.* at 126-27). Daniels confirmed that the use of comparables is the most meaningful way to value a leasehold interest and cited the trial court to a treatise published by the Appraisal Institute to support that opinion (*Id.* at 131). Daniels provided his detailed approach at valuing the leasehold interests (*Id.* at 137, 148 through 4 R.R. at 21). Appellants did not object to this methodology (*Id.*).

If anything, Daniels testified that PPAD's methodology would have undervalued the Appellants' leasehold interests (4 R.R. at 23). Daniels confirmed that although he looked at the lease terms, they did not impact the valuation (3 R.R. at 139-40; 4 R.R. at 25-26). In other words, the rent amount and the term of the lease did not impact the purchase price (*Id*). This was because the rent payments were substantially below market rate and because the Brazos River Authority routinely extended lease terms when they were sold (4 R.R. at 85). Daniels testified that the equity method simply does not apply to the leaseholds at Possum Kingdom Lake (*Id.* at 90). Additionally, regarding a comparison of the equity method and the use of comparables, Daniels testified that the two valuation methods should come to very similar conclusions (*Id.* at 87).

PPAD also called the Appellants' expert Albert Scruggs Love, Jr. by deposition (*Id.* at 93). Love testified that he did not disagree with Daniels's use of comparables in valuing the Appellants' leasehold interests (*Id*). He also testified that if there were comparable sales of similar leaseholds, he would use them as part of his approach to

determining the value of the Appellants' leasehold interests and would use the equity method if there were no comparables (*Id.* at 94). He agreed that the Appraisal Institute's treatise was authoritative in his industry and that the book advocated the use of comparables to value leasehold interests (*Id.* at 94-95).

The trial court was within its discretion to credit PPAD's experts and the testimony from the Appellants' expert. Courts have held that any evidence that tends to prove market value of taxable property is admissible in a taxpayer's action seeking de novo review of an assessment. *See Hunt County Tax Appraisal Dist. v. Rubbermaid Inc.*, 719 S.W.2d 215 (Tex. App.—Dallas 1986, writ ref'd n.r.e.). In fact, the Appellants are foreclosed from challenging that testimony on appeal because it was admitted without any objection. This failure to object was not accidental. Before trial the Appellants filed a motion to challenge PPAD's experts, and on the record, intentionally withdrew their objections (2 R.R. at 37-38). Appellants' counsel stated: "Let's let her rip and see what happens." (*Id.*). Consistently, at trial, the Appellants did not raise any objections to PPAD's experts based on the reliability of their methodologies, the facts on which they base their opinions, relevancy, etc.

c. Appellants Waived Any Objection To PPAD's Experts' Methodologies By Failing to Object At Trial.

On appeal, Appellants attempt to reverse the burden of proof and to have this Court strike expert testimony to which they never objected. This is not correct. Like other evidence issues, a party must preserve error in the admission or exclusion of expert testimony. The Texas Supreme Court held that if a party wants to complain on appeal

about the admission of expert testimony, he has an obligation to object to the evidence before trial or when the evidence is offered at trial. *See Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402 (Tex. 1998). The Court noted that absent such a timely objection, the offering party would not be given the opportunity to cure any defect which might exist, and the objecting party would be allowed an appeal by ambush:

> To preserve a complaint that scientific evidence is unreliable and thus, no evidence, a party must object to the evidence before trial or when the evidence is offered. Without requiring a timely objection to the reliability of the scientific evidence, the offering party is not given an opportunity to cure any defect that may exist, and will be subject to trial and appeal by ambush. Reviewing courts may not exclude expert scientific evidence after trial to render a judgment against the offering party because that party relied on the fact that the evidence was admitted.

Id. at 409-10. Absent a proper complaint, error in the admission of expert testimony is waived. *See, e.g., Guadalupe Blanco River Auth. v. Kraft*, 77 S.W.3d 805, 807 (Tex. 2002); *Askew v. Askew*, No. 02-04-109-CV, 2005 Tex. App. LEXIS 8229 (Tex. App.—Fort Worth October 6, 2005, no. pet.).

There is a narrow circumstance when a party can assert that expert evidence is no evidence without raising an objection at trial. To urge that an expert's testimony is no evidence on appeal, a party must preserve a legal or factual sufficiency challenge. *See, e.g., S.E.A. Leasing, Inc. v. Steele*, NO. 01-05-00189-CV, 2007 Tex. App. LEXIS 1337 (Tex. App.—Houston [1st Dist.] February 22, 2007, pet. filed); *City of Dallas v. Redbird Dev. Corp.*, 143 S.W.3d 375, 385 (Tex. App.—Dallas 2004, no pet.). In a bench trial, a party can raise a legal or factual sufficiency challenge for the first time after trial. *See* TEX. R. APP. P. 33.1(d). However, as shown above, a party challenging a trial court's

findings after a bench trial must still adequately brief a legal or factual sufficiency challenge.

Here, the Appellants have not objected to the experts' testimony at trial or challenged the legal or factual sufficiency of the evidence to support the trial court's findings and judgment. Therefore, they cannot challenge PPAD's expert's opinions on appeal, and this Court should summarily affirm the trial court's judgment.

If an appellant properly asserts a legal or factual sufficiency challenge, then a court of appeals must determine if the expert testimony is so conclusory on its face as to be no evidence even without an objection at trial. In *Coastal Transportation Company v. Crown Central Petroleum Corp.*, the only evidence regarding gross negligence was conclusory statements by the plaintiff's expert:

> Q: When viewed objectively from Coastal's point of view at the time of the September '93 incident, in your opinion, did Coastal's failure to stop using probes that could have [sensor failure] problems, did that involve a high degree of risk, considering the probability and magnitude of the potential harm to others?
>
> A: Yes, it did, very high.
>
> Q: In your opinion, did Coastal have an actual subjective awareness of the risk involved in failing to stop using probes that can have [sensor failure] problems?
>
> A: Yes, again and again.
>
> Q: And in your opinion, did Coastal nevertheless proceed with conscious indifference to the rights, safety, or welfare of others?
>
> A: That's the only conclusion I can draw.

136 S.W.3d 227, 233 (Tex. 2004). The Supreme Court held that even absent an objection to the evidence, a party may challenge the legal sufficiency of an expert's testimony when it is restricted to the face of the record:

> [W]hen a reliability challenge requires the court to evaluate the underlying methodology, technique, or foundational data used by the expert, an objection must be timely made so that the trial court has the opportunity to conduct this analysis. However, when the challenge is restricted to the face of the record (for example, when expert testimony is speculative or conclusory on its face) then a party may challenge the legal sufficiency of the evidence even in the absence of any objection to its admissibility.

Id. The Court made a distinction "between no evidence challenges to the reliability of expert testimony in which we evaluate the underlying methodology, technique or foundational data used by the expert and no evidence challenges to conclusory or speculative testimony that is non-probative on its face." *Volkswagen of Am. Inc. v. Ramirez*, 159 S.W.3d 897, 910 (Tex. 2004).

Accordingly, when a party wants to assert a challenge to the "reliability of expert testimony in which we evaluate the underlying methodology, technique or foundational data used by the expert" a party must preserve error by objecting to the evidence at the time it is offered; whereas, a party can preserve error regarding "conclusory or speculative testimony that is non-probative on its face" by raising a sufficiency-of-the-evidence challenge. *Coastal*, 136 S.W.3d at 233. Courts have routinely held that where the underlying methodologies are described, expert testimony was not so conclusory as to be no evidence and that an objection was necessary to challenge that evidence on appeal.[2]

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[2] *See, .e.g., Durham Transp. Co. v. Beettner*, 201 S.W.3d 859 n.5 (Tex. App.—Waco 2006, pet. denied) (After holding that "[e]xpert testimony is considered 'conclusory or speculative' when it

Here, PPAD's experts testified at length about their ultimate opinions on the fair market value of the Appellants' leasehold interests and about their methodologies. In order to complain about PPAD's experts' conclusions regarding the Appellants' leasehold interests values, the Appellants had the obligation to object to PPAD's experts' testimony at trial as having followed improper methodologies. They did not do so, and in fact, expressly withdrew their objections. Therefore, under the authorities outlined above, they waived any objection to PPAD's experts' conclusions, and this Court should affirm the trial court's judgment.

d. This Court Should Affirm The Judgment Because The Evidence Supports The Trial Court's Fact Findings.

Based on the Appellants' complete failure to offer any evidence of market value, the Appellants' failure to object to PPAD's experts' testimony, and the unanimous testimony of all of the experts (PPAD's and Appellants' experts) that comparable sales should be used in measuring leasehold values, the trial court correctly found for PPAD and affirmed the values of the Appellants' leasehold interests. The final determination of the value of the leasehold interests was an issue for the fact finder. *See Polk County v. Tenneco, Inc.*, 554 S.W.2d 918 (Tex. 1977). Because Appellants have not properly

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has no factual substantiation in the record," the court held that the expert's opinions were based on facts in the record and not conclusory.); *Dupont Employees Rec. Ass'n v. AVA Svs.*, No. 01-04-00053-CV, 2005 Tex. App. LEXIS 3597 *14-15 (Tex. App.—Houston [1st Dist.] May 12, 2005, no pet.) (mem. op.); *United Servs. Auto Ass'n v. Croft*, 175 S.W.3d 457, 463-66 (Tex. App.—Dallas 2005, no pet.); *Gabriel v. Lovewell*, 164 S.W.3d 835, 846 (Tex. App.—Texarkana 2005, no pet.); *Pettit v. Dowell*, No. 10-01-00420-CV, 2005 Tex. App. LEXIS 6355 (Tex. App.—Waco August 10, 2005, no pet.); *Welch v. McLean*, No. 02-02-237-CV, 2005 Tex. App. LEXIS 4231 (Tex. App.—Fort Worth June 2, 2005, no pet.); *Geoscience Eng'g & Testing v. Allen*, No. 01-03-00402-CV, 2004 Tex. App. LEXIS 9856 (Tex. App.—Houston [1st Dist.] November 4, 2004, pet. denied).

challenged this fact finding at trial or on appeal, this Court should affirm the trial court's judgment in all things.

CONCLUSION AND PRAYER

Ultimately, this appeal concerns whether the trial court erred in its fact-intensive finding regarding the fair market values of the Appellants' leasehold interests. At trial the Appellants had the burden to establish what they contended were the fair market values of their interests. They completely failed to meet this burden, and this Court should affirm the trial court's judgment due to that failure. The burden never shifted to the PPAD to present expert evidence on the values of the Appellants' interests. Notwithstanding, PPAD presented multiple experts who provided lengthy and detailed evidence concerning the values and the underlying methodologies supporting their appraisals. The Appellants failed to object to this expert evidence at trial and failed to assert legal or factual insufficiency grounds on appeal. This Court should affirm the trial court's judgment due to that failure as well.

Finally, the trial court's fact finding is just plain right. The evidence at trial unanimously showed that the best evidence of market value is the use of comparables – what other buyers purchased similar leasehold interests for in the free market. Unlike some leasehold situations, Possum Kingdom Lake has an established market for the sale of leasehold interests. PPAD correctly used comparables to determine the fair market value of the Appellants' leasehold interests. There was no expert evidence that doing so was in any way incorrect. Moreover, the caselaw in Texas and elsewhere supports the use of comparables in determining fair market value of leasehold interests.

For the reasons stated in this brief, Amici Curiae request this Court to affirm the trial court's judgment, and grant Appellee all other relief to which it is entitled in either law or equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 19th day of November, 2009, the above document was served via Certified United States Mail, Return Receipt Requested, on all parties or their attorneys of record listed below pursuant to the Texas Rules of Appellate Procedure:

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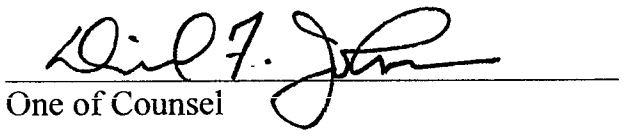

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