857 F.3d 1101
United States Court of Appeals, Tenth Circuit.

PUBLIC SERVICE COMPANY OF NEW MEXICO, a New Mexico corporation, Plaintiff-Appellant,

v.

Lorraine BARBOAN, a/k/a, Larene H. Barboan; Benjamin House, also known as, Bennie House; Annie H. Sorrell, also known as, Anna H. Sorrell; Mary Rose House, also known as, Mary R. House; Dorothy House, also known as, Dorothy W. House; Laura H. Lawrence, also known as, Laura H. Chaco; Jones Dehiya; Jimmy A. Charley, also known as, Jim A. Charley; Mary Gray Charley, also known as, Mary B. Charley; Bob Gray, Deceased, also known as, Bob Grey; Christine Gray Begay, also known as, Christine G. Begay; Thomas Thompson Gray, also known as, Thomas Grey; Jimmie Grey, also known as, Jimmie Gray; Melvin L. Charles, also known as, Melvin L. Charley; Marla L. Charley, also known as, Marla Charley; Kalvin A. Charley; Irene Willie, also known as, Irene James Willie; Charley Joe Johnson, also known as, Charley J. Johnson; Elouise J. Smith; Leonard Willie; Shawn Stevens; Glen Charles Charleston, also known as, Glen C. Charleston; Glenda Benally, also known as, Glenda G. Charleston; Navajo Nation; United States of America, Defendants-Appellees,

and

Approximately 15.49 Acres of Land in McKinley County, New Mexico; Navajo Tribal Utility Authority; Continental Divide Electric Cooperative, Inc.; Transwestern Pipeline Company, LLC; Citicorp North America, Inc.; Chevron USA Inc., as successor in interest to Gulf Oil Corp.; Harry House, Deceased; Pauline H. Brooks; Leo House, Jr.; Nancy Deheva Eskeets; Lorraine Spencer; Laura A. Charley; Marilyn Ramone; Wynema Giberson; Eddie McCray, also known as, Eddie R. McCrae; Ethel Davis, also known as, Ethel B. Davis; Wesley E. Craig; Hyson Craig; Noreen A. Kelly; Elouise Ann James, also known as, Elouise James Wood, also known as, Eloise Ann James, also known as, Elouise Woods; Alta James Davis, also known as, Alta James; Alice Davis, also known as, Alice D. Chuyate; Phoebe Craig, also known as, Phoebe C. Cowboy; Nancy James, also known as, Nancy Johnson; Betty James, Deceased; Linda C. Williams, also known as, Linda Craig-Williams; Genevieve V. King; Lester Craig; Fabian James; Daisy Yazzie Charles, also known as, Daisy Yazzie, also known as, Daisy J. Charles; Rosie Yazzie, Deceased; Kathleen Yazzie James, also known as, Catherine R. James; Verna M. Craig; Juanita Smith, also known as, Juanita R. Elote; Alethea Craig, Sarah Nelson, Larry Davis, Jr.; Berdina Davis; Michelle Davis; Steven Mccray; Velma Yazzie; Geraldine Davis; Larrison Davis, also known as, Larrison P. Davis; Adam McCray; Michelle McCray; Eugenio Ty James; Larson Davis; Cornelia A. Davis; Celena Davis, also known as, Celena Bratcher; Frankie Davis; Verna Lee Bergen Charleston, also known as, Verna L. Charleston; Vern Charleston; Kelly Ann Charleston, also known as, Kelly A. Charleston; Sheryl Lynn Charleston, also known as, Sheryl L. Charleston; Spencer Kimball Charleston, Jr., Deceased; Edwin Allen Charleston, also known as, Edwin A. Charleston; Charles Baker Charleston, also known as, Charles B. Charleston; Sam Mariano; Harry House, Jr; Matilda James; Darlene Yazzie; Unknown Owners, Claimants and Heirs of The Property Involved; Unknown Heirs of Harry House, Deceased; Unknown Heirs of Bob Gray (Bob Grey), Deceased; Unknown Heirs of Betty James, Deceased; Unknown Heirs of Rosie C. Yazzie, Deceased; Unknown Heirs of Spencer Kimball Charleston, Jr., (Spencer K. Charleston), Deceased; Unknown Heirs of Helen M. Charley, Deceased; Estate of Rosie C. Yazzie; Estate of Spencer K. Charleston; United States Department of Health & Human Services; United States Department of the Interior, Defendants.

GPA Midstream Association; The National Congress of American Indians; Pueblo of Laguna; The Ute Mountain Ute Tribe; The Confederated Tribes of the Umatilla Indian Reservation, Transwestern Pipeline Company, LLC, Amici Curiae.

No. 16-2050

Filed May 26, 2017

Synopsis

Background: Electricity provider brought condemnation action, seeking to condemn perpetual easement for electrical transmission lines over five allotted lands owned by Indian tribe and its members. Indian tribe moved to dismiss for lack of subject matter jurisdiction with respect to two allotments in which tribe held fractional interest. The United States District Court for the District of New Mexico, James A. Parker, Senior District Judge, 155 F.Supp.3d 1151, 1:15-CV-00501-JAP-CG, granted motion. Provider moved to alter or amend order. The District Court, Parker, Senior District Judge, 167 F.Supp.3d 1248, granted provider's request to certify four questions of law for interlocutory appeal, but denied provider's request to sever its claims against the two parcels in which tribe held fractional interest. Provider appealed.

Holdings: The Court of Appeals, Phillips, Circuit Judge, held that:

[1] as a matter of first impression, Indian General Allotment Act did not allow condemnation of allotted lands owned in any part by tribe, and

[2] oil pipeline company was not entitled to intervene on appeal.

Affirmed.

West Headnotes (9)

[1] Indians
Appeal or other review

Court of Appeals reviews de novo a district court's statutory interpretation of the Indian General Allotment Act. 25 U.S.C.A. § 357.

1 Cases that cite this headnote

[2] Statutes
Language
Statutes
Plain language;plain, ordinary, common, or literal meaning

In matters of statutory construction, Court of Appeals must begin with the language employed by Congress and assume that the ordinary meaning of that language accurately expresses the legislative purpose.

Cases that cite this headnote

[3] Indians
Allotment or Partition

"Allotment" is an Indian-law term of art that refers to land awarded to an individual allottee from a common holding.

1 Cases that cite this headnote

[4] Eminent Domain
Property Subject to Appropriation

Indian General Allotment Act did not allow condemnation of allotted lands owned in any part by Indian tribe; phrase "lands allotted in severalty to Indians may be condemned" illustrated singular Congressional focus on allotted land owned by individual tribal members, and tribe could not be considered owner of lands allotted in severalty to Indians. 25 U.S.C.A. § 357.

2 Cases that cite this headnote

[5] Eminent Domain
Property Subject to Appropriation
Indians
Land held in trust in general

When all or part of a parcel of allotted land owned by one or more individuals is transferred to the United States in trust for an Indian tribe, that land becomes tribal land not subject to condemnation under Indian General Allotment Act. 25 U.S.C.A. § 357.

6 Cases that cite this headnote

[6] Eminent Domain

Parties

Oil pipeline company that had right-of-way crossing parts of tribal land was not entitled to intervene on appeal in electricity provider's condemnation action under Indian General Allotment Act, which involved different area of tribal land; provider and company had same legal objective, creating presumption that provider's representation of company's interest was adequate, and company had declined ample opportunities to be heard in district court, and all parties consented to company's status as amicus curiae. 25 U.S.C.A. § 357; Fed. R. Civ. P. 24(a).

Cases that cite this headnote

[7] **Federal Courts**

Parties

Court of Appeals evaluate motions to intervene on appeal based on the following requirements: (1) an applicant's timely application, (2) an interest relating to the property or transaction which is the subject of the action, (3) possible impairment or impediment of that interest, and (4) lack of adequate representation of that interest by existing parties. Fed. R. Civ. P. 24(a).

1 Cases that cite this headnote

[8] **Federal Courts**

Intervention or addition of new parties on appeal

Though Court of Appeals usually takes a liberal view of rule governing intervention, when an applicant has not sought intervention in the district court, the Court permits it on appeal only in an exceptional case for imperative reasons. Fed. R. Civ. P. 24(a).

2 Cases that cite this headnote

[9] **Federal Courts**

Parties

Court of Appeals does not interpret rule governing motions to intervene as imposing rigid, technical requirements, but instead reads it as capturing the practical circumstances that justify intervention. Fed. R. Civ. P. 24(a).

Cases that cite this headnote

***1103 Appeal from the United States District Court for the District of New Mexico, (D.C. No. 1:15-CV-00501-JAP-CG)**

Attorneys and Law Firms

Kirk R. Allen (Stephen B. Waller, with him on the briefs), Miller Stratvert P.A., Albuquerque, New Mexico, for Plaintiff-Appellant.

Paul Spruhan, Assistant Attorney General (Ethel Branch, Attorney General, with him on the brief), Navajo Nation Department of Justice, Window Rock, Arizona, for Navajo Nation, Defendant-Appellee.

Jeffrey S. Beelaert (John C. Cruden, Assistant Attorney General, James C. Kilbourne, William B. Lazarus, and Mary Gabrielle Sprague, Attorneys, with him on the brief), U.S. Department of Justice, Washington, D.C., for the United States, Defendant-Appellee.

Zackeree S. Kelin (Michael M. Mulder, The Law Offices of Michael M. Mulder, Evanston, Illinois, with him on the brief), Davis Kelin Law Firm LLC, Albuquerque, New Mexico, for the Individual Allottees, Defendants-Appellees.

Clint Russell and Stratton Taylor, Taylor, Foster, Mallett, Downs Ramsey & Russell, Claremore, Oklahoma, filed an amicus brief for GPA Midstream Association, in support of Plaintiff-Appellant.

***1104** Jennifer H. Weddle, Troy A. Eid, Harriet McConnell, and Laura E. Jones, Greenberg Traurig, LLP, Denver, Colorado, for Ute Mountain Ute Tribe; John Dossett, National Congress of American Indians, Embassy of Trial Nations, Washington, D.C.; Dan Rey-Bear, Rey-Bear McLaughlin, LLP, Spokane, Washington, for Pueblo of Laguna; Naomi Stacy and Dan Hester, for Confederated Tribes of the Umatilla Indian Reservation, Pendleton, Oregon, Amici Curiae.

Deana M. Bennett and Emil J. Kiehne, Modrall Sperling Roehl Harris & Sisk, PA, Albuquerque, New Mexico,

filed an amicus brief for Transwestern Pipeline Company, LLC, in support of Plaintiff-Appellant.

Before BACHARACH, PHILLIPS, and McHUGH, Circuit Judges.

Opinion

PHILLIPS, Circuit Judge.

Unable to win the consent of all necessary landowners, a public utility company now contends that it has a statutory right to condemn a right-of-way on two parcels of land in New Mexico. Because federal law does not permit condemnation of tribal land, the Navajo Nation's ownership of undivided fractional interests in the parcels presents a problem for the company. We affirm the district court's dismissal of the condemnation action against the two land parcels in which the Navajo Nation holds an interest.

I

No one can feign surprise to learn that the United States government's treatment of the original inhabitants of this country has not been a model of justice. The government spent much of the nineteenth century emptying the eastern part of the country of Indians and sending them west. *See Choctaw Nation v. Oklahoma*, 397 U.S. 620, 623-26, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970). Then, when settlers caught up with the tribes in the west, the government sought to confine those tribes, and other tribes native to the west, ever more tightly onto reservations. *See, e.g.*, *Williams v. Lee*, 358 U.S. 217, 221-23, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959). Much tragedy and bloodshed ensued.

In the late nineteenth century, after the government had largely segregated Indians from the rest of society, Congress changed course. But the new course still harmed Indian tribes and their members. Instead of excluding tribal members from American society while permitting them some autonomy on the reservations, Congress tried to force tribes to assimilate into American society, minus much of their autonomy. Congress carved reservations into allotments and assigned the land parcels to tribal members—surplus lands were made available to white settlers. So began the Allotment Era. "The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Cty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 254, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992). The Allotment Era "was fueled in part by the belief that individualized farming would speed the Indians' assimilation into American society and in part by the continuing demand for new lands for the waves of homesteaders moving West." *Solem v. Bartlett*, 465 U.S. 463, 466, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984).

Congress began allotting land one tribe at a time and allowed Indians to sell the land as soon as they received it. *Cty. of Yakima*, 502 U.S. at 254, 112 S.Ct. 683. Tribal members began to lose their allotted lands in hasty and even fraudulent transactions. *Id.* In 1887, Congress passed the General Allotment Act, commonly known as the Dawes Act, which allowed the President to apply the allotment process to most tribal lands across the country, without tribal consent. *Id.* But as a check against the rapid post-allotment loss of Indian land, Congress also mandated that the federal government would hold Indian-allotted land in trust for twenty-five years, after which time it would issue a fee patent to the allottee or his heirs. *Id.*

Despite this attempted protection, "[t]he policy of allotment of Indian lands quickly ***1105** proved disastrous for the Indians." *Hodel v. Irving*, 481 U.S. 704, 707, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987). As allotments spread throughout the country, Indians continued to lose land—by the time the Allotment Era ended in 1934, as much as two-thirds of allotted lands had passed out of Indian ownership. Felix S. Cohen, *Cohen's Handbook of Federal Indian Law* § 1.04 (Nell Jessup Newton, et al. eds., 2012 ed.). Even the twenty-five-year trust protection did serious harm: "parcels became splintered into multiple undivided interests in land, with some parcels having hundreds ... of owners. Because the land was held in trust and often could not be alienated or partitioned, the fractionation problem grew and grew over time." *Hodel*, 481 U.S. at 707, 107 S.Ct. 2076.

As allotments began to create a checkerboard of tribal, individual Indian, and individual non-Indian land interests, Congress passed several right-of-way statutes to help ensure that necessities such as telegraph lines and roads could continue without encumbrance. *See United States v. Okla. Gas & Elec. Co.*, 127 F.2d 349, 352 (10th Cir. 1942), *aff'd*, 318 U.S. 206, 63 S.Ct. 534, 87 L.Ed. 716

(1943). In 1901, Congress passed one such Act. Act of March 3, 1901, ch. 832, 31 Stat. 1058 (the Act). The Act's most relevant section for our purposes, which is codified at 25 U.S.C. § 357, lies at the center of this appeal:

> Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

Id. § 3, 31 Stat. 1084 (codified as amended at 25 U.S.C. § 357).

In construing § 357's meaning, it helps to compare the Act's preceding paragraph. *Id.* § 3, 31 Stat. 1083 (codified as amended at 25 U.S.C. § 319). Unlike § 357, § 319 limited the tribes' exclusive use of tribal lands. Section 319 gave the Secretary of the Interior authority to grant rights-of-way for telephone and telegraph lines through Indian reservations, through lands held by Indian tribes or nations in the former Indian Territory, through lands reserved for Indian agencies or schools, and "through any lands which have been allotted in severalty to any individual Indian under any law or treaty." *Id.*

In comparison, § 357 does not mention any condemnation authority for rights-of-way through Indian reservations and other types of non-allotted tribal lands. And even without that context, we see no language in § 357 that authorizes condemnation of tribal land, a result Congress has full power to order if it chooses. *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 656-57, 10 S.Ct. 965, 34 L.Ed. 295 (1890). Thus, as we have noted, "a plain and clear distinction" exists "between the granting of rights-of-way over and across reservations or tribal lands and those allotted in severalty to restricted Indians." *Okla. Gas & Elec. Co.*, 127 F.2d at 354.

Perhaps the failure to authorize condemnation of tribal lands stemmed from a belief that doing so was unnecessary. After all, the Congresses of the Allotment Era "anticipated the imminent demise of the reservation." *Solem*, 465 U.S. at 468, 104 S.Ct. 1161. What need would a party have to condemn tribal land if soon no tribal lands would exist? And yet Congress has never enlarged § 357's condemnation authority even after it has become clear that tribes and reservations are here to stay.

In 1934, Congress again shifted course on Indian affairs. But this time, perhaps for the first time in American history, the congressional pendulum swung decisively toward favoring tribal sovereignty. The 1934 Indian Reorganization Act ended the ***1106** Allotment Era—Congress halted allotments, began restoring unallotted surplus land to tribal ownership, and indefinitely extended the twenty-five-year trust period for allotted lands. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101-5144); *Cty. of Yakima*, 502 U.S. at 255, 112 S.Ct. 683. Extensive federal efforts later even began to help tribes buy back lost land—efforts that continue to this day. *See, e.g.*, Indian Land Consolidation Act, Pub. L. No. 97-459, 96 Stat. 2515 (1983) (codified as amended at 25 U.S.C. §§ 2201-2221) (setting up mechanisms to consolidate tribal holdings); Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064, 3066-3067 (authorizing a $1.9 billion land buy-back program for tribal nations). Among other avenues, tribes may now purchase interests in previously allotted lands, 25 U.S.C. § 2212, or inherit less than five percent of an undivided ownership interest through intestate descent, 25 U.S.C. § 2206(a)(2)(D). And so the tribes and reservations that the Allotment Era Congresses expected to wither away instead endured.

II

That history produced, and informs, the case before us. In 1919, the federal government allotted 160 acres in New Mexico, known as Allotment 1160, to a man named Hostine Sauce, who later became known as Leo Frank, Sr. In 2006, through two conveyances from beneficial owners as authorized by the Indian Land Consolidation Act, the Navajo Nation acquired an undivided 13.6% interest in Allotment 1160. Similarly, in 1921, the federal government allotted another 160 acres in New Mexico, known as Allotment 1392, to a person named Wuala. In 2009, through intestate descent as authorized by the Indian Land Consolidation Act, the Navajo Nation acquired an undivided 0.14% interest in Allotment 1392. Both allotments are within the exterior boundaries of

the Navajo Nation and have always had protected trust status.

Public Service Company of New Mexico (PNM) is a public utility company that in 1960 obtained a right-of-way from the federal Bureau of Indian Affairs (BIA)—an agency within the Department of the Interior—for an electric transmission line across the land now in dispute. The transmission line runs about sixty miles and crosses fifty-seven land parcels that were once allotted to individual Indians, including the two parcels in which the Navajo Nation now holds an undivided interest.

The right-of-way had a fifty-year expiration date—so it was set to expire in 2010. In November 2009, PNM applied to the Secretary of the Interior for a twenty-year renewal of the right-of-way. That application process was created by the 1948 Indian Right-of-Way Act, Act of Feb. 5, 1948, ch. 45, 62 Stat. 17-18 (codified at 25 U.S.C. §§ 323-328), which mandates that "[n]o grant of a right-of-way over and across any lands belonging to a tribe ... shall be made without the consent of the proper tribal officials." 25 U.S.C. § 324. The regulations stemming from the 1948 Act affirm the necessity for tribal consent. *See, e.g.*, 25 C.F.R. § 169.107(a) (2016) ("For a right-of-way across tribal land, the applicant must obtain tribal consent, in the form of a tribal authorization and a written agreement with the tribe...."). For land parcels held in trust for individual Indians, the Secretary of the Interior can grant rights-of-way so long as the holders of a majority of interests consent. 25 U.S.C. § 324.

The renewal process began smoothly for PNM. The Navajo Nation gave written consent for the right-of-way through lands in which the United States holds the entire interest in trust. In addition, PNM obtained consent from a majority of beneficial-interest owners for the parcels that ***1107** had been allotted and in which the United States holds interest in trust. So in November 2009, the BIA began to process PNM's renewal application. But enough individual Indian owners in five land parcels revoked their consent to tip the total consenting to less than 50% of the fractional interests. In January 2015, the BIA notified PNM that it could not approve the renewal application without that consent.

On June 13, 2015, PNM filed a complaint in federal district court in New Mexico seeking to condemn the fifty-foot-wide right-of-way through the five parcels for which the company no longer had consent. The complaint alleges federal-question jurisdiction under 28 U.S.C. § 1331, pleading a claim under § 3 of the 1901 Act, codified at 25 U.S.C. § 357. PNM alleged that § 357 authorizes the condemnation of any land ever allotted to Indians, whoever might later own the land. Unlike the twenty-year renewal period that PNM sought in the application process, PNM's complaint sought a perpetual right-of-way. The complaint named as defendants all parties holding interest in the five parcels, including the Navajo Nation and the United States.

In December 2015, the district court dismissed without prejudice—for lack of subject-matter jurisdiction—PNM's condemnation claims for the two parcels in which the Navajo Nation holds an interest. The court stayed the claims for the other three parcels pending the resolution of this appeal. The court held that § 357 does not authorize condemnation of land in which a tribe has acquired an interest. The court concluded that "[t]he Nation cannot be considered as an owner of 'lands allotted in severalty to Indians.' " Appellant App. vol. 1 at 137 (quoting 25 U.S.C. § 357). Tribal interest in the land ends allotted-land status. [1] The court reminded PNM that it could still pursue a voluntary easement.

Rather than take that course, PNM moved the court to reconsider and set aside the dismissal. Alternatively, PNM asked the district court to certify four interlocutory-appeal questions. In March 2016, the district court issued an order that affirmed its earlier decision and elaborated on its reasoning: "PNM's 'once an allotment always an allotment' rule is not supported by any case law authority or the plain language of § 357 and its historical context." Appellant App. vol. 2 at 304. In response to PNM's policy arguments about the negative consequences of not allowing condemnation, the court reminded PNM that, even if negotiation should fail—which the Navajo Nation and the United States argued PNM had not shown was inevitable—it was "up to Congress, not this Court, to open up the condemnation avenue over trust lands fractionally owned by tribes." *Id.* at 320.

The district court granted PNM's request to certify four questions of law for interlocutory appeal:

I. Does 25 U.S.C. § 357 authorize a condemnation action against a parcel of allotted land in which the United States holds fee title in trust for an Indian

tribe, which has a fractional beneficial interest in the parcel?

II. Is an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land a required party to a condemnation action brought under 25 U.S.C. § 357?

*1108 III. Does an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land have sovereign immunity against a condemnation action brought under 25 U.S.C. § 357?

IV. If an Indian tribe that holds a fractional beneficial interest in a parcel of allotted land has sovereign immunity against, and cannot be joined in, a condemnation action brought under 25 U.S.C. § 357, can a condemnation action proceed in the absence of the Indian tribe?

Id. at 324.

The district court also denied PNM's request to sever the company's claims against the two parcels with Navajo Nation interests, concluding that it was better to stay the claims for the other three allotments pending the resolution of the interlocutory appeal. PNM has appealed the four certified questions.

III

[1] Because we affirm the district court's decision, we need reach only the first question certified for appeal: does § 357 authorize condemnation against land in which the United States holds fee title in trust for an Indian tribe, when the tribe has a fractional beneficial interest in the parcel?[2] We review de novo the district court's statutory interpretation of § 357. *United States v. Martinez*, 812 F.3d 1200, 1202 (10th Cir. 2015). But we also note an important canon of construction that applies to this case. "A well-established canon of Indian law states that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' " *N.L.R.B. v. Pueblo of San Juan*, 276 F.3d 1186, 1191 (10th Cir. 2002) (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985)).

[2] **[3]** In matters of statutory construction, we "must begin with the language employed by Congress" and assume that "the ordinary meaning of that language accurately expresses the legislative purpose," so we look to the plain language of § 357. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252, 124 S.Ct. 1756, 158 L.Ed.2d 529 (2004) (quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194, 105 S.Ct. 658, 83 L.Ed.2d 582 (1985)). "Allotment" is an Indian-law term of art that refers to land awarded to an individual allottee from a common holding. *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 142, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972). No one disputes that PNM may seek condemnation of any land parcel previously allotted and whose current beneficial owners are individual Indians. The language of § 357 plainly authorizes such actions.

[4] But starkly absent from § 357's language is any similar authorization for tribal lands. Tribal lands go unmentioned. As we have already noted, that absence in § 357 sharply contrasts with the paragraph immediately preceding § 357, which is part of the same section of the Act, but is codified at 25 U.S.C. § 319. Section 319 authorized the Secretary of the Interior to grant certain rights-of-way over reservations ***1109** and other lands held by tribes, as well as allotted lands. *See* 25 U.S.C. § 319. And none of PNM's cited cases support its broad contention, let alone in this context, that "[f]or more than a century, the plain meaning of Section 357 has been that if a particular parcel is allotted land, that parcel may be condemned regardless of which persons or entities own fractional interests in such parcel." Appellant Opening Br. at 10; *see United States v. Clarke*, 445 U.S. 253, 254, 100 S.Ct. 1127, 63 L.Ed.2d 373 (1980) (finding that § 357 authorizes condemnation via a formal procedure by the condemning authority, not by physical occupation and inverse condemnation for compensation); *S. Cal. Edison Co. v. Rice*, 685 F.2d 354, 356 (9th Cir. 1982) (noting that § 357 treats individual Indian allottees like any other private landowners for condemnation purposes and finding that their lands are not in use for a public purpose). The statutory silence for condemnation of tribal lands, then, poses a serious obstacle for PNM.

PNM tries to circumvent that obstacle by asking us to make several implicit conclusions. First, it asks us to view what happened during the Allotment Era as a permanent brand on Native land: that upon Congress's taking tribal lands and chopping them into allotments, Congress forever rendered all those lands as "lands allotted" within § 357's meaning. Later changes in ownership cannot

matter, PNM argues, and neither can the amount of the interest that a tribe acquires: in PNM's view, even lands that a tribe fully reobtains are "[l]ands allotted in severalty to Indians." 25 U.S.C. § 357. This is PNM's proposed rule that "once an allotment always an allotment"—rejected by the district court for lack of legal and historical backing. Appellant App. vol. 2 at 304. In support of this novel rule, PNM relies on the historical context underlying the 1901 Act. By PNM's reckoning, the Congresses of the Allotment Era wanted and expected tribes and reservations to soon be relics of the past—so they could hardly have expected that "any fractional beneficial interests would ever be transferred to the very tribe from whose reservation the lands had been removed by allotment." Appellant Opening Br. at 11.

Though we acknowledge the historical record, it provides us no license to disregard or slant § 357's plain language. Congress has neither enacted nor amended § 357 to establish that ever-allotted status would permanently trump any later tribal acquisitions. [3] In a different setting, the Supreme Court has refused "to extrapolate from this expectation [of the demise of reservations]" an intent to diminish a reservation. *Solem*, 465 U.S. at 468, 104 S.Ct. 1161. Likewise, here we refuse to extrapolate from that expectation to amend the plain language of § 357. Even if § 357 were ambiguous, we still would apply the Indian-law canon to rule in favor of tribal sovereignty and against a permanent anti-tribal-land classification. Section 357 does not reach tribal lands, even if land reobtains that status long after it was allotted.

IV

We must next clarify what qualifies as tribal land for the purposes of § 357. We have ruled that § 357 reaches allotted land even after that land has passed to individual heirs of the allottees. ***1110** *Transok Pipeline Co. v. Darks*, 565 F.2d 1150, 1153 (10th Cir. 1977). As explained above, we reject PNM's contention that any land ever allotted forever becomes "[l]ands allotted" within § 357's meaning, even when the tribe later fully reacquires and owns that land. But we still must decide what happens when tribes acquire a fractional interest. For the two mixed-ownership parcels at issue here, the Navajo Nation holds such fractional-ownership interests—a 13.6% interest in Allotment 1160, and a 0.14% interest in Allotment 1392.

In *Nebraska Public Power District v. 100.95 Acres of Land in Thurston County*, 719 F.2d 956, 961-62 (8th Cir. 1983), the Eighth Circuit confronted a similar question. There, the Winnebago Tribe of Nebraska held undivided future interests in land that a public utility company sought to condemn. *Id.* at 957-58. The court held that those future interests sufficed to make the relevant parcels tribal land, beyond § 357's condemnation reach. *Id.* at 961-62. For support, the court considered a regulation promulgated under the 1948 Right-of-Way Act (codified at 25 U.S.C. §§ 323-328). [4] *Id.* at 962. That regulation, and its amended version, treats any tribal interest as sufficient to establish tribal-land status. *See id.* (" 'Tribal land' means land *or any interest therein*, title to which is held by the United States in trust for a tribe...." (quoting 25 C.F.R. § 169.1(d) (1983))); 25 C.F.R. § 169.2 (2016) ("Tribal land means any tract in which the surface estate, or an undivided interest in the surface estate, is owned by one or more tribes in trust or restricted status."). The BIA has also clarified that "a tract is considered 'tribal land' if any interest, fractional or whole, is owned by the tribe. A tract in which both a tribe and individual Indians own fractional interest is considered tribal land for the purposes of regulations applicable to tribal land." Rights-of-Way on Indian Land, 80 Fed. Reg. 72,492, 72,497 (Nov. 19, 2015) (codified at 25 C.F.R. pt. 169). In doing so, the BIA rejected opposing views that would have limited tribal land to tracts not individually owned or in which the tribe holds a majority interest. *Id.* The BIA also noted that the different treatment afforded to individual and tribal interests befits the unique government-to-government relationship between the United States and Native tribes, and federal attempts to promote tribal self-governance. *Id.* at 72,492. Thus, even if tribal interest does not constitute a majority interest, tribal consent is still required for a right-of-way. *Id.* at 72,509.

[5] These regulations have a limited impact on our interpretation of § 357 because they do not apply to condemnation actions. *Id.* at 72,495, 72,517. PNM views the inapplicability of the regulations as a critical point, arguing that the district court and the Eighth Circuit erred by considering them. PNM ignores that the district court went to great lengths to explain that the regulations were referenced "only to amplify" the court's conclusion about tribal lands based on § 357's plain meaning. Appellant App. vol. 2 at 311. We view the regulations similarly. Faced with a definition based on the federal government's long-stated policy goal of respecting tribal

sovereignty, PNM gives us no alternative definition other than its extreme position that § 357 reaches even land held entirely by a tribe. In essence, we face two choices: (1) concluding that all ***1111** land ever allotted is subject to condemnation under § 357, even if a tribe reobtains a majority or total interest in it, or (2) concluding that even previously allotted land that a tribe reobtains any interest in becomes tribal land beyond condemnation under § 357. Governed by § 357's plain language, we must choose the latter approach. We side with the Eighth Circuit and agree with the district court's conclusion: "When all or part of a parcel of allotted land owned by one or more individuals is transferred to the United States in trust for a tribe; that land becomes 'tribal land' not subject to condemnation under § 357." *Id.* at 304. [5]

V

PNM argues that Congress would not have encouraged tribes to increase their tribal lands under land buy-back and consolidation programs if it had believed that it correspondingly was shrinking § 357 condemnation authority for those reacquired lands. And if that is so, PNM argues that this shows Congress never intended tribal lands to be exempt from condemnation under § 357. We reject these arguments. First, Congress has known about the Eighth Circuit's case for 34 years and has not amended § 357 to allow condemnation of tribal lands. Second, the Acts creating tribal buy-back and consolidation programs say nothing about allowing condemnation on tribes' reacquired land. So we must conclude that § 357, as in 1901, does not give condemnation authority over tribal lands.

PNM complains that our interpretation of § 357 will create "stranded" infrastructure on tribal land for which it will now have no choice but to negotiate rights-of-way with the tribes or face trespass actions. Appellant Reply Br. at 26. PNM goes so far as to raise, without elaboration, the specter of a due-process deprivation.

But PNM has no legal backing for its interpretation. No court has held that § 357 allows condemnation of tribal land, whether the tribal interest is fractional, future, or whole. The only major decision on point is *Nebraska Public Power District*, decided by the Eighth Circuit in 1983, holding that any tribal interest, including undivided future interests, acquired by the tribe after allotment defeats any condemnation authority provided in § 357. 719 F.2d at 961-62. In managing the transmission line in this case and its other infrastructure, PNM had every reason to know about the Eighth Circuit case, as well as the reigning canon of construction favoring tribal sovereignty. PNM invested in the face of adverse precedent and with no supportive case law at its back. Whatever negative policy effects it claims may follow, PNM's remedy lies elsewhere.

VI

Because the Navajo Nation did not acquire its undivided fractional interests by allotment, PNM argues that the Nation is a mere successor-in-interest under § 357. *See Transok*, 565 F.2d at 1153. All agree that the Navajo Nation acquired its interests in the disputed parcels by the congressionally approved mechanisms of conveyance and intestate descent. The issue is not how the tribe acquired the land, but instead what is the land's present status now that the tribe has acquired it. As ***1112** discussed, we hold that the land is now tribal land and thus beyond the reach of condemnation.

PNM also attempts to make a distinction where none exists. PNM argues that it does not seek to divest the tribe of its fractional interest, but instead merely to condemn a right-of-way on its land. We acknowledge as much, but § 357 contains no authorization for any tribal-land condemnation, whether by divestiture or otherwise. Because we have determined that Allotments 1160 and 1392 are tribal land, PNM cannot force condemnation.

In addition, PNM argues that § 357 supports PNM's condemnation authority by the manner in which it provides for condemnation payments. Section 357 provides that money awarded as damages from a condemnation action "shall be paid to the allottee." PNM seizes upon this language and, combined with the United States' off-handed observation that the payment language also applies to an allottee's heirs, uses it to argue that, if § 357 reaches heirs despite a lack of explicit textual reference, must not § 357 reach tribes also? In this argument, PNM once again suggests that tribes (like heirs) are mere successors-in-interest. But unlike ordinary heirs inheriting interests in land, tribes are "sovereign political entities possessed of sovereign authority." *Nanomantube v. Kickapoo Tribe in Kan.*, 631 F.3d 1150, 1151-52 (10th Cir. 2011). That Congress allows tribes to inherit and

purchase interests in previously allotted land does not mean that Congress subjects the reacquired tribal lands to condemnation under § 357. Absent explicit authorization, tribal sovereignty prevails.

PNM also argues that the significance of a tribal interest on an ever-allotted land parcel depends on the statutory meaning of the word "lands" itself. Because condemnation is an "in rem" action, PNM argues, § 357 does not, and we should not, consider who owns interest in the "lands" as a relevant factor in determining § 357's reach. Appellant Opening Br. at 25-28; Appellant Reply Br. at 9. But as the district court noted, a § 357 proceeding is not a pure in rem proceeding. Thus, under § 357, we look not only to what lands are at issue, but to their ownership. Here, because the tribe owns an interest in the disputed parcels, § 357's "[l]ands allotted in severalty to Indians" prerequisite is inapplicable and so the law gives PNM no authority to condemn. And that deprives us of federal jurisdiction under 28 U.S.C. § 1331.

Finally, PNM argues that interpreting § 357 as we do will leave it vulnerable to trespass actions and paying higher compensation to obtain consent. Worse, it argues, because of congressional efforts to help tribes buy back interest in lands lost during the Allotment Era, the availability of condemnation under § 357 will continue to shrink as tribes avail themselves of well-funded programs enabling them to buy back formerly tribal land. This, PNM argues, amounts to an implied partial repeal of § 357, a position built upon its view that § 357 allows condemnation of tribal lands. Because we reject that view, the argument has no force.

Nor do we believe that PNM's unfavorable policy outcome necessarily comes from Congress overlooking it. In the 116 years after the 1901 Act, Congress has not amended § 357 to favor PNM's interpretation. Nor has it responded to *Nebraska Public Power District* in the thirty-four years since the Eighth Circuit decided that case disfavoring similar arguments to PNM's. Instead, Congress has acted to protect and strengthen tribal sovereignty. *See, e.g.*, Rights-of-Way on Indian Land, 80 Fed. Reg. at 72,509 (observing that requiring tribal consent for a right-of-way "restores a measure of tribal sovereignty ***1113** over Indian lands and is consistent with principles of tribal self-governance that animate modern Federal Indian policy"); U.S. Dep't of Interior, Updated Implementation Plan, Land Buy-Back Program for Tribal Nations 10, 23, 31 (2013) (noting that a "foundational goal" of the buy-back program is "to strengthen tribal sovereignty" and prioritizing acquisitions to accomplish that goal); *see also Michigan v. Bay Mills Indian Cmty.*, —— U.S. ——, 134 S.Ct. 2024, 2043, 188 L.Ed.2d 1071 (2014) (Sotomayor, J., concurring) (noting that a "key goal of the Federal Government is to render Tribes more self-sufficient"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980) (recognizing that Congress has demonstrated "a firm federal policy of promoting tribal self-sufficiency" and "tribal independence").

PNM's claims that condemnation serves the interest of the tribe and its members by allowing continued operation of transmission lines on tribal land are likewise best directed elsewhere. Such claims may be valuable during negotiations for voluntary rights-of-way. If the tribe does not accept such claims as true, that is the tribe's prerogative.

VII

[6] We also deny the motion to intervene of Transwestern Pipeline Company, LLC (Transwestern). Transwestern first entered this case as a party after PNM named it as a defendant possibly having an interest in the property involved in the condemnation action. Transwestern has a right-of-way crossing parts of Allotment 1392, but not the part that PNM sought to condemn. So Transwestern disclaimed any interest in the easements that PNM sought and also waived any future notice of the proceedings. When the Navajo Nation filed a motion to dismiss, Transwestern chose not to file an opposing brief. At the district court, the Navajo Nation and the United States argued that the land in dispute was tribal land beyond § 357's condemnation authority. When the district court dismissed PNM's condemnation action for Allotments 1160 and 1392, Transwestern concurred with PNM's motion to alter or amend the Dismissal Order and its request for certification of issues for interlocutory appeal. In addition, Transwestern filed an "Answer and/or Cross-Petition" in support of PNM's Petition for Permission to Appeal. Transwestern Intervention Reply Br. at 5. When Transwestern filed a motion to participate as a party on appeal, we denied it, allowing Transwestern instead to move to intervene or appear as amicus.

[7] **[8]** **[9]** We evaluate motions to intervene on appeal based on the four requirements of Fed. R. Civ. P. 24(a): (1) an applicant's timely application, (2) an "interest relating to the property or transaction which is the subject of the action," (3) possible impairment or impediment of that interest, and (4) lack of adequate representation of that interest by existing parties. *Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005). Though we usually take a liberal view of Rule 24(a), when an applicant has not sought intervention in the district court, we permit it on appeal "only in an exceptional case for imperative reasons." *Id.* at 1103 (quoting *Hutchinson v. Pfeil*, 211 F.3d 515, 519 (10th Cir. 2000)). We do not interpret Rule 24(a) as imposing "rigid, technical requirements," but instead read it as capturing the practical circumstances that justify intervention. *San Juan Cty. v. United States*, 503 F.3d 1163, 1195 (10th Cir. 2007) (en banc). Under these standards, we conclude that we must deny Transwestern's motion to intervene.

First, PNM is adequately representing Transwestern's interest in the case. When the applicant and an existing party share ***1114** an identical legal objective, we presume that the party's representation is adequate. *Tri-State Generation & Transmission Ass'n, Inc. v. N.M. Pub. Regulation Comm'n*, 787 F.3d 1068, 1072-73 (10th Cir. 2015). Here, PNM and Transwestern have the same legal objective—prevailing on their interpretation that § 357 allows condemnation of land ever allotted to Indians in severalty, even when a tribe later reacquires an interest.

Second, Transwestern had ample opportunity to be heard at the district court and declined to do so. At the most consequential phase of the district court proceedings—the Navajo Nation's ultimately successful motion to dismiss—Transwestern declined to participate in briefing. Both the Navajo Nation and the United States raised the now-disputed issue of the scope of § 357 in the district court. Transwestern has already had the opportunity it now seeks and let it slip by. [6]

Transwestern argues that an adverse decision for PNM in this case would significantly affect its own extensive network of energy infrastructure. That seems likely. But that was equally true in the district court, where Transwestern declined to make its arguments. We see little that has changed in the meantime, except perhaps a heightened fear of an unfavorable decision.

Nor is Transwestern being excluded from the case. All parties consent to Transwestern's status as amicus curiae, and we have considered the company's briefed arguments. But Transwestern's legal objective duplicates PNM's, and its arguments come too late for us to grant intervention. [7]

CONCLUSION

For the reasons stated, we affirm the district court's dismissal of the condemnation action for lack of subject-matter jurisdict ***1115** ion as to the two land parcels in which the Navajo Nation holds an interest.

All Citations

857 F.3d 1101

Footnotes

1 The district court also concluded that the Navajo Nation was a required party to the condemnation action under Fed. R. Civ. P. 19(a) because of the Nation's interest in the land to be condemned, but one that could not be joined because of sovereign immunity. And the court found that under Fed. R. Civ. P. 19(b), "in equity and good conscience" the condemnation action could not proceed without the Nation. Appellant App. vol. 1 at 155.

2 Though we need not reach the other questions raised on appeal, we note that the district court's orders provide thorough and well-reasoned bases to affirm on each. The court's orders are especially persuasive on the question of tribal immunity, which the court rightly observes must be abrogated unequivocally, not implicitly, by Congress. *See Nanomantube v. Kickapoo Tribe in Kan.*, 631 F.3d 1150, 1152 (10th Cir. 2011). PNM offers evidence of only implicit abrogation. We take note of this to demonstrate that even had PNM prevailed on the § 357 statutory question, it still would have had a long, difficult road ahead before its condemnation action could proceed.

3 In our view, PNM's reading of § 357 requires inserting language that is not there, as shown by the missing language included in the brackets: "[All Tribal] Lands [ever] allotted in severalty to Indians[, regardless of whether they return to tribal

ownership,] may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee."

4 A district court in our circuit, also looking to the regulations for clues, similarly found that because a tribe "owns an undivided 1.1% interest in the tract that is held in trust, the Court finds that the tract is tribal land and cannot be condemned pursuant to 25 U.S.C. § 357. The Court, therefore, finds that it does not have subject matter jurisdiction over this action." *Enable Okla. Intrastate Transmission, LLC v. A 25 Foot Wide Easement*, No. CIV-15-1250-M, 2016 WL 4402061, at *3 (W.D. Okla. Aug. 18, 2016).

5 Because we hold that the tribal interests make Allotments 1160 and 1392 tribal land for the purposes of § 357, PNM cannot proceed with a condemnation action against the individual interests in the parcels while leaving the tribal interests undisturbed. Holding otherwise would accomplish little other than to waste judicial resources, and those of PNM, as PNM would still need tribal consent before it could obtain a right-of-way under 25 U.S.C. § 324.

6 We decline to decide whether the United States is correct in its allegation that Transwestern engaged in "sandbagging tactics" by willfully holding back arguments in the district court in hopes of more favorable treatment on appeal. United States Intervention Br. at 2. But opening the door to such tactics is another reason weighing against allowing Transwestern's intervention. *See Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1127 (10th Cir. 2011).

7 Granting Transwestern's motion to intervene would not change the outcome of the case. The company offers only one relevant argument that was not substantially raised by the appellant: that the Supreme Court in *County of Yakima* allowed the local county to tax lands that had been earlier allotted from a tribal reservation, that had passed out of trust status into fee-simple status, and that later had been repurchased by the tribe. 502 U.S. at 270, 112 S.Ct. 683. Transwestern argues that this shows that the Supreme Court recognizes the permanence of a land's allotment status even after the tribe re-obtains the land. Thus, in our case, Transwestern argues, we should recognize the permanence of the disputed land's allotment status even after a tribal purchase and inheritance.

But *County of Yakima* differs from our case in at least one key aspect—here, the land never became fee-simple land. Instead, it has always retained its status as held in trust by the United States. What *County of Yakima* turned on was not allotment status, but fee-simple status. The Court held that once land had become fee-simple land, the tribe could not unilaterally return it to protected status and exempt itself from ad valorem taxes via its purchase. *Id.* The Court did not give any independent meaning to allotment status—it simply reviewed that history to show why the relevant Act of Congress resulted in the land being held in fee-simple status. *Id.* at 254-56, 258-60, 112 S.Ct. 683. Moreover, a case on local tax authority does not automatically compel us to adopt the same principles for condemnations.

PNM raised a similar argument in the district court based on *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 542 F.Supp.2d 908 (E.D. Wis. 2008), and the district court rejected it for the same fee-title status versus trust status divide that we have just discussed. PNM did not raise the case again on appeal.

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434 P.3d 746
Colorado Court of Appeals, Division VI.

CITY OF LAFAYETTE, a home rule municipality and a Colorado municipal corporation, Plaintiff–Appellant,
v.
TOWN OF ERIE URBAN RENEWAL AUTHORITY; and Town of Erie, Colorado, Defendants–Appellees.

Court of Appeals No. 17CA0595
|
Announced June 14, 2018

Synopsis

Background: City, a home rule municipality, filed petition in condemnation and motion for immediate possession of parcel of land owned by statutory town. The District Court, Boulder County, No. 16CV30791, Norma A. Sierra, J., granted town's motion to dismiss. City appealed.

[Holding:] The Court of Appeals, Fox, J., held that home rule city's condemnation of property that statutory town was planning to develop was motivated by bad faith and thus was not for lawful purpose.

Affirmed.

Furman, J., specially concurred and filed opinion.

West Headnotes (12)

[1] Eminent Domain
Questions of fact, verdicts, and findings

In examining the public purpose for a condemnation, the Court of Appeals examines whether the stated public purpose is supported by the record. Colo. Rev. Stat. Ann. § 38-1-101(2)(b).

Cases that cite this headnote

[2] Eminent Domain
Conclusiveness and effect of exercise of delegated power

In examining the public purpose for a condemnation, allegations of bad faith are reviewed by reference to the record. Colo. Rev. Stat. Ann. § 38-1-101(2)(b).

Cases that cite this headnote

[3] Eminent Domain
To municipality

Home rule municipalities may condemn property for any lawful, public, local, and municipal purpose. Colo. Const. art. 20, § 1; Colo. Rev. Stat. Ann. § 38-1-101(2)(b).

Cases that cite this headnote

[4] Eminent Domain
Property Subject to Appropriation

A municipality is not necessarily prohibited from exercising its legitimate condemnation authority to take land owned by a neighboring statutory town, if a valid public purpose exists. Colo. Const. art. 20, § 1; Colo. Rev. Stat. Ann. §§ 38-1-101(2)(b), 38-1-101(4)(a)(II).

Cases that cite this headnote

[5] Eminent Domain
Conclusiveness and effect of exercise of delegated power

Courts may review condemnation actions to determine if the essential purpose of the condemnation is to obtain a public benefit. Colo. Rev. Stat. Ann. § 38-1-101(2)(b).

Cases that cite this headnote

[6] Eminent Domain
Necessity for appropriation

Even if a condemnation decision is motivated in part by a public benefit, the existence of an incidental public benefit does not prevent a court from finding bad faith and invalidating a condemning authority's determination that

a particular acquisition is necessary. Colo. Rev. Stat. Ann. § 38-1-101(2)(b).

Cases that cite this headnote

[7] **Eminent Domain**
Public Use

Bad faith factors into the lawful public purpose analysis when reviewing condemnation actions. Colo. Rev. Stat. Ann. § 38-1-101(2)(b).

Cases that cite this headnote

[8] **Eminent Domain**
Public Use

Eminent Domain
Necessity for appropriation

For purposes of condemnation, the issues of necessity and public purpose are closely related and, to some extent, interconnected. Colo. Rev. Stat. Ann. § 38-1-101(2)(b).

Cases that cite this headnote

[9] **Eminent Domain**
Conclusiveness and effect of exercise of delegated power

While the existence of a public purpose is always subject to judicial review in condemnation cases, the necessity of an acquisition of a specific parcel of property may only be reviewed by a court upon a showing of bad faith. Colo. Rev. Stat. Ann. § 38-1-101(2)(b).

Cases that cite this headnote

[10] **Eminent Domain**
Conclusiveness and effect of exercise of delegated power

If bad faith is at issue, courts may look behind an entity's stated condemnation purpose and finding of necessity. Colo. Rev. Stat. Ann. § 38-1-101(2)(b).

Cases that cite this headnote

[11] **Eminent Domain**
Parks and reservations

Home rule city's condemnation of property that statutory town was planning to develop was motivated by bad faith and thus was not for lawful purpose; stated public purpose of open space buffer was valid, but blocking town's planned development that predated city's condemnation petition was not lawful, city had no interest in property until it learned of town's proposed development, city presented no evidence showing why setback incorporated in town's development plans would have been insufficient to serve as community buffer, and city's public officials were highly motivated to keep potential tenant within city. Colo. Const. art. 20, § 1; Colo. Rev. Stat. Ann. § 38-1-101(2)(b).

Cases that cite this headnote

[12] **Eminent Domain**
Conclusiveness and effect of exercise of delegated power

In condemnation cases, a determination of necessity is not reviewable absent a showing of bad faith or fraud.

Cases that cite this headnote

***747** Boulder County District Court No. 16CV30791, Honorable Norma A. Sierra, Judge

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Opinion

Opinion by JUDGE FOX

¶ 1 This dispute stems from the attempt by the City of Lafayette (Lafayette) to condemn a parcel of land owned by the Town of Erie (Erie). Lafayette appeals the district court's order granting Erie's motion to dismiss for lack of jurisdiction. Because the record supports the district court's finding that Lafayette had an unlawful motive for the condemnation, we affirm.

I. Background and Procedural History

¶ 2 Lafayette, a home rule municipality, and Erie, a statutory town, were signatories to the East Central Inter–Governmental Agreement (IGA), a comprehensive plan that sought to maintain some rural development as community buffers. The agreement lasted from 1994 to 2014. Lafayette and Erie were also signatories to the Super IGA—a comprehensive development plan for Boulder County. Erie and Lafayette withdrew from the Super IGA in July 2013.

¶ 3 After the two IGAs ended and the land along Highway 287 was no longer designated for rural preservation, commercial development by Erie and Lafayette ensued along Highway 287. The map below shows the relevant corridor of Highway 287. The Tebo property is part of unincorporated Boulder County. Lafayette annexed Weems, a residential community. The Safeway above Nine Mile Corner—the property at issue—is in Erie. Beacon Hill, located below Nine Mile Corner, is residential property within Lafayette.

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¶ 4 Erie formed the Town of Erie Urban Renewal Authority (TOEURA) in 2011. In 2012, TOEURA purchased the Nelson property and the Kuhl property—together, they form Nine Mile Corner. Erie annexed Nine Mile Corner from TOEURA in 2015. [1]

***749** ¶ 5 In 2013, Erie commissioned a geotechnical investigation of the property which determined that the property was suitable for development. Two blight studies commissioned by Erie, in 2012 and 2015, found that Nine Mile Corner was a blighted area. Erie then began to develop an urban renewal plan for the property. Erie, TOEURA, and the Nine Mile Developer signed a disposition and development agreement on March 22, 2016.

¶ 6 Erie hired a consultant to examine the property and identify potential tenants, including King Soopers. King Soopers had a location in Lafayette, but it had developed a larger store prototype. In early 2016, Lafayette became aware that King Soopers might relocate to open a larger store. In February 2016, Lafayette engaged in discussions to keep King Soopers (and its corresponding tax revenue) in Lafayette. Lafayette offered King Soopers a potential development site north of the Walmart on the west side of Highway 287.

¶ 7 In May 2016, Lafayette's city council passed an ordinance declaring, "[a]cquisition of [part of Nine Mile Corner] is necessary for the public purpose of open space and benefits associated with open space, as well as preservation of Lafayette's local and unique character, and buffering of Lafayette from development activities in neighboring communities." Lafayette determined it would condemn twenty-two acres of the southern portion of Nine Mile Corner to create an open space community buffer and leave the remaining twenty-three acres of Nine Mile Corner for Erie.

[**Editor's Note**: The preceding image contains the reference for footnote [2]].

¶ 8 After attempting to purchase the property, [3] Lafayette filed its petition in condemnation and motion for immediate possession in July 2016. Erie responded by filing a motion to dismiss arguing that Lafayette's condemnation lacked a proper public purpose, thereby depriving the court of jurisdiction. After a two-day evidentiary hearing, the ***750** district court granted Erie's motion to dismiss, thus preventing Lafayette from condemning the property.

¶ 9 Lafayette appeals, arguing that its condemnation had a proper public purpose and that no bad faith motivated its condemnation decision. Although we agree that condemnation to create an open space community buffer could be a proper public purpose, the record here supports the district court's findings that Lafayette's condemnation decision fails because it was motivated by bad faith. Thus, we affirm the district court's judgment.

II. Standard of Review

[1] **[2]** ¶ 10 The parties dispute the applicable standard of review. In examining the public purpose for a condemnation, we examine whether the stated public purpose is supported by the record. *City & Cty. of Denver v. Block 173 Assocs.*, 814 P.2d 824, 828–29 (Colo. 1991). Allegations of bad faith are also reviewed by reference to the record. *Id.*; *see also Glenelk Ass'n, Inc. v. Lewis*, 260 P.3d 1117, 1120 (Colo. 2011) (in a private condemnation action, the district court's findings of facts are reviewed under the clearly erroneous standard); *Denver W. Metro. Dist. v. Geudner*, 786 P.2d 434, 436 (Colo. App. 1989) (recognizing that even if there is an incidental public benefit, a court may still find bad faith). [4]

III. Open Space Buffer as Public Purpose

¶ 11 First, we consider whether a municipality may condemn property belonging to a statutory town for an open space buffer under article XX of the Colorado Constitution. As a general matter, *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008), concluded that open space buffers can serve a valid public purpose.

A. Condemnation Law

[3] ¶ 12 Home rule municipalities may "condemn property for any lawful, public, local, and municipal purpose." *Id.* at 164 (discussing Colo. Const. art. XX); *see also Kelo v. City of New London*, 545 U.S. 469, 478, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005) (recognizing that

a governmental entity may not take property "under the mere pretext of a public purpose"). [5] It is true "the powers of a home rule or statutory municipality to acquire by condemnation property outside of its territorial boundaries [must] be limited to the narrowest extent permitted by article XX of the state constitution," § 38–1–101(4)(a)(II), C.R.S. 2017, but our supreme court has stated more than once that the powers enumerated in article XX are illustrative not exclusive, *see Telluride*, 185 P.3d at 166; *Town of Glendale v. City & Cty. of Denver*, 137 Colo. 188, 194, 322 P.2d 1053, 1056 (1958) (allowing Denver to condemn property belonging to Glendale for the construction of sewer lines ***751** because "[a]lthough sewers are not expressly mentioned in the Constitution, the powers enumerated therein are by way of illustration and not of limitation").

¶ 13 In a condemnation action, "the burden of proof is on the condemning entity to demonstrate, by a preponderance of the evidence, that the taking of private property is for a public use[.]" § 38–1–101(2)(b).

¶ 14 In *Telluride*, our supreme court concluded that "article XX grants home rule municipalities the power to condemn property, within or outside of territorial limits, for any lawful, public, local, and municipal purpose[,]" because "the list of purposes in section 1 [of article XX] is not comprehensive." 185 P.3d at 166. But, *Telluride* did not adopt a uniform rule for what constitutes a lawful public purpose "because of the difficulty of capturing the permissible range of local and municipal projects with a static test." [6] *Id.* at 167. On the facts before it, the *Telluride* court concluded that open space and parks were a valid public purpose for which a municipality could condemn extraterritorially. *Id.* at 167–68.

[4] ¶ 15 Section 1 of article XX also provides, "[a municipality] shall have the power, within or without its territorial limits, to ... condemn ... in whole or in part, and everything required therefore, for the use of said city and county and the inhabitants thereof[.]" Colo. Const. art. XX, § 1; *cf. City of Aurora v. Commerce Grp. Corp.*, 694 P.2d 382, 385 (Colo. App. 1984) ("[T]here is a presumption against implication of authority for eminent domain not expressly granted[.]"). Thus, a municipality would not necessarily be prohibited from exercising its *legitimate* condemnation authority to take land owned by a neighboring statutory town, if a valid public purpose exists. [7] *See City of Thornton v. Farmers Reservoir & Irrigation Co.*, 194 Colo. 526, 537, 575 P.2d 382, 391 (1978) ("[*Beth Medrosh Hagodol v. City of Aurora*, 126 Colo. 267, 248 P.2d 732 (1952),] recognizes that Colo. Const. [a]rt. XX grants to home rule municipalities ample power to acquire by condemnation property already devoted to a public use."); *Town of Glendale*, 137 Colo. at 195, 322 P.2d at 1057. *But see Town of Parker v. Colo. Div. of Parks & Outdoor Recreation*, 860 P.2d 584, 586 (Colo. App. 1993) ("The right to take property already dedicated to a public use for another public use exists in some cases, but such rights must be by specific grant of authority."); *see also CAW Equities, L.L.C. v. City of Greenwood Village*, 2018 COA 42M, ¶¶ 27–28.

B. Bad Faith in the Condemnation Context

¶ 16 Lafayette argues that (1) there was no bad faith or fraud behind its decision to condemn the property and (2) its finding of necessity cannot be disturbed. We disagree with both contentions.

[5] **[6]** **[7]** ¶ 17 Courts may review condemnation actions to determine if "the essential purpose of the condemnation is to obtain a public benefit." *Geudner*, 786 P.2d at 436. Even if a condemnation decision is motivated in part by a public benefit, "the existence of an incidental public benefit does not prevent a court from finding 'bad faith' and invalidating a condemning authority's determination that a particular acquisition is necessary." *Id.* Bad faith factors into the lawful public purpose analysis. Without judicial review of condemnation actions, there would be no end to ***752** one entity subverting another entity's condemnation action by initiating one of its own. *See Schroeder Invs., L.C. v. Edwards*, 301 P.3d 994, 999 (Utah 2013) ("[O]ne of the primary policies underlying the 'more necessary public use' provision is the avoidance of serial takings.") (citation omitted); *Lake Cty. Parks & Recreation Bd. v. Ind.–Am. Water Co.*, 812 N.E.2d 1118, 1123 (Ind. Ct. App. 2004) ("[A]bsent the prior public use doctrine, property could be condemned back and forth indefinitely.").

¶ 18 In *Telluride*, however, the court noted that the trial court found that Telluride's condemnation was not motivated by bad faith. *Town of Telluride*, 185 P.3d at 169 n.7. Thus, on review, the court "accept[ed] as fact

that Telluride sought the condemnation pursuant to [a] constitutionally valid purpose." *Id.*

[8] **[9]** **[10]** ¶ 19 Further, "[t]he issues of necessity and public purpose are 'closely related and, to some extent, interconnected.' " *Geudner*, 786 P.2d at 436 (quoting *Thornton Dev. Auth. v. Upah*, 640 F.Supp. 1071, 1076 (D. Colo. 1986)). "While the existence of a public purpose is always subject to judicial review, the necessity of an acquisition of a specific parcel of property may only be reviewed by a court upon a showing of bad faith." *Id.* Thus, if bad faith is at issue, courts may look behind an entity's stated condemnation purpose and finding of necessity.

C. Analysis of the Legality of the Asserted Purpose

[11] **[12]** ¶ 20 Lafayette's argument hinges on its belief that because the Lafayette city council determined this condemnation was necessary, the district court cannot look behind that determination to see if it was motivated by bad faith. This is incorrect. It is true that "[a] determination of necessity ... is not reviewable absent a showing of bad faith or fraud." *Block 173 Assocs.*, 814 P.2d at 829. But here, Erie's motion to dismiss alleged that Lafayette's condemnation was motivated by bad faith and was not for a lawful public purpose.

¶ 21 To rebut Lafayette's claim that the taking was for a public purpose, § 38–1–101(2)(b), Erie presented evidence of Lafayette's alleged bad faith during the two-day evidentiary hearing. Because Erie sufficiently showed that Lafayette's decision could have been motivated by bad faith, the district court appropriately reviewed Lafayette's finding of necessity. *See Block 173 Assocs.*, 814 P.2d at 828–29 ("In examining the stated public purpose for a condemnation, we look to whether the stated public purpose is supported by the record.").

¶ 22 *Pheasant Ridge Associates Ltd. Partnership v. Town of Burlington*, 399 Mass. 771, 506 N.E.2d 1152, 1154 (1987), presented a similar question on "the lawfulness of the town's taking in light of the plaintiffs' assertion that the taking was made in bad faith[.]" The court stated that "[b]ad faith in the use of the power of eminent domain ... includes the use of the power of eminent domain solely for a reason that is not proper, although the stated public purpose or purposes for the taking are plainly valid ones." *Id.* at 1156. That is precisely the situation here. The stated public purpose of an open space buffer is valid, but blocking Erie's planned development—planning that predated Lafayette's condemnation petition—is not lawful. *See, e.g.*, *R.I. Econ. Dev. Corp. v. Parking Co., L.P.*, 892 A.2d 87, 104 (R.I. 2006) (concluding that condemnation of a temporary easement was inappropriate where it was motivated by a desire for increased revenue and was not undertaken for a legitimate public purpose). Because the district court's determination—that Lafayette's primary interest in the property was to interfere with Erie's proposed commercial development—enjoys record support, we defer to those factual findings. *See Glenelk Ass'n*, 260 P.3d at 1120; *Bd. of Cty. Comm'rs v. Kobobel*, 176 P.3d 860, 866 (Colo. App. 2007) (finding no valid public purpose for challenged condemnation of land used as a public road to a private cemetery).

¶ 23 Although TOEURA submitted its land use application in October 2016 (after Lafayette passed its condemnation ordinance), Erie had begun sufficient work to develop the site including hiring a developer, identifying potential tenants, and signing a development agreement. As in *Pheasant Ridge*, ***753** Lafayette filed its action to condemn the property only after Erie's development plans began to take shape. *See* 506 N.E.2d at 1157 ("The matter of taking the subject site came forward only when the plaintiffs' proposal became known."). "Although not controlling, the absence of any prior town interest in the site or its neighborhood is instructive on the matter of good faith." *Id.* At the evidentiary hearing, Lafayette's city administrator tried to explain that Lafayette's failure to include the property on previous open space and trail priority (PROST) lists from 2008 to 2016 did not reflect a lack of interest in the property. He suggested that the PROST lists reflected properties Lafayette believed Boulder County would financially partner with Lafayette to acquire, but that Lafayette had always been interested in the subject property. The district court judge heard all arguments and evidence and reasonably concluded that Erie's explanation—that Lafayette had no interest in the property until it learned of Erie's proposed development—was more credible.

¶ 24 Erie also presented evidence that without the southern twenty-two acres, the value of the property was severely diminished and developing the remaining portion could be foreclosed. The district court was within its discretion to consider the respective economic impacts

on Erie and Lafayette of losing the property and King Soopers as a tenant, *see Kelo*, 545 U.S. at 490, 125 S.Ct. 2655 (concluding that a taking in furtherance of an economic development plan constitutes a public use), and to determine Lafayette invoked its condemnation power improperly—especially because Lafayette was unable to explain how it determined that the condemned twenty-two acres were necessary, *see Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 543 S.E.2d 844, 847 (N.C. 2001) (stating that the condemning entity must explain what portion of the condemned property is actually for the asserted public purpose and what portion of the land is "in excess of the public purpose" to prevent "the condemner from taking the entire tract of land by [asserting] that the property is needed for a public purpose *without* defining that segment of the land actually necessary"). Here, Lafayette engaged in extensive commercial development along Highway 287 but ignored Nine Mile Corner—until King Soopers threatened relocation. Finally, Lafayette presented no evidence showing why the setback incorporated in Erie's development plans would be insufficient to serve as a community buffer.

¶ 25 Because Erie, as the property owner, met its burden of showing bad faith, *see Goltra*, 66 P.3d at 174, the district court properly examined Lafayette's finding of necessity to determine, with record support, that the taking to establish an open space community buffer was pretextual and was not a lawful public purpose. *See Glenelk Ass'n*, 260 P.3d at 1120. The court also indicated that Lafayette's public officials were highly motivated to keep King Soopers—and the corresponding tax revenue—within Lafayette. Accordingly, the record amply supports the district court's findings. *See id.*

IV. Attorney Fees and Costs

¶ 26 Because the district court has not issued an order on Erie's motion for attorney fees, we do not review the issue. *See Weston v. T & T, LLC*, 271 P.3d 552, 561 (Colo. App. 2011) ("The trial court must make sufficient findings, so that, when they are considered together with the record, the reviewing court can conduct a meaningful review.").

V. Conclusion

¶ 27 Because Erie sufficiently showed that Lafayette's condemnation decision was made in bad faith and was thus not for a lawful public purpose, we affirm the district court's judgment.

JUDGE ASHBY concurs.

JUDGE FURMAN specially concurs.

JUDGE FURMAN, specially concurring.

¶ 28 I agree with my colleagues that Erie sufficiently showed that Lafayette's condemnation decision was made in bad faith and was thus not for a lawful public purpose. That was the focus of the litigation in the district court. I write separately to point out what I consider to be a more important question that we need not answer: Whether ***754** the Colorado Constitution, or some other authority, authorizes one home rule municipality to exercise its eminent domain power over public land owned by a statutory town. The parties in the district court appear to have assumed that such authority exists; so the focus of the litigation was over whether Lafayette had a proper public purpose in acquiring the land. My agreement with the division is on this narrow basis.

All Citations

434 P.3d 746, 2018 COA 87

Footnotes

1 Lafayette argued in the supplemental briefing requested by this court that the property still belongs to TOEURA, a statutory body. However, the record (and the parties' previous briefing) indicates that Erie annexed the property as of 2015 so the property is currently within the boundaries of Erie, a statutory town.

2 The Nine Mile Corner property: the blue/shaded area reflects the twenty-two acres Lafayette sought to condemn, and the white area reflects the twenty-three acres left for Erie.

3 The record is sparse regarding Lafayette's purchase efforts. Erie's answer brief asserts that Lafayette never attempted to negotiate the size of the condemnation parcel, but does not assert that Lafayette never attempted a purchase. Lafayette

contends it tried to purchase the property before starting condemnation proceedings, but denies it was obligated to negotiate the size of the condemnation parcel.

4 The parties agreed in their briefing that there is not a specific definition of "bad faith" in the case law; rather it is a fact specific inquiry into whether a condemning entities' proffered motives for a condemnation are legitimate.

5 Decisions before and after the 2005 decision in *Kelo v. City of New London*, 545 U.S. 469, 478, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), have examined the motives of condemning authorities when considering whether a taking was pretextual. *See Fideicomiso De La Tierra Del Caño Martin Peña v. Fortuño*, 604 F.3d 7, 23 n.13 (1st Cir. 2010) (noting that the court was not foreclosing a later as-applied challenge to a condemnation as a "mere pretext of a public purpose" (quoting *Kelo*, 545 U.S. at 478, 125 S.Ct. 2655)); *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 171 (D.C. Cir. 2007) (acknowledging the potential for a claim that an alleged "public purpose is a pretext" to a condemnation (quoting *Kelo*, 545 U.S. at 478, 125 S.Ct. 2655)); *Cty. of Hawaii v. C & J Coupe Family Ltd. P'ship*, 119 Hawai'i 352, 198 P.3d 615, 647–49 (2010) (noting that courts must consider evidence of an illegitimate purpose and determine whether the rationale was "a mere pretext for its actual purpose to bestow a private benefit"); *Middletown Twp. v. Lands of Josef Seegar Stone*, 595 Pa. 607, 939 A.2d 331, 337–38 (2007) ("In considering whether a primary public purpose was properly invoked, this [c]ourt has looked for the 'real or fundamental purpose' behind a taking[,]" meaning that "the government is not free to give mere lip service to its authorized purpose or to act precipitously and offer retroactive justification.") (citation omitted); *see also Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F.Supp.2d 1203, 1229 (C.D. Cal. 2002) ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext."); *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F.Supp.2d 1123, 1129 (C.D. Cal. 2001) ("No judicial deference is required ... where the ostensible public use is demonstrably pretextual.").

6 In *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008), the court did not analyze the *Public Service Co. of Colorado v. Shaklee*, 784 P.2d 314 (Colo. 1989), factors. It is unclear if the court's failure to reference *Shaklee* is meaningful. But here, the district court referenced and considered the *Shaklee* factors: (1) the physical condition of the property; (2) the community's needs; (3) the character of the benefit the project would confer on the community; and (4) the necessity of the improvement for the development of state resources. *Shaklee*, 784 P.2d at 318. Because *Telluride*, 185 P.3d at 164–68, suggests that extensive discussion of these factors may not be necessary, the district court's discussion was sufficient. In any event, we can affirm the district court on any ground supported by the record. *Taylor v. Taylor*, 2016 COA 100, ¶ 31, 381 P.3d 428.

7 After *Telluride*, a bill to limit the ability of a home rule municipality to acquire real property outside its territorial boundaries via condemnation was introduced to the General Assembly. H.B. 09–1258, 67th Gen. Assemb., 1st Sess. (Feb. 3, 2009). However, the bill did not pass.

302 Ga. 645
Supreme Court of Georgia.

CITY OF MARIETTA
v.
SUMMEROUR.

S17G0057
|
Decided October 30, 2017

Synopsis

Background: City filed petition to condemn property. Following an evidentiary hearing before a special master, the Superior Court, Cobb County, S. Lark Ingram, J., adopted the return of the special master and entered an order of condemnation. Landowner appealed, and the Court of Appeals, 338 Ga. App. 259, 788 S.E.2d 921, vacated and remanded. City filed a petition for a writ of certiorari, which was granted.

Holdings: The Supreme Court, Blackwell, J., held that:

[1] city failed comply with statutory requirement that it provide the appraisal summary to landowner prior to the initiation of condemnation negotiations or as soon thereafter as practicable; and

[2] city's failure to comply with statutory requirement required dismissal of its condemnation petition.

Affirmed in part and reversed in part.

West Headnotes (15)

[1] Statutes
Language

A statute draws its meaning from its text.

Cases that cite this headnote

[2] Statutes
Natural, obvious, or accepted meaning

Statutes
Language

When a court reads the statutory text, the court must presume that the General Assembly meant what it said and said what it meant, and so, the court must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would.

3 Cases that cite this headnote

[3] Statutes
Context

In reading statutory text, the common and customary usages of the words are important, but so is their context; for context, the court may look to other provisions of the same statute, the structure and history of the whole statute, and the other law, constitutional, statutory, and common law alike, that forms the legal background of the statutory provision in question.

2 Cases that cite this headnote

[4] Statutes
Introductory statements;preambles and prologues

Codified preambles are a part of an act and appropriate to read in pari materia.

1 Cases that cite this headnote

[5] Statutes
Liberal or strict construction

When confronted with ambiguities in a remedial statute, and in the absence of contrary indicia of meaning, the court commonly construes the statutory provisions broadly to apply to all cases consistent with the remedial purpose which, under a fair construction of their terms, they can be made to reach.

Cases that cite this headnote

[6] Eminent Domain

Strict compliance with statutory requirements

Compliance with the provisions of statute setting forth policies and practices governing condemnations is required to the extent that compliance is practicable. Ga. Code Ann. § 22-1-9.

Cases that cite this headnote

[7] **Eminent Domain**

Negotiations, offer to purchase, and inability to agree with owner

City failed to comply with statutory requirement that it provide the appraisal summary to landowner prior to the initiation of condemnation negotiations or as soon thereafter as practicable; city did not send landowner an appraisal until three years after it first made offer for property, and appraisal it did send was dated almost ten months prior to its production. Ga. Code Ann. § 22-1-9(3).

Cases that cite this headnote

[8] **Statutes**

Context

When a court considers the meaning of a statutory provision, the court does not read it in isolation, but rather, reads it in the context of the other statutory provisions of which it is a part.

Cases that cite this headnote

[9] **Eminent Domain**

Negotiations, offer to purchase, and inability to agree with owner

In context of provision of statute governing condemnation practices requiring condemning authority to provide landowner summary of basis for amount offered as just compensation, the "summary" envisioned by the statute requires, at a minimum, information sufficient to provide the property owner with the ability to meaningfully evaluate the offer. Ga. Code Ann. § 22-1-9(3).

Cases that cite this headnote

[10] **Eminent Domain**

Negotiations, offer to purchase, and inability to agree with owner

Under statute setting forth policies and practices governing condemnations, a condemning authority must provide the appraisal summary to the landowner prior to the initiation of negotiations or as soon thereafter as practicable. Ga. Code Ann. § 22-1-9(3).

Cases that cite this headnote

[11] **Eminent Domain**

Negotiations, offer to purchase, and inability to agree with owner

Records

Exemptions or prohibitions under other laws

Statute requiring a condemning authority to disclose certain information to the condemnee does not conflict with the government's option to prevent disclosure of this information pursuant to an Open Records Act request from a third party. Ga. Code Ann. §§ 22-1-9(3), 50-18-72(9).

Cases that cite this headnote

[12] **Eminent Domain**

Dismissal before hearing

Dismissing a condemnation petition is an appropriate remedy where a condemning authority has acted outside its authority by violating the law, irrespective of bad faith.

Cases that cite this headnote

[13] **Eminent Domain**

Negotiations, offer to purchase, and inability to agree with owner

Eminent Domain

Dismissal before hearing

City's failure to comply with statutory requirement that it provide landowner an appraisal summary at or before initiation of negotiations required dismissal of its condemnation petition; because landowner did not acquiesce in or waive strict compliance with the statute, city acted outside its authority by condemning the property. Ga. Code Ann. § 22-1-9(3).

Cases that cite this headnote

[14] **Eminent Domain**
Nature and source of power

Eminent Domain
Strict compliance with statutory requirements

The taking or injuring of private property for the public benefit is the exercise of a high power, and all the conditions and limitations provided by law, under which it may be done, should be closely followed; too much caution in this respect cannot be observed to prevent abuse and oppression.

Cases that cite this headnote

[15] **Eminent Domain**
Strict compliance with statutory requirements

Eminent Domain
Negotiations, offer to purchase, and inability to agree with owner

Eminent Domain
Dismissal before hearing

A failure to comply with statute governing condemnation practices, even when that failure requires the dismissal of a condemnation petition, does not permanently foreclose efforts to acquire a particular property; if a condemnor violates some provision of the statute—for example, by failing to provide an appraisal summary at or before the initiation of negotiations and failing to rectify that failure for a long period of time—it might effectively reset its opportunity to comply with the statute by obtaining a new appraisal and reinitiating negotiations, giving a summary of that appraisal to the landowner at the time negotiations recommence. Ga. Code Ann. § 22-1-9.

Cases that cite this headnote

****325** Superior Court, Cobb County, S. Lark Ingram

Attorneys and Law Firms

Haynie, Litchfield, Crane & White, Douglas R. Haynie, Daniel W. White, Sarah G. Hegener, for appellant.

Donald C. Evans, Jr., for appelllee. Richard N. Hubert, amicus curiae.

Opinion

Blackwell, Justice.

***645** This case concerns a small grocery store on Allgood Road in Marietta and, more particularly, the parcel of land on which that store sits. Ray Summerour has owned the land for nearly three decades. The City of Marietta wants to acquire the land for the purpose of building a public park. When the City was unable to negotiate a voluntary sale of the parcel, it resolved to take the land by eminent domain, and it filed a petition in the Superior Court of Cobb County to condemn the property. Following an evidentiary hearing before a special master, see OCGA § 22–2–100 et seq., the superior court adopted the return of the special master and entered an order of condemnation.

Summerour appealed, and in Summerour v. City of Marietta, 338 Ga. App. 259, 788 S.E.2d 921 (2016), the Court of Appeals set ****326** aside the condemnation order. The Court of Appeals reasoned that, when the City attempted to negotiate a voluntary sale of the land, it failed to fulfill its obligations under OCGA § 22–1–9, and the Court of Appeals directed that the case be remanded for the superior court to consider whether the failure to comply with Section 22–1–9 amounted to bad faith. We issued a writ of certiorari to review the decision of the Court ***646** of Appeals, and we now hold that compliance with Section 22–1–9 is an essential prerequisite to the filing of a petition to condemn, that the City failed in this case to fulfill that prerequisite, and that its petition to

condemn, therefore, must be dismissed, irrespective of bad faith. We accordingly affirm the judgment of the Court of Appeals to the extent that it set aside the order of condemnation, but we reverse its direction to the superior court to inquire into bad faith.

1. The relevant facts are not in dispute. In 2009, Marietta voters approved the issuance of bonds for, among other purposes, the improvement and expansion of a park located at the site of an existing recreation center near the intersection of Allgood Road and North Marietta Parkway. Soon thereafter, the City commenced efforts to acquire several parcels of land in the vicinity of that recreation center, including the parcel owned by Summerour. On June 1, 2010, the City sent a letter to Summerour, informing him that the City had an interest in his property, that it had hired an appraiser to determine the value of the land, and that an offer to purchase the property was forthcoming. Three weeks later, the City sent a written offer to Summerour, which said:

> The City of Marietta has employed a Certified Appraiser to appraise your property. The Certified Appraiser has valued your property at $85,000.00. The purpose of this letter is to offer you the appraised value of your property. Please review this offer and let me know if you are willing to sell your property to the City of Marietta for the certified appraised value.

Summerour did not respond to this offer. On October 6, 2010, the City sent another offer letter to Summerour, identical to its earlier written offer. Again, Summerour did not respond.

For the next two-and-a-half years, the City did not correspond further with Summerour. But then, on May 23, 2013, the City resumed its efforts to acquire his land. That day, the City sent a letter to Summerour in which it expressed its continuing interest in the land and suggested that, if Summerour had any interest in selling the property, he ought to contact the City. In that letter, however, the City did not offer to purchase the land for any particular amount. Summerour again did not respond. The City hired a real estate appraiser to reappraise the land, and it engaged a business appraiser to assess the value of the grocery store that sits on the property. On July 26, 2013, a lawyer for the City sent another written offer to Summerour, which said:

> This firm represents the City of Marietta which has an interest in purchasing your property located at the above ***647** referenced address. The city has engaged a professional certified real estate appraiser to conduct a current appraisal on your property and the current appraised value is $95,000.00. In addition, the certified business appraiser has placed a value of $46,700.00 on the business located on the property. Therefore, the total value of the property is believed to be $141,700.00. Please accept this letter as an official request by the City of Marietta to purchase your property at the above address for the above stated value. At your convenience, please contact the undersigned regarding this matter.

On August 13, 2013, Summerour responded. In a letter to the City, he explained that he had cooperated with the appraisers hired by the City, meeting with them and giving them the information that they requested. Summerour asked for a summary of the appraisals done for the City or "some form of documentation to show me how [the appraisers] came up with the numbers," and he noted that the offer was less than he expected. Summerour said that he intended to obtain his own appraisal of the property, and he expressed his willingness to discuss the matter with the City.

****327** On December 4, 2013, Summerour sent another letter to the City, in which he made a counteroffer to sell the property for $375,000. The next day, Summerour met with a lawyer for the City to discuss his counteroffer. The City rejected the counteroffer on December 10, 2013. Two days later, the City offered $152,000 for the property and warned that, unless Summerour obtained

his own appraisal and shared it with the City, "this is likely to be the [C]ity's highest offer." On December 17, 2013, Summerour rejected the latest offer but proposed a meeting to discuss the differences in how he and the City valued the property. Following the December negotiations, Summerour hired an attorney, and at some point, he obtained his own appraisal of the land.

In April 2014, the lawyers for the City and Summerour corresponded about the property on several occasions, although the City refused to schedule a meeting with Summerour until he had his own "written signed appraisal" in hand. On May 8, 2014, Summerour's lawyer sent a letter to the City, reminding the City that it never had provided Summerour with a summary of its appraisals, notwithstanding its repeated demands that Summerour produce his own appraisal report. At that point, the City finally provided a summary of its appraisals to Summerour, and on May 16, 2014, the City produced a copy of an appraisal report. That report was dated July 17, 2013, almost ten months prior to its production.

***648** On May 21, 2014, the City notified Summerour that the mayor and city council soon would meet to consider whether to acquire the property by eminent domain. The City again offered to purchase the property based on its 2013 appraisal. A flurry of negotiations followed, in the course of which the City eventually offered $160,000 for the land, but Summerour rejected the City's final offer. On June 11, 2014, the city council approved a motion for the City to acquire the land by eminent domain.

On October 2, 2014, the City filed a petition in the Superior Court of Cobb County to condemn the parcel of land owned by Summerour. Summerour filed an answer, and the trial court appointed a special master to conduct an evidentiary hearing. For three days, the special master heard evidence from both parties regarding their respective valuations of the land. In addition, Summerour argued to the special master that the petition should be dismissed because the City had failed to comply with OCGA § 22–1–9 when it attempted to negotiate a voluntary sale of the land. On January 20, 2015, less than one week after the conclusion of the hearing, the special master issued written findings that the City had complied with its statutory obligations and had negotiated with Summerour in good faith. The special master also found that the fair market value of Summerour's land was $225,000. The findings of the special master were returned to the superior court, and the parties filed exceptions to the return. After a hearing, the trial court adopted the special master's return as its own judgment, and it ordered the condemnation of the land.

Summerour appealed, and the Court of Appeals set aside the condemnation order. In its opinion, the Court of Appeals pointed to OCGA § 22–1–9 (3), which, it said, required the City to provide Summerour with a written summary of the basis for its valuation of his land before, or at least around the time that, negotiations commenced. See Summerour, 338 Ga. App. at 265 (1), 788 S.E.2d 921. Upon its review of the record, the Court of Appeals concluded that the City did not provide Summerour with any such summary in a timely manner, and indeed, the City only provided a summary in May 2014, "long after the initiation of negotiations." Id. (punctuation omitted). Noting that the failure of the City to fulfill its obligations under Section 22–1–9 (3) might be indicative of bad faith, the Court of Appeals directed the superior court on remand to reconsider the question of bad faith. See id. at 267 (2), 788 S.E.2d 921. The Court of Appeals declined to decide whether noncompliance with Section 22–1–9 (3) is remediable, irrespective of bad faith. See id. at 268 (3), 788 S.E.2d 921.

***649** The City timely filed a petition for a writ of certiorari. We granted that petition, directing the parties to address three questions:

> (1) To what extent are the provisions of OCGA § 22–1–9 mandatory requirements?
>
> ****328** (2) Did the Court of Appeals err in determining that [the City] failed to comply with OCGA § 22–1–9 (3)?
>
> (3) If the provisions of OCGA § 22–1–9 are mandatory and the Court of Appeals correctly determined that [the City] failed to comply, what is the proper remedy?

We turn now to these questions.

2. To begin, we consider the extent to which the provisions of OCGA § 22–1–9 are mandatory. The City contends that Section 22–1–9 sets forth merely suggested guidelines for condemnations, which are not mandatory or, at the least, judicially enforceable. Summerour responds that the provisions of Section 22–1–9 are

mandatory except to the extent that compliance with those provisions is impracticable, and he says that the statute imposes meaningful and judicially enforceable limits upon condemnations, even if it leaves some matters to the discretion of the condemning authority. Each side finds some support for its position in the statutory text and context, but in the end, we conclude that Summerour has the better argument.

[1] **[2]** **[3]** "A statute draws its meaning from its text." Grange Mut. Cas. Co. v. Woodard, 300 Ga. 848, 857 n.8, 797 S.E.2d 814 (2017) (citation and punctuation omitted). When we read the statutory text, "we must presume that the General Assembly meant what it said and said what it meant," Deal v. Coleman, 294 Ga. 170, 172 (1) (a), 751 S.E.2d 337 (2013) (citation and punctuation omitted), and so, "we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would." FDIC v. Loudermilk, 295 Ga. 579, 588 (2), 761 S.E.2d 332 (2014) (citation and punctuation omitted). "The common and customary usages of the words are important, but so is their context." Tibbles v. Teachers Ret. Sys. of Ga., 297 Ga. 557, 558 (1), 775 S.E.2d 527 (2015) (citation and punctuation omitted). "For context, we may look to other provisions of the same statute, the structure and history of the whole statute, and the other law—constitutional, statutory, and common law alike—that forms the legal background of the statutory provision in question." Zaldivar v. Prickett, 297 Ga. 589, 591 (1), 774 S.E.2d 688 (2015) (citation omitted).

Adopted in response to perceived abuses of eminent domain, Section 22–1–9 is a part of the Landowner's Bill of Rights and Private Property Protection Act of 2006. See Ga. L. 2006, p. 40. See also ***650** Stephen D. Morrison, Jr., *Protecting Private Property: An Analysis of Georgia's Response to Kelo v. City of New London*, 2 J. Marshall L. J. 51, 70 (2009).[1] Section 22–1–9 sets forth a number of "policies and practices" by which "all condemnations and potential condemnations shall, to the greatest extent practicable, be guided." When a government seeks to acquire real property, Section 22–1–9 calls for the government to, among other things, pursue negotiations before resorting to the power of eminent domain, obtain an independent appraisal of the real property to establish its fair market value, offer no less than the value established by the independent appraisal, disclose the basis for that valuation to the owner of the real property, and negotiate in good faith. In full, Section 22–1–9 provides:

> In order to encourage and expedite the acquisition of real property by agreements with owners, to avoid litigation and relieve congestion in the courts, to assure consistent treatment for property owners, and to promote public confidence in land acquisition practices, all condemnations and potential condemnations shall, to the greatest extent practicable, be guided by the following policies and practices:
>
> ****329** (1) The condemning authority shall make every reasonable effort to acquire expeditiously real property by negotiation;
>
> (2) Where the condemning authority seeks to obtain a fee simple interest in real property, real property shall be appraised before the initiation of negotiations, and the owner or his or her designated representatives shall be given an opportunity to accompany the appraiser during his or her inspection of the property, except that the condemning authority may, by law, rule, regulation, or ordinance, prescribe a procedure to waive the appraisal in cases involving the acquisition by sale or donation of property with a low fair market value;
>
> ***651** (3) Before the initiation of negotiations for fee simple interest for real property, the condemning authority shall establish an amount which it believes to be just compensation and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the condemning authority's independent appraisal of the fair market value of such property. The condemning authority shall provide the owner of real property to be acquired with a written statement of, and summary of the basis for, the amount it established as just compensation. Where appropriate, the just compensation for the real property acquired and for damages to remaining real property shall be separately stated. The condemning authority shall consider alternative sites suggested by the owner of the property as of the compensation offered;
>
> (4) No owner shall be required to surrender possession of real property before the condemning authority pays the agreed purchase price or deposits with the court in accordance with this title, for the benefit of the owner, an amount not less than the

condemning authority's appraisal of the fair market value of such property or the amount of the award of compensation in the condemnation proceeding for such property;

(5) The construction or development of a project for public use shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling or to move his or her business or farm operation without at least 90 days' written notice from the condemning authority of the date by which such move is required;

(6) If the condemning authority permits an owner or tenant to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the condemning authority on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier;

(7) In no event shall the condemnor act in bad faith in order to compel an agreement on the price to be paid for the property;

(8) If any legal interest in real property is to be acquired by exercise of the power of eminent domain, the condemning authority shall institute formal condemnation proceedings. No condemnor shall intentionally make ***652** it necessary for an owner to institute legal proceedings to prove the fact of the taking of his or her real property; and

(9) A person whose real property is being acquired in accordance with this title may, after the person has been fully informed of his or her right to receive just compensation for such property, donate such property, any part thereof, any legal interest therein, or any compensation paid to a condemning authority, as such person shall determine.

[4] When a government is unable to acquire property by a voluntary sale negotiated as provided in Section 22–1–9, and it must resort to formal condemnation proceedings, other provisions of the Act set forth additional protections for property owners. OCGA § 22–1–10, for instance, imposes certain notice requirements with which a condemning authority must comply before initiating formal condemnation proceedings. OCGA § 22–1–11 expressly authorizes a superior court in condemnation proceedings to decide, before title vests in the condemning authority, whether the condemnation is legally authorized, ****330** [2] and it permits the superior court to stay condemnation proceedings pending that decision. OCGA § 22–1–12 allows a property owner to recoup attorney fees and other costs if a condemnation is abandoned or determined to be unauthorized. And OCGA § 22–1–13 entitles landowners displaced by condemnation to recover certain relocation expenses. The text, structure, and history of the statute as a whole indicate that this statutory scheme is to protect property owners from abuse of the power of eminent domain at all stages of the condemnation process. See Morrison, supra, at 70–71. See also Jody Arogeti et al., *Legislative Review, Eminent Domain*, 23 Ga. St. U. L. Rev. 157, 190 (2006) (noting that the Act was understood at the time of its adoption "to increase due process for property owners and in effect give them a 'bill of rights' "). Its protections are meant to, among other things, "assure consistent treatment for property owners [and] promote public confidence in land acquisition practices[.]" OCGA § 22–1–9. [3]

***653** In this case, the heart of the dispute about the meaning of Section 22–1–9 owes to its introductory provision, specifically these words: "[A]ll condemnations and potential condemnations shall, to the greatest extent practicable, be guided by the following policies and practices[.]" Because the statute provides that a condemning authority is to be "guided" only "to the greatest extent practicable" by the provisions of Section 22–1–9, the City says, those provisions are effectively nothing more than suggestions from which a condemning authority may depart whenever it concludes that another course would be better. This understanding of Section 22–1–9 is confirmed, the City contends, by a contrast with the language of Section 22–1–10, which provides in unequivocal terms that "a governmental condemnor shall ...." Finally, the City points to cases in which the federal courts have addressed a federal statute from which many provisions of Section 22–1–9 were borrowed, noting that the federal courts have concluded that the federal statute is not mandatory or judicially enforceable.

Summerour, on the other hand, notes that the provisions of Section 22–1–9 are introduced not in terms of a suggestion, but instead by words of command ("shall ... be guided"). He points as well to OCGA § 22–1–8, a statute that predates the Act of 2006 but provides that "[a]ll persons authorized to take or damage private

property for public purposes shall proceed as set forth in this title," a title that now includes, of course, the provisions of the Act. That Section 22–1–9 offers relief to condemning authorities in instances in which strict compliance is not practicable, Summerour says, makes its provisions no less mandatory in cases in which compliance is practicable. As for the federal case law cited by the City, Summerour argues that it not only fails to support the City's interpretation of Section 22–1–9, but confirms the interpretation that he urges.

As Summerour argues, the City makes too much, we think, of the introductory provision of Section 22–1–9. To the extent that the statute demands compliance, we acknowledge that it does so, generally speaking, only "to the greatest extent practicable." That feature alone, however, is hardly proof that the provisions are entirely optional for a government condemnor. "Practicable" is a word susceptible of a limited range of meanings—as we will discuss in Division 3—and to say that one must comply with a requirement "to the greatest extent practicable" is not to say that he must comply with it only "if he feels like complying" or "if he thinks it a good idea." Cf. Brown v. Bd. of Ed., 349 U.S. 294, 300, 75 S.Ct. 753, 99 L.Ed. 1083 (1955) (desegregation decrees ought to require "admission to public schools as soon as practicable on a **331 nondiscriminatory basis," and constitutional imperative to desegregate could not be overcome "simply because of disagreement with [it]"). That the statute leaves *654 some flexibility to condemning authorities in cases in which strict compliance would be impracticable does not indicate that the provisions of Section 22–1–9 are not mandatory. Indeed, if the statute were entirely optional, there would be no need for a provision affording such flexibility.

As for the fact that the introductory provision of Section 22–1–9 uses the phrase "shall ... be guided," we concede that this phrasing is less certain than the simple "shall" that appears in the introduction of Section 22–1–10.[4] Even so, Section 22–1–9 still uses a word of command to introduce the provisions that follow. At most, the introductory provision is somewhat ambiguous about the extent to which the provisions that follow are mandatory. Important context, however, resolves any such ambiguity and establishes that the statute is most reasonably understood as mandatory.

[5] We noted earlier that the text, structure, and history of the 2006 Act as a whole reveals a remedial purpose of protecting property owners against abuse of the power of eminent domain at every stage of the condemnation process and thereby promoting public confidence in the exercise of that power. Within this statutory scheme, Section 22–1–9 serves the important function of addressing abusive practices in negotiations prior to the commencement of formal condemnation proceedings, a stage at which no contemporaneous judicial oversight is available and property owners may be most vulnerable. If Section 22–1–9 were entirely optional, as the City urges, the protective function of the Act as a whole would be impaired significantly. It is a settled principle of our law of statutory interpretation that, when confronted with ambiguities in a remedial statute, and in the absence of contrary indicia of meaning, we commonly construe the statutory provisions broadly "to apply to all cases [consistent with the remedial purpose] which, under a fair construction of their terms, they can be made to reach." East Ga. Land & Dev. Co. v. Baker, 286 Ga. 551, 553 (2), 690 S.E.2d 145 (2010) (citation and punctuation omitted).

*655 More significantly, the federal cases to which the City points are instructive, but they lead to a conclusion at odds with the interpretation that the City urges. In large part, the provisions of Section 22–1–9 were borrowed from 42 USC § 4651, a part of the Federal Relocation Assistance and Real Property Acquisition Policies Act of 1970. Indeed, the preamble and introductory provision of Section 22–1–9 is virtually identical to that of the federal statute, and many of the provisions that follow essentially mirror those found in the federal statute. And as the City notes, the federal courts consistently have understood 42 USC § 4651 as discretionary and affording no judicially enforceable rights to property owners. But there is a crucial difference. Another provision of the federal law, 42 USC § 4602 (a), states unequivocally that "[t]he provisions of section 4651 of this title create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation." All of the federal cases cited by the City rely not on the preamble and introductory provision of 42 USC § 4651 to conclude that it is not mandatory, but rather, on the express disclaimer in 42 USC § 4602. See, e.g., United States v. 410.69 Acres of Land, 608 F.2d 1073, 1074 n.1 (5th Cir. 1979) (citing 42 USC § 4602 for the proposition that "Congress ... made it clear that [42 USC §

4651] creates no rights in landowners"); Portland Nat. Gas Transmission Sys. v. 4.83 Acres of Land, 26 F.Supp.2d 332, 336 (II) (A) (D.N.H. 1998) (citing 42 USC § 4602 (a) for the proposition that 42 USC § 4651 "does not create **332 any substantive rights" in condemnees); Tennessee Gas Pipeline Co. v. New England Power, C.T.L., Inc., 6 F.Supp.2d 102, 104 (D. Mass. 1998) (citing 42 USC § 4602 (a)). See also United States v. 416.81 Acres of Land, 525 F.2d 450, 454 (III) (7th Cir. 1975) (landowners' argument about government's failure to comply with 42 USC § 4651 "might have some force were it not for the language of [42 USC § 4602]"); State v. Costich, 152 Wash.2d 463, 98 P.3d 795, 799 (2004) ("While it is true the quoted provisions of [state version of 42 USC § 4651] seemingly impose ... mandatory obligations on the condemning authority, the legislature expressly rejected this approach." (citing state version of 42 USC § 4602)).

[6] When our General Assembly borrowed from 42 USC § 4651 in its adoption of Section 22–1–9, it did not borrow the disclaimer from 42 USC § 4602. "We must presume that its failure to do so was a matter of considered choice." Fair v. State, 284 Ga. 165, 168 (2) (b), 664 S.E.2d 227 (2008) (citations and punctuation omitted). See also Summerlin v. Ga. Pines Community Svc. Bd., 286 Ga. 593, 594 (2), 690 S.E.2d 401 (2010) ("The General Assembly is presumed to enact all statutes with full knowledge of the existing condition of the law and with reference to it."). This important context, as much as anything else, suggests *656 that Section 22–1–9 is understood most reasonably as mandatory, not optional. We hold that compliance with the provisions of Section 22–1–9 is required to the extent that compliance is "practicable."

[7] 3. We now consider whether the City complied with Section 22–1–9 (3), which provides:

> *Before the initiation of negotiations for fee simple interest for real property*, the condemning authority shall establish an amount which it believes to be just compensation and shall make a prompt offer to acquire the property for the full amount so established. In no event shall such amount be less than the condemning authority's independent appraisal of the fair market value of such property. *The condemning authority shall provide the owner of real property to be acquired with a written statement of, negotiation process as possible. Section and summary of the basis for, the amount it established as just compensation.* Where appropriate, the just compensation for the real property acquired and for damages to remaining real property shall be separately stated. The condemning authority shall consider alternative sites suggested by the owner of the property as of the compensation offered[.]

OCGA § 22–1–9 (3) (emphasis supplied). We agree with the Court of Appeals that the City violated this provision because it failed to disclose the appraisal summary to Summerour in a timely manner. [5]

[8] **[9]** The City's main argument is that the clause "[b]efore the initiation of negotiations for fee simple interest for real property" applies only to the first sentence of Section 22–1–9 (3), concerning a "prompt offer," and that the sentence requiring an appraisal summary —appearing in the middle of that subsection—does not contain an express timing requirement. Thus, the City contends, it was required to provide an appraisal summary (if at all) not *before* beginning negotiations, but at whatever time it deemed necessary and practicable. The City's reading of the statute, however, is too narrow. "When we consider the meaning of a statutory provision, we do not read it in isolation, but rather, we read it in the context of the other statutory provisions of which it is a part." *657 Hartley v. Agnes Scott College, 295 Ga. 458, 462 (2) (b), 759 S.E.2d 857 (2014); Hendry v. Hendry, 292 Ga. 1, 3 (1), 734 S.E.2d 46 (2012). See also Houston v. Lowes of Savannah, Inc., 235 Ga. 201, 203, 219 S.E.2d 115 (1975) ("[A] statute must be viewed so as to make all its parts harmonize and to give a sensible and intelligent effect to each part."). Viewed in context with the rest of Section 22–1–9, the provision at issue is best understood **333 to ensure that the landowner receives enough accurate appraisal information to enable a fair negotiation of the property sale. As the Court of Appeals explained below, "the summary envisioned by the statute requires,

at a minimum, information sufficient ... to provide the property owner with the ability to meaningfully evaluate the offer." Summerour, 338 Ga. App. at 266 (1), 788 S.E.2d 921. Without appraisal information, a landowner cannot know whether an offer is fair and whether it reflects the true market value of the property. As to timing, the stated statutory goal of promoting fair and expeditious negotiations is best served if the appraisal summary is provided as early in the negotiation process as possible. Section 22–1–9 (3) requires a condemning authority to obtain an appraisal "[b]efore the initiation of negotiations," and so, it is reasonable to conclude that the government must also provide the appraisal summary at that time, or at least as soon thereafter as practicable.

[10] If we interpret the provision at issue to contain no timing requirement whatsoever, the city could wait even until *after* formally condemning the property before providing the summary—an absurd result that would defeat the purpose of this provision. See Roberts v. Deal, 290 Ga. 705, 709 (2), 723 S.E.2d 901 (2012) (statutes generally should be construed to "avoid absurd results"). Thus, we give this provision its most sensible and reasonable meaning: a condemning authority must provide the appraisal summary prior to the initiation of negotiations or as soon thereafter as "practicable."

In this case, the City sent Summerour three letters in 2010, one of which expressed interest in purchasing the property, and two of which communicated a specific offer—$85,000. Three years later, in July 2013, the City sent Summerour a slightly more detailed letter, breaking down the offer amount into $95,000 for the property and $46,700 for the store business. While each of these letters contained an offer and purported to be based on an appraisal, none of them constituted a "summary of the basis for" the offer amount as contemplated by Section 22–1–9 (3). See Summerour, 338 Ga. App. at 266 (1), 788 S.E.2d 921. The City did not send Summerour an appraisal summary until May 2014. Even if we consider the July 2013 appraisal as the only relevant appraisal and the July 2013 letter as the true start of negotiations, the appraisal summary came nearly 10 months later. We agree with the Court of Appeals that "the 2010 and 2013 offers do not contain a ***658** sufficient summary of the basis for the amount the City established as just compensation, and the sufficient summary that was provided in 2014 came far too late." [6] Summerour, 338 Ga. App. at 265 (1), 788 S.E.2d 921.

We understand that the City may have had its reasons for withholding the appraisal summary. The City explains that it was, at the time, attempting to negotiate the sale not only of the land owned by Summerour, but several neighboring parcels. If the City had provided each of the several owners with information about the basis for their respective appraisals, the owners might have compared information, and those with parcels that had been appraised lower than neighboring parcels might misapprehend that their parcels had been undervalued. Such misapprehensions, the City worries, would have driven up the prices at which the owners would voluntarily agree to sell their land. This argument is unavailing. In the first place, the idea on which it is based strikes us as highly implausible. There was nothing to stop the owners of the neighboring parcels from comparing *offers*, and any such comparison would have revealed any substantial disparities in the valuations. The notion that any misgivings arising from these disparities would be dispelled by withholding information about the basis for the appraisals—information ****334** that presumably, of course, would have explained the disparities—seems far-fetched.

[11] More important, "practicable" does not mean convenient. In modern usage, "practicable" is commonly understood to mean "reasonably capable of being accomplished" or "feasible in a particular situation." Black's Law Dictionary (10th ed. 2014). See also 2 New Shorter Oxford English Dictionary, p. 2317 (1993 ed.) ("practicable" means "[a]ble to be put into practice; able to be effected, accomplished, or done; feasible"). To say that something is impracticable is to say that it reasonably cannot be done; it does not mean merely that it is inconvenient. The reasons offered by the City for withholding information about the appraisal for as long as it did go to the convenience of the City, not the feasibility of disclosing that information to Summerour. It was entirely feasible for the City to provide the ***659** appraisal summary to Summerour long before it actually did so. Thus, the City failed to comply with the dictates of Section 22–1–9 (3). [7]

[12] **[13]** 4. We now turn to the issue of what remedy is available to Summerour as a result of the City's violation of Section 22–1–9 (3). The City contends that, even if it violated subsection (3), no remedy is available to Summerour, except upon a showing of bad faith,

because Section 22–1–9 itself does not contain a remedial provision, and "it is well settled that violating statutes and regulations does not automatically give rise to a civil cause of action by an individual claiming to have been injured from a violation thereof." Govea v. City of Norcross, 271 Ga. App. 36, 41 (1), 608 S.E.2d 677 (2004). But a "cause of action" is just one type of remedy. It may well be true that a violation of Section 22–1–9 will not, by itself, allow the aggrieved individual to sue the condemning authority. But we need not decide the issue here because that is not what Summerour is trying to do. Summerour is simply requesting a defensive remedy—the dismissal of the City's condemnation petition. And dismissing the condemnation petition is an appropriate remedy where a condemning authority has acted outside its authority by violating the law, irrespective of bad faith. See City of Atlanta v. First Nat. Bank of Atlanta, 246 Ga. 424, 425, 271 S.E.2d 821 (1980) (reversing the disallowance of condemnation because the landowner failed to show that the city either acted in bad faith or "exceeded its lawful authority"); Miles v. Brown, 223 Ga. 557, 559, 156 S.E.2d 898 (1967) (condemnation was authorized where landowner "produced no evidence to show that the action of the defendants was in bad faith or *beyond the powers conferred upon them by law*" (emphasis supplied)).

[14] Georgia law has always required governments to comply strictly with condemnation procedures when exercising the power of eminent domain, and the procedures listed in Section 22–1–9 are no exception. See OCGA § 22–1–8 ("All persons authorized to take or damage private property for public purposes shall proceed as set forth in this ***660** title."). As we explained over a century ago,

> [t]he taking or injuring of private property for the public benefit is the exercise of a high power, and all the conditions and limitations provided by law, under which it may be done, should be closely followed. Too much caution in this respect cannot be observed to prevent abuse and oppression.

Frank v. City of Atlanta, 72 Ga. 428, 432 (2) (1884); Sims v. City of Toccoa, 256 Ga. 368, 369, 349 S.E.2d 385 (1986) (same); ****335** Dept. of Transp. v. City of Atlanta, 255 Ga. 124, 132 (3) (b), 337 S.E.2d 327 (1985) ("[W]hile the procedure for condemnation under OCGA § 32–3–2 et seq. does not violate due process, the statute must be strictly conformed to by the condemning body." (citation and punctuation omitted)). See also Thomas v. City of Cairo, 206 Ga. 336, 338, 57 S.E.2d 192 (1950) ("The power of eminent domain should never be exercised unless and until there has been a strict compliance with the provisions of the law by the condemnor."); D'Antignac v. City Council of Augusta, 31 Ga. 700, 710 (1861) ("[I]n proceedings by statute authority, whereby a man may be deprived of his property, the statute must be strictly pursued. Compliance with all its prerequisites must be shown."). Indeed, we previously have countenanced equitable remedies to halt condemnation proceedings in cases in which the condemnor failed to comply with statutory obligations to attempt negotiations before resorting to the exercise of eminent domain. See, e.g., City of Atlanta v. Austell, 146 Ga. 456, 456, 91 S.E. 478 (1917) ("In not giving petitioner notice in his representative capacity, and in not attempting to agree with him in a representative capacity as to the price to be paid for the land, the city had failed to comply with the provision of the statutory requisite to the condemnation of property for public purposes."); City of Elberton v. Hobbs, 121 Ga. 750, 49 S.E. 780 (1905) ("Failure to secure the property by contract, by reason of the inability of the parties to agree upon the compensation to be paid therefor, is an essential prerequisite to the condemnation of private property for public uses.").

[15] Because the City failed to comply with Section 22–1–9 (3), and because there is no evidence in the record that Summerour acquiesced in or waived strict compliance with the statute, the City acted outside its authority by condemning Summerour's property, and the City's condemnation petition must be dismissed.[8] See ***661** Thomas, 206 Ga. at 338, 57 S.E.2d 192 (trial court erred in refusing to enjoin condemnation proceedings where, by attempting to limit its liability for payment of compensation, city "has not sufficiently complied with the law in order to exercise the high power of eminent domain"); Suburban Investment Co. v. City of Atlanta, 148 Ga. 593, 594–596, 97 S.E. 542 (1918) (condemnation should have been enjoined where city failed to comply with condemnation procedure by passing an ordinance in an untimely manner). See also Stafford v. Bryan County Bd. of Ed., 267 Ga. 274, 275, 476 S.E.2d 727 (1996)

(trial court erred by entering judgment on condemnation award where "the plain language of OCGA § 22–2–112 was not followed and the record is clear that there was no acquiescence in or waiver of strict compliance with the statute"); Wrege v. Cobb County, 186 Ga. App. 512, 514 (1), 367 S.E.2d 817 (1988) ("strict statutory requirements mandated by the Legislature" cannot be "ignored or deliberately sidestepped with impunity by the condemning authority," even if the landowners "arguably" benefitted from the violation).[9] There is no need for the trial **336 court to reconsider the question of bad faith, and to the extent that the Court of Appeals directed the trial court to do so on remand, its judgment is reversed.

Judgment affirmed in part and reversed in part.

Hines, C. J., Melton, P. J., Benham, Hunstein, Nahmias, Boggs, Grant, JJ., and Judge David L. Cannon, Jr., concur. Peterson, J., disqualified.

All Citations

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Footnotes

1 The Act appears to have been adopted largely in response to the decision of the United States Supreme Court in Kelo v. City of New London, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005). See Morrison, supra, at 70. In Kelo, the Supreme Court held that economic development qualifies as a "public use" under the Takings Clause of the United States Constitution, and therefore, a city could use its power of eminent domain to acquire private property for redevelopment by private industry. See Kelo, 545 U.S. at 483–484 (IV), 125 S.Ct. 2655. Kelo sparked widespread concern throughout the nation about the potential abuse of eminent domain and the limited protections afforded by the Takings Clause. Around the time of the Kelo decision, there also were other concerns about the misuse of eminent domain in Georgia. See Morrison, supra, at 63–67 (noting concerns about a condemnation by the City of Stockbridge, which culminated in City of Stockbridge v. Meeks, 283 Ga. App. 343, 641 S.E.2d 584 (2007)).

2 Even before the adoption of Section 22–1–11, a superior court in condemnation proceedings was authorized to consider whether the condemnation was within the lawful authority of the condemning authority. See City of Atlanta v. First Nat. Bank of Atlanta, 246 Ga. 424, 424 & n.1, 271 S.E.2d 821 (1980); Scarlett v. Georgia Ports Auth., 223 Ga. 417, 418 (1), 156 S.E.2d 77 (1967). Section 22–1–11 reinforces that longstanding rule.

3 This statement of legislative purpose appears in the codified preamble of Section 22–1–9. As our Court of Appeals has explained, "codified preambles *are* part of the act and appropriate to read in pari materia." Harrison v. McAfee, 338 Ga. App. 393, 400 (2) (b), 788 S.E.2d 872 (2016) (Peterson, J.) (emphasis in original; citations omitted).

4 We note, however, that a simple "shall" suffices in Section 22–1–10 ("a governmental condemnor shall") because all of the provisions that follow are directed specifically to the condemning authority. The provisions of Section 22–1–9, on the other hand, are directed to "all condemnations and potential condemnations," not always the condemning authority in particular. See, e.g., OCGA § 22–1–9 (9) ("A person whose real property is being acquired in accordance with this title may, after the person has been fully informed of his or her right to receive just compensation for such property, donate such property, any part thereof, any legal interest therein, or any compensation paid to a condemning authority, as such person shall determine.").

5 The City argues, among other things, that the Court of Appeals incorrectly applied a de novo standard of review and failed to give proper deference to the fact findings of the trial court and the special master. But the facts relevant to the Court of Appeals's decision were not in dispute, and thus a de novo review was proper. See Trax-Fax, Inc. v. Hobba, 277 Ga. App. 464, 464, 627 S.E.2d 90 (2006) ("[E]rroneous applications of law to undisputed facts ... are subject to a de novo standard of review.").

6 Appraisals are opinions about valuation at a particular point in time, and they become stale over time. We cannot say with confidence that the July 2013 appraisal had not grown stale by the time a summary of the basis for that appraisal was disclosed in May 2014. Cf. Fannie Mae, Selling Guide (Single Family), Appraisal Age and Use Requirements, § B4–1.2–02 (2017) (available at: https://www.fanniemae.com/content/guide/sel092617.pdf, last visited on Oct. 23, 2017) ("When an appraisal report will be more than four months old on the date of the note and mortgage ... the appraiser must inspect the exterior of the property and review current market data to determine whether the property has declined in value since the date of the original appraisal.").

7 The City also argues that interpreting subsection (3) to require disclosure of an appraisal summary before condemnation proceedings are commenced would be inconsistent with the Open Records Act, OCGA § 50–18–72 (9), which, at the time Section 22–1–9 was enacted, exempted real estate appraisals from public disclosure until condemnation proceedings have been concluded, i.e., "until such time as the property has been acquired or the proposed transaction has been terminated or abandoned." Black v. Dept. of Transp., 262 Ga. 342, 342, 417 S.E.2d 655 (1992) (citation omitted). The City's argument, however, is unavailing. The Open Records Act governs the disclosure of government records to members of the general public who seek such records—it has nothing to do with the flow of information between parties to a transaction. Requiring a government buyer to disclose certain information to the seller does not conflict with the government's option to prevent disclosure of this information pursuant to an Open Records Act request from a third party.

8 We do not decide today whether a minor, technical, and clearly harmless violation of Section 22-1-9 requires dismissal. The violation in this case was neither minor, technical, nor clearly harmless. The City's failure to timely provide an appraisal summary to Summerour substantially undermined fair negotiations. The July 2013 appraisal was nearly eleven months old by the time the City provided it to Summerour, and this appraisal may not have accurately reflected the current value of the property. Moreover, the City's long delay in providing a sufficient basis for its offer increased at least the appearance of bad faith, undermining trust and increasing the potential for litigation. Indeed, by the time the City provided the appraisal, mistrust and frustration on both sides were high enough that negotiations effectively ceased within a matter of days. This is exactly what Section 22–1–9 was designed to prevent.

We also note that a failure to comply with Section 22–1–9—even when that failure requires the dismissal of a condemnation petition—does not permanently foreclose efforts to acquire a particular property. If a condemnor violates some provision of Section 22–1–9—for example, by failing to provide an appraisal summary at or before the initiation of negotiations and failing to rectify that failure for a long period of time—it might effectively reset its opportunity to comply with the statute by obtaining a new appraisal and reinitiating negotiations, giving a summary of that appraisal to the landowner at the time negotiations recommence.

9 Section 22–1–12 provides additional remedies, including attorney fees, when "final judgment is that the condemning authority cannot acquire the real property by condemnation[.]" Having concluded that the City's condemnation petition must be dismissed, we leave it to the trial court to determine the appropriate costs and expenses to which Summerour may be entitled under Section 22–1–12.

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559 S.W.3d 374
Supreme Court of Kentucky.

LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT, Appellant
v.
Justin T. MOORE, Appellee

2017-SC-000555-DG
|
NOVEMBER 1, 2018

Synopsis
Background: County brought condemnation action seeking a temporary construction easement and permanent drainage easement across portion of property owner's land. County filed a motion for interlocutory judgment. After a hearing, in which owner asserted that county should have been required to take the property by fee simple, the Circuit Court entered an interlocutory order in favor of county. On appeal, the Court of Appeals determined that Circuit Court erred in granting the judgment. The Supreme Court granted discretionary review.

[Holding:] The Supreme Court, Venters, J., held that Court of Appeals failed to give appropriate deference to Circuit Court's finding that county negotiated in good faith before bringing condemnation action.

Reversed and reinstated.

West Headnotes (9)

[1] Eminent Domain
Discretion in exercise of power

A governmental entity generally has broad discretion in exercising its eminent domain authority.

Cases that cite this headnote

[2] Eminent Domain
Extent of appropriation

A condemnor's decision on the amount of land it requires for present and future needs will be disturbed only if it is unreasonable in relation to the public interest involved.

Cases that cite this headnote

[3] Eminent Domain
Conclusiveness and effect of exercise of delegated power

A condemnor's determination as to the necessity of a taking is ordinarily conclusive but remains subject to judicial review for arbitrariness or action exceeding its authority.

Cases that cite this headnote

[4] Eminent Domain
Questions of fact, verdicts, and findings

Although the factors of necessity and public use associated with condemnation are ultimately legal issues, resolution of those issues encompasses factual matters subject to deferential review on appeal.

Cases that cite this headnote

[5] Eminent Domain
Extent of appropriation

Eminent Domain
Negotiations, offer to purchase, and inability to agree with owner

County negotiated in good faith for purchase of construction and drainage easements across owner's property prior to filing a condemnation action, and thus was entitled to interlocutory judgment on the issue of good faith, despite fact that county declined to consider fee simple ownership instead of an easement; county had a legal duty to pursue the taking of an interest less than fee simple ownership if doing so could achieve the public purpose of the taking and the Circuit Court credited the testimony of county's witness that federal and state funding sources were the primary factors in county's intent to obtain

only an easement. Ky. Const. § 13; § 242; Ky. Rev. Stat. Ann. § 416.610.

Cases that cite this headnote

[6] **Eminent Domain**
Questions of fact, verdicts, and findings

A trial court's factual findings in a condemnation action are not clearly erroneous if they are supported by substantial evidence.

Cases that cite this headnote

[7] **Eminent Domain**
Questions of fact, verdicts, and findings

Substantial evidence, as needed to support a trial court's factual findings in a condemnation action, is evidence which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person.

Cases that cite this headnote

[8] **Appeal and Error**
Credibility and Number of Witnesses

Appeal and Error
Province of, and deference to, lower court in general

It is within the province of the trial court as the fact-finder to determine the credibility of witnesses and the weight given to the evidence.

Cases that cite this headnote

[9] **Eminent Domain**
Extent of appropriation

Caselaw rule that a condemning authority could not take, by power of eminent domain, a greater interest in land than was necessary for the purpose it sought to achieve applied to county's condemnation action for easements across portion of an owner's property, rather than fee simple ownership of that portion, where this rule accurately reflected the public policy implicit in the condemnation statute on which the rule was premised. Ky. Const. § 13; § 242; Ky. Rev. Stat. Ann. § 416.550.

Cases that cite this headnote

***375** ON REVIEW FROM COURT OF APPEALS, CASE NO. 2016-CA-000187-MR, FAYETTE CIRCUIT COURT NO. 15-CI-03477

Attorneys and Law Firms

COUNSEL FOR APPELLANT: Michael Keith Horn, Lexington, Charles Edwards III, Lexington-Fayette Urban County Government, Department of Law.

COUNSEL FOR APPELLEE: Katherine Yunker, Jon Allen Woodall, Brendan Reynolds Yates, Lexington, McBrayer McGinnis Leslie & Kirkland PLLC.

Opinion

OPINION OF THE COURT BY JUSTICE VENTERS

The Fayette Circuit Court entered an interlocutory judgment pursuant to KRS 416.610 concluding that Appellant, Lexington-Fayette Urban County Government ("LFUCG"), properly exercised its power of eminent domain in the taking of a permanent easement on the land of Appellee Justin Moore for the public purpose of constructing a storm water culvert and drainage system. Moore appealed. [1] Moore's appeal acknowledged LFUCG's power to condemn, but he argued that by taking only an easement on the 4,518.6 sq. ft. area, rather than a fee simple, LFUCG was not acting in good faith.

The Court of Appeals agreed with Moore that under the circumstances presented here, where the condemned land was left essentially valueless to the landowner following the taking, LFUCG's duty as a condemning authority to act in good faith obligated it to take possession of the land by fee simple rather than by easement.

***376** We granted discretionary review, and for the reasons set forth below, we reverse the Court of Appeals and reinstate the interlocutory judgment of the Fayette Circuit Court.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case concerns LFUCG's taking, pursuant to Kentucky's Eminent Domain Act (KRS 416.540-416.680), of an interest in a portion of Moore's 2.68-acre residential tract located on Deer Haven Lane in Fayette County. Along the western boundary of Moore's property runs a section of Polo Club Boulevard that terminates before it reaches Deer Haven Lane, which runs along the northern boundary of Moore's property. LFUCG's project will extend Polo Club Boulevard to meet Deer Haven Lane, but it requires the construction of a 16-foot by 4-foot box culvert and a drainage system extending sixty feet on to Moore's property to a pond located on Moore's tract. The area of the land needed for the culvert and drainage system is 4,518.6 sq. ft., a little less than the size of a basketball court, at a corner of Moore's 2.68 acres.

Before the condemnation action began, an appraisal report prepared for LFUCG in connection with the project estimated that Moore's after-taking utility of the section to be occupied by the 4,518-square foot permanent easement would be 5%. No benefit to the property from the easement was identified.

Based upon the appraisal, LFUCG made an offer to pay Moore for a permanent easement on the 4,518.6-sq.ft. section, and the temporary construction easement on a larger area of 26,504.18 square feet. In response to the offer, Moore questioned why LFUCG would merely take a permanent easement instead of fee simple ownership since the taking would reduce the utility of this section to 5% of its former utility. LFUCG Acquisition Agent, Paul Willard, responded that the permanent easement was "to provide the government access to maintain the culvert for maintenance purposes" and that this was "the same treatment ... generally on any building project using state or federal funds." Willard did not identify any state or federal authorities requiring that an easement be taken in situations such as this, where the landowner's after-taking utility is minimal. Through his attorney, Moore expressed concern that if he remained the title owner of the area, he could be liable for injuries or accidents caused in connection with the culvert and drainage system. LFUCG argued that the policy is reasonable to avoid the burden of the government owning fee-simple title to hundreds of miniscule plots of land throughout its boundaries. Negotiations produced no settlement, and the condemnation action ensued.

LFUCG filed the action seeking a temporary construction easement and permanent drainage easement on Moore's property. The appointed commissioners found that the proposed permanent easement would diminish the fair market value of Moore's 2.68-acre tract by the sum of $1,287 and that a fair rental value for the area required for the temporary construction easement was $8,000. Moore's answer to the complaint contested LFUCG's right to take the property, a position he later abandoned, and further argued that LFUCG was acting in bad faith or abusing its discretion by seeking to take a permanent easement rather than a fee simple interest.

LFUCG eventually filed a motion for interlocutory judgment pursuant to *377 KRS 416.610[2] requesting that the government be allowed to take the property. At the hearing held pursuant to KRS 416.610(4), Moore did not dispute that the proposed taking was for a public purpose. He continued to assert that LFUCG should be required to take the property by fee simple since its taking as an easement left him with no useful purpose for the property.

LFUCG acknowledged that the remaining utility of this section of Moore's property, after being subjected to the permanent easement, would be 5% and that Moore would not be able to use it because of the box culvert located on it. LFUCG's witness, Willard, testified that he was not aware of any similar-sized culvert which LFUCG had taken as an easement rather than a fee simple interest. Willard testified that LFUCG followed the Kentucky Transportation Cabinet's "standard practice," which required the taking of an easement under these circumstances and that LFUCG must comply with federal and state guidelines because of funding requirements. LFUCG provided no citations to the federal and state guidelines to support those assertions.

On cross-examination, Willard conceded that he was unaware of any written Transportation Cabinet policy or guideline requiring the acquisition of a permanent easement rather than fee simple. When asked specifically if the purchase of fee simple interest would jeopardize state funding for the project, he replied, "I have no idea whether it would or not." When asked why LFUCG would not want to take the property in fee simple, given

the magnitude of the planned structure, he responded, "Basically, the practice is, leave the property in their [the land owner's] name. If, for instance - let's go theoretical - that pipe gets removed at some point in time, there's no need for it. The City doesn't need to own that property then. Yet we would be stuck with it; it'd be unusable."

Following Willard's testimony, Moore requested a continuance to further investigate the Transportation Cabinet's position on funding if a fee simple rather than an easement is taken. Moore pointed out that a factor in determining whether LFUCG acted in good faith or had abused its discretion was whether it was fair to not take a fee simple interest in the property if the state, in fact, allows it. The trial court denied Moore's request for a continuance. The trial court questioned LFUCG about the property owner's liability in the event something occurred on or because of the culvert. LFUCG did not dispute that Moore would remain subject to liability but contended that any such threat of liability was no different than what Moore would be subjected to for an injury that occurred because of the pond, and that by creating a buffer reducing public access to the pond, Moore's threat of liability would actually decrease.

At the close of the hearing, the trial court ruled in favor of LFUCG. The trial court stated that Willard had presented persuasive testimony that taking an easement under these circumstances was the way the state does it, further noting that even if LFUCG "could have done it either way it wanted to, ... the city has decided to go the easement route.... 'We've always done it that way' is rarely a good excuse to me, but I think that is what it is ***378** in this case." In its subsequent written interlocutory order, the trial court concluded that LFUCG had satisfied its obligation to negotiate in good faith "to obtain the property interests needed for this public project prior to bringing this action." The trial court did not discuss the easement versus fee simple issue in the order. On appeal, the Court of Appeals held that under the circumstances presented in this case, where the after-taking utility to the landowner approaches zero, that it would be arbitrary and in excess of LFUCG's authority under the Eminent Domain Act to take less than a fee simple interest in the property and, therefore, the circuit court had erred in granting the interlocutory judgment in favor of LFUCG.

II. ANALYSIS

[1] **[2]** **[3]** **[4]** A governmental entity generally has broad discretion in exercising its eminent domain authority. *See Commonwealth, Department of Highways v. Burchett,* 367 S.W.2d 262 (Ky. 1963) ("With respect to the public interest, obviously the highway department must be allowed a broad discretion."). The condemnor's decision on the amount of land it requires for present and future needs will be disturbed only if it is unreasonable in relation to the public interest involved. *McGee v. City of Williamstown,* 308 S.W.2d 795, 797 (Ky. 1957). Similarly, the condemnor's determination as to the necessity of the taking is ordinarily conclusive but remains subject to judicial review for arbitrariness or action exceeding its authority. *God's Center Foundation, Inc. v. Lexington Fayette Urban County Government,* 125 S.W.3d 295, 299-300 (Ky. App. 2002). "Although the factors of necessity and public use associated with condemnation are ultimately legal issues, resolution of those issues encompasses factual matters subject to deferential review on appeal." *Id.* at 300.

LFUCG makes three arguments in support of its appeal: 1) that the Court of Appeals failed to give appropriate deference to the circuit court's finding that LFUCG acted in good faith; 2) that the Court of Appeals improperly extended our holding in *Sprint Communications v. Leggett,* 307 S.W.3d 109 (Ky. 2010); and 3) that the Court of Appeals failed to follow controlling precedent and created conflicting demands for local governments by requiring that local governments condemn property in fee simple when a lesser interest would be equally effective. We agree with LFUCG on each point.

LFUCG's authority to exercise the power of eminent domain is not disputed. That authority, however, is subject to the constitutional restrictions that the taking be for "public use" and the payment of "just compensation being previously made." Ky. Const. § 13; *see also* Ky. Const. § 242. [3]

In addition to the foregoing limitations, and of significance in this case, "Kentucky courts have also imposed a duty on the condemnor to negotiate in good faith the acquisition of the property prior to seeking condemnation." *God's Center Foundation,* 125 S.W.3d at 300; *see also* ***379** *Usher & Gardner, Inc. v. Mayfield*

Independent Board of Education, 461 S.W.2d 560 (Ky. 1970) ("The real inquiry ... is whether the condemnor made a reasonable effort in good faith to acquire the land by private sale at a reasonable price.").

[5] The Court of Appeal concluded, contrary to the circuit court's findings, that LFUCG had failed to negotiate in good faith because, despite the extremely limited utility of the property as the servient estate to the government's easement, the government declined to consider any other option.

[6] **[7]** **[8]** Whether LFUCG acted in good faith is a finding of fact for the trial court to decide. Appellate review of that finding, along with the trial court's other factual findings, must proceed under the clearly erroneous standard. *See Carroll v. Meredith,* 59 S.W.3d 484, 489 (Ky. App. 2001); *Commonwealth, Transportation Cabinet, Dept. of Highways v. Taub,* 766 S.W.2d 49 (Ky. 1988); CR 52.01. Factual findings are not clearly erroneous if they are supported by substantial evidence. *Id.* Substantial evidence is evidence "which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." *See Uninsured Employers' Fund v. Garland,* 805 S.W.2d 116, 118 (Ky. 1991); *Cole v. Gilvin,* 59 S.W.3d 468, 473 (Ky. App. 2001).

> It is within the province of the trial court as the fact-finder to determine the credibility of the witnesses and the weight given to the evidence. Although the factors of necessity and public use associated with condemnation are ultimately legal issues, resolution of those issues encompasses factual matters subject to deferential review on appeal.

God's Center Foundation, 125 S.W.3d at 300.

In *City of Bowling Green v. Cooksey,* 858 S.W.2d 190, 192 (Ky. App. 1992), the Court of Appeals construed KRS 416.550[4] as incorporating the principle that a condemning authority "cannot acquire the property in fee simple if it can obtain access or use of the property through other privileges or easements." In *God's Center Foundation,* the Court of Appeals reiterated that holding. 125 S.W.3d at 300. This Court had not explicitly addressed the rule, so at the time LFUCG negotiated its taking with Moore, *Cooksey* imposed upon LFUCG a duty to pursue the taking of an interest less than fee simple ownership if its public purpose could be so achieved. Given that legal environment, it is hard to say that LFUCG was negotiating in bad faith.

Willard testified that federal and state funding sources were primary factors motivating LFUCG's intent to obtain merely an easement rather than fee simple title. That claim was undermined by his admission that he could cite no written policies to that effect. As Moore noted, LFUCG never produced any evidentiary support for Willard's claim. Nevertheless, the circuit court credited Willard's testimony in reaching its finding that LFUCG had acted in good faith. With the rule from *Cooksey* in place, it cannot be said that the ***380** circuit court's finding was clearly erroneous.

Moore argues, and the Court of Appeals held, that *Cooksey* was implicitly overruled or abrogated by our decision in *Sprint Communications Co., L.P. v. Leggett,* 307 S.W.3d 109 (Ky. 2010). We disagree. The circumstances of *Leggett* are easily distinguishable and our holdings in *Leggett* had no impact upon the *Cooksey* rule.

Leggett is not a condemnation action; it is an abuse of process case. Sprint Communications had tried to use its statutory eminent domain authority to obtain a "permanent utility easement" over the entire half-acre city lot owned by Leggett. Sprint intended to demolish Leggett's building and, on his lot, construct a new facility to house long-distance telephone equipment. Unlike LFUCG, which is a governmental unit possessed of the Commonwealth's sovereign authority to condemn property for a public purpose, Sprint's authority as a "telephone company" under KRS 278.540(2)[5] and KRS 416.150,[6] was limited to the power to condemn land for a "right of way" across private property. *Leggett* stands for the proposition that a "telephone company," with limited condemnation authority, cannot forcibly take the entirety of someone's property by the power of eminent domain by calling the taking a "permanent easement," rather than the fee simple taking it really was. 307 S.W.3d at 115.

Quite to the contrary, Moore owns a rather large residential estate on Deer Haven Lane and only a fraction of that lot is affected by the land LFUCG needs for a drainage easement. Obviously, all of the square-footage to be occupied by the drainage system is affected, but unlike *Leggett,* that is not the entirety of Moore's property. Moore will retain fee simple ownership of his entire tract, while LFUCG's easement occupies but a corner of it.

Leggett is further distinguished by the fact that Sprint lacked the legal authority to acquire Leggett's property by eminent domain for the proposed new building, hence, the abuse of process claim. Calling the taking a "right of way" or a "permanent utility easement" did not alter the reality that Sprint was trying to obtain the entirety of Leggett's property, leaving nothing for him.

We reject the Court of Appeals' conclusion that *Leggett* implicitly overruled *Cooksey. Cooksey* holds that the condemning authority cannot take, by the power of eminent domain, a greater interest in land than is necessary for the purpose it seeks to achieve. *Leggett* holds that a condemning authority cannot threaten to take by the power of eminent domain a greater interest in land than the law allows. The two are not inconsistent. The Court of Appeals erred in its application of *Leggett* and in using *Leggett* as a basis for concluding that LFUCG acted in bad faith by refusing to acquiesce to Moore's insistence that the property be taken in fee simple.

[9] *Cooksey* premised its holding on KRS 416.550. See footnote 4. KRS 416.550 does not explicitly contain the rule as stated in *Cooksey.* The rule is, however, reasonably ***381** inferred from the express limitation that the interests in the property to be taken must be "needed." It reasonably follows that an estate greater than what is "needed" to achieve the legal purpose cannot be taken. As provided in American Jurisprudence:

> Where an eminent domain statute does not expressly or by implication grant the right to take an estate in fee simple, the interest taken is limited to that necessary to accomplish the purpose or the public use, and no greater estate or property may be taken. In other words, the condemnor only acquires interests sufficient to satisfy the purpose of the taking. Thus, only an easement or qualified fee is taken by the eminent domain proceedings unless: (1) the statute clearly provides for taking a fee, either expressly or by necessary implication; or (2) a fee is necessary for the purposes for which the land is taken.

27 Am. Jur. 2d *Eminent Domain* § 789 (citations omitted); *see also Pennsylvania Game Commission v. Renick,* 21 Pa.Cmwlth. 30, 342 A.2d 824, 827 (1975) ("[N]o more property may be taken than the public use requires [is] a rule which applies both to the amount of property and the estate or interest to be acquired. Unless the statute expressly provides that a fee simple absolute estate must be taken ... only an easement will be acquired by the condemnor, if that is all it requires."). We, accordingly, reaffirm the *Cooksey* rule because it accurately reflects the public policy implicit in KRS 416.550. We reiterate that when a governmental unit needs to take a small area out of a larger estate, it should take the least possible interest, such as an easement, so that if the public purpose for the tract is concluded, it may be reintegrated into the original estate unburdened by the prior public taking.

III. CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals is reversed, and the judgment of the Fayette Circuit Court is reinstated.

All sitting. All concur.

All Citations

559 S.W.3d 374

Footnotes

1 In *Ratliff v. Fiscal Court of Caldwell County,* 617 S.W.2d 36, 39 (Ky. 1981), we held that a property owner has a right to appeal a circuit court interlocutory order entered under KRS 416.610 determining that the condemning governmental unit has a right to take his property.

2 In the event the governmental unit's right to condemn under KRS 416.610 is not challenged, KRS 416.610(2) mandates the entry by the circuit court of an order granting the condemnation and the right to possession in favor of the governmental unit, though the statute also permits the landowner to continue to challenge the amount of compensation to which he is entitled.

3 Kentucky Constitution § 242: "Municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them; which compensation shall be paid before such taking, or paid or secured, at the election of such corporation or individual, before such injury or destruction. The General Assembly shall not deprive any person of an appeal from any preliminary assessment of damages against any such corporation or individual made by Commissioners or otherwise; and upon appeal from such preliminary assessment, the amount of such damages shall, in all cases, be determined by a jury, according to the course of the common law."

4 KRS 416.550: "Whenever any condemnor cannot, by agreement with the owner thereof, acquire the property right, privileges or easements needed for any of the uses or purposes for which the condemnor is authorized by law, to exercise its right of eminent domain, the condemnor may condemn such property, property rights, privileges or easements pursuant to the provisions of KRS 416.550 to 416.670. It is not a prerequisite to an action to attempt to agree with an owner who is unknown or who, after reasonable effort, cannot be found within the state or with an owner who is under a disability."

5 "Any telephone company authorized to do business in this state may, by contract with any person, construct, maintain and operate telephone lines on and across the real property of that person, and if it cannot obtain the right-of-way by contract it may, except as provided in KRS 416.090, condemn the right-of-way in the manner provided in the Eminent Domain Act of Kentucky."

6 "Any telephone company desiring to condemn a right-of-way under the authority of subsection (2) of KRS 278.540 shall proceed pursuant to the Eminent Domain Act of Kentucky."

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497 S.W.3d 78
Court of Appeals of Texas, Houston (14th Dist.).

Jose Gerardo PADILLA, Giovanna Padilla,
and Houston Best Foods & Services,
LLC d/b/a Doneraki Fulton, Appellants
v.
METROPOLITAN TRANSIT AUTHORITY
OF HARRIS COUNTY, Appellee

NO. 14–14–00938–CV
|
Opinion filed May 24, 2016
|
Rehearing Overruled September 6, 2016

Synopsis

Background: Restaurant owners brought inverse condemnation action against county transit authority, alleging that construction of a light rail line blocked access to the restaurant for significant periods of time, forcing the closure of the restaurant. The County Civil Court at Law No. 4, Harris County, granted transit authority's motion to dismiss for lack of subject-matter jurisdiction, and restaurant owners appealed.

Holdings: The Court of Appeals, J. Brett Busby, J., held that:

[1] affidavit by restaurant employee was not conclusory and was sufficient to create a genuine issue of material fact as to whether access to restaurant was totally blocked, and

[2] genuine issue of material fact as to whether county transit authority knew light rail project was causing harm to restaurant property or was substantially certain to result in specific property damage precluded summary judgment.

Reversed and remanded.

West Headnotes (20)

[1] Pleading

Plea to the Jurisdiction

A governmental unit's plea to the jurisdiction may challenge either the plaintiff's pleadings or the existence of jurisdictional facts.

Cases that cite this headnote

[2] Pleading

Scope of inquiry and matters considered in general

When the governmental unit's plea to the jurisdiction challenges the existence of jurisdictional facts, and the parties submit evidence relevant to the jurisdictional challenge, court must consider that evidence as necessary to resolve the jurisdictional issues raised; this evidence includes the nonmovant's discovery responses.

Cases that cite this headnote

[3] Pleading

Questions of law and fact

If the evidence raises a fact issue as to jurisdiction, the governmental unit's plea to the jurisdiction must be denied because the issue must be resolved by the trier of fact; if the relevant evidence is undisputed or fails to present a jurisdictional fact issue, however, the court should rule on the plea as a matter of law.

Cases that cite this headnote

[4] Eminent Domain

Recovery of compensation

Eminent Domain

Corporations or persons liable

States

Eminent domain

Texas Constitution waives governmental immunity from suit for the taking, damaging, or destruction of property for public use and requires compensation for such destruction. Tex. Const. art. 1, § 17.

Cases that cite this headnote

[5] **Eminent Domain**

Nature and grounds in general

To prove an inverse condemnation claim, a claimant must show that a governmental actor intentionally performed acts that resulted in the taking, damaging, or destruction of its property. Tex. Const. art. 1, § 17.

Cases that cite this headnote

[6] **Eminent Domain**

Nature and grounds in general

A governmental entity acts intentionally, supporting an inverse condemnation claim, if it knows either that a specific act was causing identifiable harm or that specific property damage was substantially certain to result from the entity's action. Tex. Const. art. 1, § 17.

Cases that cite this headnote

[7] **Eminent Domain**

Nature and grounds in general

A governmental entity is substantially certain that its actions will damage property, supporting an inverse condemnation claim, when the damage is necessarily an incident to or necessarily a consequential result of the governmental entity's action; an awareness that damage is a mere possibility is not evidence of the governmental entity's intent. Tex. Const. art. 1, § 17.

Cases that cite this headnote

[8] **Eminent Domain**

Nature and grounds in general

Government's knowledge of harm or damage, as required for an inverse condemnation claim, must be determined as of the time the governmental unit acted, not with the benefit of hindsight. Tex. Const. art. 1, § 17.

Cases that cite this headnote

[9] **Eminent Domain**

Recovery of damages

Not all damage caused by government construction projects is compensable through an inverse condemnation claim; property owners may not recover for injuries sustained in common with the community where the property is situated, such as damage from noise, dust, increased traffic, diversion of traffic, circuity of travel, and other inconveniences incident to road or highway construction. Tex. Const. art. 1, § 17.

2 Cases that cite this headnote

[10] **Eminent Domain**

Recovery of damages

Inverse condemnation damages peculiar to a property owner, such as impaired access, are not barred by the concept of community injury. Tex. Const. art. 1, § 17.

1 Cases that cite this headnote

[11] **Eminent Domain**

Obstruction of access

To obtain compensation for impairment of access, an inverse condemnation plaintiff must establish that the governmental entity materially and substantially impaired access rights to his property. Tex. Const. art. 1, § 17.

1 Cases that cite this headnote

[12] **Eminent Domain**

Obstruction of access

To obtain compensation for impairment of access, an inverse condemnation plaintiff must show that there has been: (1) a total but temporary restriction of access, (2) a partial but permanent restriction of access, or (3) a temporary limited restriction of access brought about by an illegal activity or one that is negligently performed or unduly delayed; if the plaintiff does so, the property owner is entitled to be compensated for the lost profits arising from the denial of access. Tex. Const. art. 1, § 17.

Cases that cite this headnote

[13] **Eminent Domain**
Questions for jury

Whether there has been a material and substantial impairment of access is a question of law for the court in an inverse condemnation action. Tex. Const. art. 1, § 17.

Cases that cite this headnote

[14] **Judgment**
Matters of fact or conclusions

Summary judgment affidavit by restaurant employee was not conclusory and was sufficient to create a genuine issue of material fact, precluding summary judgment on inverse condemnation claim, as to whether access to restaurant was totally blocked for temporary periods during light rail construction project; employee's statement that "for months at a time all the entrances and exits were blocked" by construction was a statement of fact, employee provided background facts that explained the basis of that statement, including that he was in charge of the restaurant and was present at the restaurant virtually every day, and employee also explained that road work and utility work around the restaurant was left unfinished for long periods, with no crews working. Tex. Const. art. 1, § 17.

1 Cases that cite this headnote

[15] **Judgment**
Matters of fact or conclusions

A "conclusory statement" in a summary judgment affidavit is one that expresses a factual inference without providing underlying facts to support that conclusion.

10 Cases that cite this headnote

[16] **Judgment**
Matters of fact or conclusions

Affidavits containing conclusory statements that fail to provide the underlying facts supporting those conclusions are not proper summary judgment evidence.

13 Cases that cite this headnote

[17] **Judgment**
Matters of fact or conclusions

To avoid being conclusory, a summary judgment affidavit must contain specific factual bases, admissible in evidence, from which any conclusions are drawn.

4 Cases that cite this headnote

[18] **Judgment**
Particular Cases

Genuine issue of material fact as to whether county transit authority knew light rail project was causing harm to restaurant property or was substantially certain to result in specific property damage, despite contract which instructed contractors to minimize effects of construction on private property owners, precluded summary judgment for county transit authority on restaurant owners' inverse condemnation claim. Tex. Const. art. 1, § 17.

Cases that cite this headnote

[19] **Eminent Domain**
Nature and grounds in general

Eminent Domain
Weight and sufficiency

To establish an inverse condemnation claim, a claimant must show that a governmental actor acted intentionally when it took or damaged property for a public use; such intent may be shown by circumstantial evidence. Tex. Const. art. 1, § 17.

Cases that cite this headnote

[20] **Eminent Domain**

Necessity of making compensation in general

A governmental entity responsible for a construction project cannot avoid its constitutional obligation to compensate private property owners for resulting damage simply by proving that the project was carried out by contractors rather than the entity itself. Tex. Const. art. 1, § 17.

Cases that cite this headnote

***80** On Appeal from the County Civil Court at Law No. 4, Harris County, Texas, Trial Court Cause No. 1010704

Attorneys and Law Firms

Michael Sydow, Sr., Houston, TX, for appellant.

Frederick D. Junkin, Houston, TX, for appellee.

Panel consists of Justices Boyce, Busby, and Brown.

OPINION

J. Brett Busby, Justice

Appellants Jose Gerardo Padilla, Giovanna Padilla, and Houston Best Foods & Services, LLC d/b/a Doneraki Fulton appeal from the trial court's order dismissing their inverse condemnation lawsuit against appellee Metropolitan Transit Authority of Harris County (Metro) for lack of subject-matter jurisdiction. Appellants owned and operated a Doneraki restaurant on Fulton Street in Houston, Texas. Appellants alleged that Metro's construction of a light rail line along Fulton blocked access to the restaurant for significant periods of time, forcing the closure of the restaurant. Appellants sued Metro, alleging, among other claims, that they were entitled to compensation for the total, temporary blockage of access under Article 1, section 17 of the Texas Constitution.

In multiple issues on appeal, appellants argue that the trial court erred when it dismissed their inverse condemnation lawsuit. Because the jurisdictional evidence raised a genuine issue of material fact on both Metro's intent and on whether Metro's construction of the light rail line temporarily blocked all access to the Doneraki restaurant and thereby damaged appellants' property, we hold that the trial court erred when it granted Metro's motion to dismiss. We therefore reverse the trial ***81** court's order of dismissal and remand the case to the trial court.

BACKGROUND

A. Access to appellants' restaurant before Metro's North Line project began

Appellants' restaurant was located on the southeast corner of the intersection of Fulton Street and Halpern Street. Fulton runs along the west side of the restaurant property and Halpern borders the north side of the restaurant property. The property had a restaurant building as well as a paved parking area accessible from Halpern Street. To supplement the on-site parking area, appellants leased a separate surface parking lot a short distance south of the restaurant on Fulton Street. The public entrance into the restaurant building fronted on Fulton Street.

Prior to the construction, Fulton Street adjacent to the restaurant consisted of one northbound lane with an additional six-foot wide bike lane, one southbound lane with an additional six-foot wide bike lane, and a curbed median. The intersection of Fulton and Halpern was controlled by a traffic light. The following traffic movements were permitted at that intersection prior to the construction project: (1) vehicles traveling southbound on Fulton could continue through the intersection, make a right turn into an apartment complex, make a left turn onto Halpern and travel east, or make a u-turn and travel north on Fulton; (2) vehicles traveling northbound on Fulton could continue straight through the intersection, make a right turn onto Halpern and travel east, make a left turn into the apartment complex, or make a u-turn and travel south on Fulton; and (3) vehicles traveling westbound on Halpern could continue through the intersection into the apartment complex, make a right turn onto Fulton and travel north, or make a left turn onto Fulton and travel south.

B. The North Line construction plans

Metro began construction of a five-mile extension of an existing light rail line, referred to as the North Line, in the spring of 2009. As part of the rail-line extension, Metro had to relocate public and private utilities, widen

and reconstruct portions of North Main, Boundary, and Fulton streets, install new traffic signals and associated wires and cables, and construct the light rail guideway and transit stations. Although Metro did none of the actual work on the project, the work was performed by private companies operating under contract with Metro. Metro's agreement with its chosen builder, which eventually became Houston Rapid Transit Joint Venture (HRT), is set forth in six documents that we refer to collectively as the Contract. The Contract admonished HRT not to use private property in the construction of the North Line or to engage in acts of negligence that would harm property owners along the route. The Contract also urged HRT to minimize impacts to adjoining property owners:

> Design–Builder [HRT] shall ensure that all of its activities and the activities of Subcontractors are undertaken in a manner that will minimize the effect on surrounding property and the public to the maximum extent practicable. Without limiting the foregoing, Design-Builder shall fully and timely implement the provisions on minimizing impacts of noise, dust, vibration, construction lighting, traffic and pedestrian diversion, and other construction-related activities to properties, businesses, and residents adjacent to the Work and to the general public set forth in the Contract Documents.

The Contract also admonished HRT to maintain reasonable access to the properties adjoining the North Line, providing as ***82** follows: "The Facility Provider [HRT] shall provide and maintain vehicle and pedestrian access to all public and private properties during the construction, except for limited short periods of time when full and complete access is not possible." HRT retained the discretion, however, to construct the North Line in the manner it deemed most appropriate.

C. Construction adjacent to the restaurant

Beginning in January 2011 and continuing through approximately June 2011, HRT reconstructed the northbound lane of Fulton adjacent to the restaurant and nearby separate parking lot. Metro did not acquire any portion of the restaurant property as part of the North Line project.

According to Jose Padilla, however, the construction prevented customers from accessing the restaurant property, blocking all of the entrances and exits for months at a time. Additionally, access to the property during construction was all but impossible for reasonably competent drivers of ordinary passenger cars.

Although appellants continued, for a time, to operate the restaurant for those customers able to access the property, appellants asserted that Metro's construction activity prevented appellants' trash company from removing trash between the beginning of February and the latter part of March 2011. The resulting foul-smelling pile of trash adjacent to the restaurant further reduced business. Appellants also contended that construction workers broke a gas line in approximately January 2011 and ruptured a water line in May 2011, causing a total temporary loss of the use of the property in both instances.

D. Access to the restaurant following construction

The construction of the North Line and City of Houston traffic safety requirements resulted in permanent restrictions on traffic movements in the area. The intersection of Fulton and Halpern has been closed to east-west through traffic. The following traffic movements are now permitted at that intersection: (1) vehicles traveling southbound on Fulton may continue through the intersection or make a right turn into the apartment complex; (2) vehicles traveling northbound on Fulton may continue through the intersection or make a right turn onto Halpern and travel east; and (3) vehicles traveling westbound on Halpern must make a right turn onto Fulton and travel north. Although the Fulton/Halpern intersection is closed to east-west through traffic, some intersections in the area remained open to east-west through traffic. The open intersections include the Fulton/Hays intersection, located approximately 700 feet north of the restaurant, and the Fulton/Boundary intersection, located approximately 1,150 feet south of the restaurant.

According to appellants, once construction was completed, access to the restaurant was possible but

difficult. Although some access remained, appellants alleged that the business could not survive the more than $500,000 in losses suffered during construction, and the restaurant was closed in November 2011.

E. The litigation

Appellants filed an inverse condemnation lawsuit against Metro pursuant to Article 1, Section 17 of the Texas Constitution. Appellants sought to recover lost profits allegedly caused by the temporary, total denial of access to the restaurant during the construction of the North Line. Appellants also sought to recover for the permanent diminution in the value of the property caused by the alleged material and substantial impairment of access once the North Line construction was completed.

***83** Metro responded by filing a motion to dismiss for lack of jurisdiction. Metro argued that the trial court did not have jurisdiction over appellants' inverse condemnation suit because: (1) any impairment appellants suffered was not material and substantial; (2) appellants' losses were "community damages" and therefore not compensable under Texas law; (3) Metro did not have the required intent to effect a taking; and (4) Metro enjoys sovereign immunity in all circumstances unless its immunity has been waived by a specific act of the Legislature.

Appellants filed a response in opposition to Metro's motion to dismiss. Appellants attached an affidavit to their response stating that access to the restaurant was: (1) totally blocked during the construction adjacent to its location; and (2) permanently impaired after construction. The trial court granted Metro's motion to dismiss, and this appeal followed.

ANALYSIS

Appellants raise three issues on appeal challenging the trial court's dismissal of their suit against Metro. We address these issues together.

I. Standard of review and applicable law

[1] **[2]** A governmental unit's plea to the jurisdiction may challenge either the plaintiff's pleadings or the existence of jurisdictional facts. *Texas Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 226–27 (Tex.2004). When, as here, the governmental unit challenges the existence of jurisdictional facts, and the parties submit evidence relevant to the jurisdictional challenge, we must consider that evidence as necessary to resolve the jurisdictional issues raised. *Id.* at 227–28; *Olivares v. Brown & Gay Eng'g, Inc.,* 401 S.W.3d 363, 369 (Tex.App.–Houston [14th Dist.] 2013), *aff'd,* 461 S.W.3d 117 (Tex.2015); *see Perez v. City of Dallas,* 180 S.W.3d 906, 913 (Tex.App.–Dallas 2005, no pet.) (examining the jurisdictional evidence submitted by both parties in the litigation to resolve governmental unit's plea to the jurisdiction). This evidence includes the nonmovant's discovery responses. *See State v. Fiesta Mart, Inc.,* 233 S.W.3d 50, 56 (Tex.App.–Houston [14th Dist.] 2007, pet. denied) ("The trial court properly considered Fiesta's [discovery] responses in determining whether it had jurisdiction.").

[3] If the evidence raises a fact issue as to jurisdiction, the governmental unit's plea must be denied because the issue must be resolved by the trier of fact. *Miranda,* 133 S.W.3d at 227–28. If the relevant evidence is undisputed or fails to present a jurisdictional fact issue, however, the court should rule on the plea as a matter of law. *Id.* The standard of review for a plea to the jurisdiction based on evidence generally mirrors that of a motion for summary judgment. *Quested v. City of Houston,* 440 S.W.3d 275, 279–80 (Tex.App.–Houston [14th Dist.] 2014, no pet.). We therefore must credit evidence favoring the nonmovant and draw all reasonable inferences in the nonmovant's favor. *Id.*

[4] **[5]** **[6]** **[7]** **[8]** The Texas Constitution provides that no person's property "shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made...." Tex. Const. art. I, § 17. Thus, the Texas Constitution waives governmental immunity from suit for the taking, damaging, or destruction of property for public use and requires compensation for such destruction. *State v. Bhalesha,* 273 S.W.3d 694, 697 (Tex.App.–Houston [14th Dist.] 2008, no pet.). To prove an inverse condemnation claim, a claimant must show that a governmental actor intentionally performed acts that resulted in ***84** the taking, damaging, or destruction of its property. *Smith v. City of League City,* 338 S.W.3d 114, 122 (Tex.App.–Houston [14th Dist.] 2011, no pet.) (citing *State v. Holland,* 221 S.W.3d 639, 643 (Tex.2007)). For purposes of article I, section 17, a governmental entity acts intentionally if it knows either that a specific act was causing identifiable harm or that

specific property damage was substantially certain to result from the entity's action. *City of San Antonio v. Pollock,* 284 S.W.3d 809, 821 (Tex.2009). A governmental entity is substantially certain that its actions will damage property when the damage is necessarily an incident to or necessarily a consequential result of the governmental entity's action. *Id.* An awareness that damage is a mere possibility is not evidence of the governmental entity's intent. *Id.* The government's knowledge must be determined as of the time it acted, not with the benefit of hindsight. *Id.*

[9] Not all damage caused by government construction projects is compensable. Property owners may not recover for injuries sustained in common with the community where the property is situated, such as damage from noise, dust, increased traffic, diversion of traffic, circuity of travel, and other inconveniences incident to road or highway construction. *See Felts v. Harris County,* 915 S.W.2d 482, 485 (Tex.1996); *State v. Whataburger, Inc.,* 60 S.W.3d 256, 260 (Tex.App.–Houston [14th Dist.] 2001, pet. denied) ("Increased access to property often enhances its value; the inconvenience and temporary impairment which a property owner suffers when street improvements are made is simply an incident of city life and must be endured.").

[10] **[11]** **[12]** **[13]** Damages peculiar to a property owner, such as impaired access, are not barred by the concept of community injury. *State v. Heal,* 917 S.W.2d 6, 9 (Tex.1996). To obtain compensation for impairment of access, a plaintiff must establish that the governmental entity materially and substantially impaired access rights to his property. *Whataburger, Inc.,* 60 S.W.3d at 261. More specifically, the plaintiff must show that there has been: (1) a total but temporary restriction of access; (2) a partial but permanent restriction of access; or (3) a temporary limited restriction of access brought about by an illegal activity or one that is negligently performed or unduly delayed. *Id.* If the plaintiff does so, the property owner is entitled to be compensated for the lost profits arising from the denial of access. *Id.* Whether there has been a material and substantial impairment of access is a question of law for the court. *Heal,* 917 S.W.2d at 9.

II. The jurisdictional evidence raises a fact issue on appellants' inverse condemnation claim against Metro.

In its motion to dismiss, Metro argued that "the jurisdictional facts do not support a cause of action for which Metro's immunity has been waived." Many of Metro's arguments attacked appellants' now-abandoned claim that the North Line construction caused a permanent, partial impairment of access to their restaurant.[1] With respect to appellants' remaining claim that the North Line construction caused a temporary, total denial of access to the restaurant, Metro made two arguments. First, ***85** Metro asserted that appellants' complaints alleged problems arising out of the construction that are non-compensable community damages. Second, Metro argued that the jurisdictional evidence established that it did not have the necessary intent to take or damage appellants' property. In response, appellants argued that the jurisdictional evidence raised a genuine issue of material fact on whether the construction caused a temporary, total denial of access to their restaurant as well as on Metro's intent. We examine each argument in turn.

A. There is a fact issue on whether the construction of the North Line caused a temporary, total denial of access to appellants' restaurant.

[14] In its motion to dismiss, Metro argued that it established as a matter of law that the North Line construction did not cause a temporary, total denial of access to appellants' restaurant. Metro attached to its motion the affidavit of Michael Bruce Krantz, the "Senior Project Director of METRORail Expansion Capital Programs." In that role, Krantz was "responsible for monitoring and reporting on the status of the Metro light rail projects and interfacing with [HRT], its subcontractors, and the City of Houston ... regarding those projects." Krantz also stated that as a result of his work, he was "familiar with the planning, design, and construction of the extension of Metro's Red Line light rail line 5.3 miles north, from the University of Houston–Downtown to the Northline Transit Center." According to Krantz, although the construction caused occasional disruptions along the route, HRT always made alternative arrangements so customers could access appellants' restaurant and its parking.[2] Because HRT always made arrangements for access to the restaurant and parking areas for the use of the restaurant's patrons, Metro argued that appellants' allegations regarding access were nothing more than the type of non-compensable inconveniences associated with all government transportation projects, and therefore its immunity was preserved.

Appellants attached an affidavit of appellant Jose Gerardo Padilla to their response to Metro's motion to dismiss. According to Padilla, he was in charge of the Fulton Doneraki restaurant and was present at the restaurant "virtually every day during Metro's construction of a light rail route in the vicinity of our restaurant." Among other things, Padilla stated that "for months[ ] at a time all the entrances and exits were blocked." Padilla continued that "there were many times when the restaurant access was blocked for long periods because road work and utility work around the restaurant was left unfinished with no crews working at all." In appellants' view, the trial court erred when it granted Metro's motion to dismiss because Padilla's affidavit generated a fact issue on the question whether access to the Doneraki restaurant was totally blocked for temporary periods during the light rail construction project. Metro responds, as it did in the trial court, that Padilla's affidavit is not competent evidence because his statements are conclusory.

[15] **[16]** **[17]** A conclusory statement is one that expresses a factual inference without providing underlying facts to support that conclusion. *See, e.g., Arkoma Basin Expl. Co. v. FMF Assocs. 1990–A, Ltd.,* 249 S.W.3d 380, 389 n. 32 (Tex.2008); ***86** *Dolcefino v. Randolph,* 19 S.W.3d 906, 930 & n. 21 (Tex.App.–Houston [14th Dist.] 2000, pet. denied) (holding statement in affidavit that "this was false and defamatory and has injured me in my profession" was conclusory). Affidavits containing conclusory statements that fail to provide the underlying facts supporting those conclusions are not proper summary judgment evidence. *Nguyen v. Citibank, N.A.,* 403 S.W.3d 927, 931 (Tex.App.–Houston [14th Dist.] 2013, pet. denied). To avoid being conclusory, an affidavit must contain specific factual bases, admissible in evidence, from which any conclusions are drawn. *Southtex 66 Pipeline Co. v. Spoor,* 238 S.W.3d 538, 542 (Tex.App.–Houston [14th Dist.] 2007, pet. denied). In Metro's view, Padilla's statements are conclusory because his affidavit does not include necessary additional facts —such as describing exactly what was blocking access to the restaurant—supporting his statement that access was blocked.

We hold that Padilla's affidavit is not conclusory. Padilla's statement that "for months[ ] at a time all the entrances and exits were blocked" by Metro's construction is a statement of fact, not an inference from unstated facts. *See Arkoma Basin Expl. Co.,* 249 S.W.3d at 389 n. 32. Moreover, Padilla provided background facts that explain the basis of his factual statement that access was blocked. Padilla stated that he was in charge of the restaurant and was present at the restaurant "virtually every day" during the construction project. *See Southtex 66 Pipeline Co.,* 238 S.W.3d at 543 ("A person's position or job responsibilities can peculiarly qualify him to have personal knowledge of facts and establish how he learned of the facts."). Padilla also explained that road work and utility work around the restaurant was left unfinished for long periods, with no crews working at all. The cases Metro cites do not support its contention that minute detail is necessary to render testimony regarding blocked access non-conclusory. [3] Because Padilla's affidavit is competent evidence, we hold that it raises a genuine issue of material fact on whether Metro's North Line construction activities caused a temporary, total denial of access to appellants' restaurant. *See Whataburger, Inc.,* 60 S.W.3d at 261.

B. There is a fact issue on Metro's intent.

[18] **[19]** To establish an inverse condemnation claim, a claimant must show that a governmental actor acted intentionally when it took or damaged property for a public use. *Smith,* 338 S.W.3d at 122. Intent may be shown by circumstantial evidence. *Harris County Flood Control Dist. v. Kerr,* No. 13–0303, 2015 WL 3641517, at *3 (Tex. June 12, 2015). Metro argued in its motion to dismiss that the trial court did not have jurisdiction because the jurisdictional evidence established conclusively that it did not have the requisite intent. To defeat intent, Metro relied on its contract with HRT and the argument that it was HRT and HRT's subcontractors, not Metro, that actually performed the work causing any denial of ***87** access. Because the contract instructed HRT to minimize the effects of construction on private property owners, Metro asserted that it did not know damage beyond the typical disruptions associated with construction was substantially certain to result.

[20] In *City of Dallas v. Jennings,* the Supreme Court of Texas held that a governmental entity may be held liable for compensation under article 1, section 17 of the Texas Constitution if it (1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized governmental action—that is, that the damage is necessarily an incident to, or necessarily a consequential

result of, the government's action. 142 S.W.3d 310, 314 (Tex.2004). Under this standard, a governmental entity responsible for a construction project cannot avoid its constitutional obligation to compensate private property owners for resulting damage simply by proving that the project was carried out by contractors rather than the entity itself. *See City of Dallas v. Zetterlund,* 261 S.W.3d 824, 831–32 (Tex.App.–Dallas 2008, no pet.) (rejecting plea to the jurisdiction because city failed to prove as a matter of law that it did not know about or authorize actions of contractors).

Here, it is undisputed that construction of the North Line was an authorized Metro project. Metro's contractual instruction to minimize the impact of construction on surrounding property owners indicates that it anticipated such impact. In addition, Krantz—Metro's Senior Project Director responsible for monitoring and reporting on the status of the project—stated in his affidavit that he monitored the project regularly, and he professed detailed personal knowledge of facts regarding access to appellants' property. On this record, Metro's argument to the trial court regarding use of contractors does not prove as a matter of law that Metro lacked knowledge that construction (1) was causing identifiable harm to appellants, or (2) was substantially certain to result in specific property damage to appellants. *See Jennings,* 142 S.W.3d at 314.

Because the jurisdictional evidence shows there are genuine issues of material fact regarding both of Metro's arguments challenging the trial court's subject-matter jurisdiction, we sustain appellants' issues on appeal.

CONCLUSION

Having sustained appellants' issues on appeal, we reverse the trial court's order dismissing appellants' inverse condemnation claim against Metro based on a temporary, total denial of access to their restaurant, and we remand this case to the trial court for further proceedings.

All Citations

497 S.W.3d 78

Footnotes

1 Appellants initially alleged claims for both a permanent, partial restriction of access and a temporary, total denial of access. During oral argument, appellants conceded that we no longer need to consider the permanent, partial restriction of access claim in this appeal. Therefore, the only claim still at issue here is appellants' claim that Metro's construction of the North Line project created a temporary, total denial of access.

2 These disruptions included a six-day closure of the Fulton Street access to the restaurant's separate Fulton Street parking area. While admitting the closure, Krantz stated that HRT arranged an alternative access point to that parking lot as well as the use of another parking lot in the area during the entrance closure.

3 *See Brookshire Katy Drainage Dist. v. Lily Gardens, LLC,* 333 S.W.3d 301, 308–09 (Tex.App.–Houston [1st Dist.] 2010, pet. denied) (holding affidavit statement of District's president interpreting District's legislative authority was legal conclusion and thus not competent summary judgment evidence); *Stryker v. Broemer,* No. 01–09–00317–CV, 2010 WL 4484176, at *5 (Tex.App.–Houston [1st Dist.] Nov. 10, 2010, pet. denied) (holding plaintiff's statement that she suffered mental anguish as a result of attorney's failure to settle case was conclusory); *Southtex 66 Pipeline Co.,* 238 S.W.3d at 543–45 (holding attorney/witness did not provide facts explaining how he had expertise to interpret Texas Railroad Commission documents).

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