

Lessons (To Be) Learned from PR Investments and FKM Partnership

On December 15, 2006, the Texas Supreme Court granted review in two condemnation cases involving the extent of a condemning authority's ability to materially alter the nature of its taking, *State v. PR Investments and Specialty Retailers, Inc.*, 180 S.W.3d 654 (Tex. App.—Houston [14th Dist.] 2005, review granted), and *Board of Regents of University of Houston System v. FKM Partnership, Ltd.*, 178 S.W.3d 1 (Tex. App.—Houston [14th Dist.] 2005, review granted). The cases were submitted to the Court, with oral argument, on March 21, 2007. As of December 15, 2007, the Court has not issued opinions in either case. While this is not an unusual delay, particularly in light of the complexity of the issues involved, the premise of this paper was to be an analysis of the Supreme Court's opinions in these cases. Instead, the paper offers an analysis of the issues presented in the Supreme Court and some thoughts on how the Court might rule and why.

State v. PR Investments and Specialty Retailers, Inc.

The State's Taking

The State sought to condemn a portion of the front part of property owned by PR Investments (PRI) and leased to Specialty Retailers, Inc. for the widening of South Main (US-90A) in Houston. The State's plans were to elevate the main lanes of the highway in front of the remainder property. During pre-suit negotiations between the State, PRI, and Specialty Retailers, the State agreed to construct a raised, concrete traffic island and deceleration and acceleration lanes to provide a safe and suitable means of access in and out of the property. At the special commissioners' hearing, the State represented it would use the condemned property in accordance with this construction plan, which significantly reduced the potential impacts of the State's taking on the remainder property.

Only days before trial, the State for "litigation" purposes switched to a materially different construction plan which resulted in substantially increased damages never considered by the special commissioners in determining the compensation to which the property owners were entitled. At trial, the State insisted on proceeding on the newly-disclosed construction plan, even though that plan was never considered by the special commissioners and was not timely disclosed at any time before trial. The State offered as an alternative to try the case on the first plan—the only plan timely disclosed—with the assurance to the trial court that the State would never build its project in accordance with that plan. Faced with these alternatives, the trial court dismissed the State's petition, without prejudice to its refile, and awarded litigation fees and expenses to PRI and Specialty Retailers.

The Intermediate Appeal

The Fourteenth Court initially affirmed, reasoning under *State v. Nelson*, 334 S.W.2d 788 (Tex. 1960), that the trial court had lost the power to grant the relief requested by the State when the State implemented a material change in its intended use of the property on the eve of trial, substantially altering the compensation facts from what was considered by the special commissioners. In a 5-4 *en banc* decision, the Fourteenth Court vacated the panel's decision and reversed the trial court's judgment. The majority dismissed *Nelson's* discussion regarding the

nature of a trial court's eminent domain jurisdiction and held that nothing in the Texas condemnation scheme prohibits a condemning authority from substantially changing its proposed use of the condemned property after the special commissioners' hearing, even if this change materially prejudices the property owner, or requires that the damages issues presented in the trial court bear any relation to those considered by the special commissioners.

Four judges dissented, explaining that the majority had replaced "trial de novo" in a condemnation case with "trial by ambush" and had confused subject matter jurisdiction with "the trial court's appellate jurisdiction—or its power to proceed—in eminent domain cases." The dissent warned that, under the majority's analysis, a condemning authority could "completely subvert the administrative phase of an eminent domain" case and has "no incentive to present the special commissioners with evidence of the nature of what it actually intends to build or the use to which it intends to put the land." Instead, the dissent noted, a property owner could never be assured of a true determination of compensation at the administrative level before the special commissioners and, thus, must appeal the commissioners' award in every case to be assured that the compensation will be based on the condemning authority's "final" plan for the use of the condemned property, undermining the legislative intent to resolve compensation disputes at the administrative level so as to avoid burdening the judicial system.

In the Supreme Court

In the absence of an opinion, the best indicator of the Court's outlook on the case may be found in the questions to counsel during oral argument.

Dixon Montague argued the case to the Supreme Court. Mr. Montague argued that it was vital that the Court reverse the appellate court's majority opinion if we are to have a "fair and efficient condemnation process" in this State. The questions to Mr. Montague indicated a Court divided between notions of fairness and efficiency in evaluating the property owners' position.

This divide was evidenced by the first two questions from the Court to Mr. Montague, by Justice Medina and Justice Brister. Justice Medina asked counsel to address whether the lack of timely notice to Specialty Retailers of the final plan would allow for "trial by ambush." Before the question was even partially addressed, however, Justice Brister interrupted the discussion by asking counsel whether "this all could have been fixed with a short continuance." The questions reflect the tension between the unfairness of allowing the State to change its plans from what was presented to the special commissioners and the perceived harshness of the remedy prescribed by the Texas Property Code and ordered by the trial court in this case: a complete dismissal of the State's condemnation proceeding, after payment to the property owner of its litigation fees and expenses incurred.

As argued by Mr. Montague, the key to this case is the procedure set forth in Article 21.017 of the Texas Property Code. This procedure requires an administrative hearing to satisfy the due process requirements of Article 1, Section 17 of the Texas Constitution. A condemning authority is required to pay compensation into the registry of the court *before* it can occupy or use the property taken, and a condemning authority should not be allowed to orchestrate the proceedings to minimize the extent of this obligation. The Court characterized the State's course of conduct in presenting the less burdensome plan at the administrative hearing

and the more burdensome plan at trial as a “bait and switch,” and this terminology caught on as a shorthand reference for the State’s tactic.

Justice Wainwright asked why the Court should not apply “a certain level of abstraction” to the concept of the intended use of the part taken. The State pleaded that it intended to use the property for highway purposes, and the proposed use under both plans was for highway purposes. Mr. Montague identified two problems with the premise of this question. First, if the only limitation to the State’s intended use of the property was for “highway purposes,” then within “highway purposes” the property owner could argue the fullest extent of the State’s possible use of the part taken in assessing damages to its remaining property. *See Gleghorn v. City of Wichita Falls*, 545 S.W.2d 446, 447-48 (Tex. 1976) (if proposed use of condemned property is not specifically limited, jury may consider condemnor’s right to use property to fullest extent provided in pleadings). More importantly, the State itself imposed additional limits on its intended use of the part taken than the general “highway purposes” language set forth in its condemnation petition. The State limited the planned use of the part taken to a specific set of plans in order to limit the amount of compensation it was required to pay. To allow the State to renege on this limitation after the property owner has relied on it and after the State has benefited from it, in the form of a lesser payment required before possession may be obtained, offends traditional notions of fairplay.

Following this discussion, Justice Brister expressed the Court’s concern about the trial court’s purported dismissal of the case for lack of jurisdiction, noting the trend in the Court’s decisions to avoid declarations that things are jurisdictional because of issues of finality. This is a red herring. Mr. Montague plainly clarified that the trial court’s dismissal was not a matter of subject matter jurisdiction. Once the case is appealed to the trial court, the trial court has subject matter jurisdiction of the compensation claim and every other issue that may be presented. The trial court’s judgment would not be subject to collateral attack, as would a judgment entered by a court that lacked jurisdiction. This must be true because the defects that can cause a condemnation case to be dismissed “for lack of jurisdiction” may be waived, while true jurisdictional defects may not. Instead, in the parlance of condemnation cases, the trial court’s “lack of jurisdiction” was analogous to a failed condition precedent. The trial court could not award title to the condemning authority under the procedural context presented.¹

Justice O’Neill recognized that, despite some apparent confusion in the court of appeals, the issue was clearly not subject matter jurisdiction and instead equated the trial court’s reference to a lack of jurisdiction to a court’s appellate jurisdiction. The Supreme Court lacks jurisdiction to address facts that were not presented in the lower courts. Similarly, upon an appeal of the administrative proceeding, the trial court cannot address compensation facts that were not presented in the administrative proceeding.

Mr. Montague brought the discussion back to his point that the property owner is not adequately compensated for the taking of his property if the condemning authority can present

¹ Despite the “jurisdictional” terminology used in condemnation cases, the statutory prerequisites that a condemning authority must comply with to condemn property are really conditions precedent. Like any other condition precedent, the failure to perform one of these conditions precludes recovery and requires a dismissal. Unlike conditions precedent in contractual settings, however, the dismissal of a condemnation case is generally without prejudice to refile once the condition or prerequisite has been complied with.

plans in the administrative hearing to limit the property owner's compensation but is not bound to those plans. However, the Court continued to press on the perceived inefficiency of throwing the whole case out and starting over anew. In pressing this issue, the Court demonstrated some confusion over the how these cases proceed in general. For example, a number of justices inquired whether the case could be "remanded" to the panel of special commissioners for additional proceedings, similar to a remand to the trial court. Because a panel of special commissioners is disbanded upon its filing of the award with the trial court, such a procedure is not available. Additionally, there is no mechanism, as Justices O'Neill and Hecht suggested, for the trial court to impose an additional deposit to supplement the award upon the condemning authority's interjection of materially different compensation facts.

Mr. Montague noted that the danger of allowing the State to proceed as it has in this case was demonstrated by the compensation facts. Based on the plan presented at the administrative hearing, the award of compensation was \$200,000. Under the new plan, the property owner contends damages are more than \$5 million, or 25 times the award. Assuming just compensation is \$5 million, the State's contrivance resulted in inadequate compensation of \$4.8 for the State's possession of the property until final compensation is determined and title is awarded. Because just compensation in this State requires that compensation to be paid first, before the State may take possession, an inadequate payment of the preliminary determination of compensation is constitutionally inadequate compensation.

Justice Brister responded to this argument by asking whether that would not always be true where the amount of final compensation exceeded the amount of the award. The difference between the simple circumstance of the property owner recovering more at trial than at the administrative hearing and what happened in this case is straight-forward: the property owner did not have the opportunity to recover for the true impacts to its remaining property during the administrative hearing because the State limited the compensation facts to a plan that it ultimately did not intend to build.

Chief Justice Jefferson was concerned that the property owners' argument was one to be made to the Legislature, noting that the condemnation statute lacked the level of specificity of the condemning authority's intended or proposed use of the part taken advocated by the property owners. The focus of the Court's question was the pleading requirements of Section 21.012 of the Texas Property Code. Mr. Montague redirected the Court to Sections 21.041 and 21.042 of the Texas Property Code, which relate to the evidence to be considered by the special commissioners in partial takings cases in determining compensation. This evidence need not be identical to what is presented in the trial court, but if it is materially different in kind or degree, the trial court must have discretion to address situations when the condemning authority has circumvented the protections afforded to the property owner by the statutory framework requiring a meaningful determination of just compensation before the condemning authority may obtain possession and use of the property to be acquired.

The final question to Mr. Montague again reflected the Court's aversion to the remedy afforded to the trial court in this situation. Justice Wainwright posited the situation of an agreement between the parties on the plan to be followed and a subsequent determination by the State for legitimate reasons to follow another plan and asked what should happen if the State believes changes need to be made. Mr. Montague argued that the State should make the changes

but that if they are material, the case must go back to the special commissioners, by way of dismissal.

Danica Milios argued the case for the State. Her first argument was an effort to equate the State's position with the Court's opinion in *Hubenak*, arguing that the *PR Investments* case calls upon the Court to decide whether it really meant what it said in *Hubenak* that procedural errors are not jurisdictional. Justice O'Neill rejected this argument, noting the concession by the property owners that "we are not talking about subject matter jurisdiction."

Ms. Milios then contradicted the property owners' assertion that there is something special about the administrative hearing, arguing instead that the one and only "endgame" in a condemnation is just compensation. Justice O'Neill expressed her concern that, if that argument were true, then the special commissioners' hearing would become a "pro forma" proceeding because the condemning authority could limit the proceeding to compensation facts that would not ultimately control the compensation to be paid.

At this point, Justice Brister took up the fairness issue with the State's tactics exhibited in this case. He asked what the remedy would be for the property owner if this change in plan occurred after a decision by the property owner not to appeal the award based on the State's promise that the project will be constructed in a certain manner. Ms. Milios saw no prejudice to the property owner in this situation because it could file an inverse condemnation case against the State in that situation.² Justice Medina noted at a minimum it would add the burden of additional expenses and would put the property owner at a procedural disadvantage. Justice Hecht agreed that, at a minimum, the property owner is put out by having to file another lawsuit. He then posited his own hypothetical of a nefarious condemning authority who might take this tack to simply run the property out based on the disparity of resources of the State and property owners and the State's considerable ability to "keep it up."

Ms. Milios argued that the State's conduct was not a bait and switch. Justice Medina outlined the facts of the case in rejecting this argument: you had a party rely on a plan the State had presented to it, that party did not participate in the special commissioners' hearing based on this representation, and then the State changed the plan. As Justice Medina concluded, "this was a bait and switch."

Chief Justice Jefferson asked what it meant to fail to bring the case properly. Ms. Milios argued that this has to relate to Section 21.012, which in *Hubenak* the Court said was not jurisdictional. Justice O'Neill again distinguished *Hubenak*, this time because *Hubenak* did not address the compensation issue. Ms. Milios responded with the strained argument that *Hubenak* addressed good-faith offers and that good faith offers "would of course go before the special commissioners." This is obviously incorrect. The fact that the State's offer may be coincident with its position on the compensation issue does not mean that the special commissioners are asked to make any determination regarding good faith offers or any other issue outside of the amount of compensation to be paid for the taking.

² The Supreme Court's opinion in *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005), provides a grim outlook on the property owner's likelihood of recovery in such an inverse proceeding.

The Court next asked about the State's position as to the Court's authorities holding that the proceeding in the trial court is an appeal. Ms. Milios first argued that it was a trial *de novo* and that, therefore, there were no limitations on the court's jurisdiction. She quickly retracted this statement, admitting that the trial court could not consider additional property or parties not involved in the administrative proceeding but that these were the only two limitations.

Justice Hecht then asked a loaded question and received a telling response. In response to his question as to whether Ms. Milios thought it was ever possible for a condemning authority to change course during a condemnation proceeding to the prejudice of the property owner, she answered that it was not. Justice Hecht repeated his question: "so the landowner cannot be prejudiced?" The second time around, Ms. Milios conceded the possibility of prejudice only if the trial court failed to grant a continuance. In response to this concession, Justice Brister noted that continuances always cost money, too, and that Section 21.0195 did not give the trial court the authority to award fees or expenses in the event of a continuance. The situation, as described by Justice Brister, "didn't quite seem fair": if the trial court cannot dismiss the condemnation case, then the State can materially change the compensation facts and the property owner has to pay Dixon Montague's not insubstantial fees to go through all of this again and it doesn't get compensated for that.

On rebuttal, Allyn Hoaglund argued for Specialty Retailers. The Court asked Mr. Hoaglund why inverse condemnation did not cure the problems presented by the State's conduct. In response, Mr. Hoaglund argued that, contrary to Ms. Milios's arguments, PR Investments and Specialty Retailers would be limited in their ability to recover additional damages in a subsequent inverse-condemnation action under the rule of *City of La Grange v. Pieratt*, 175 S.W.2d 243, 246 (Tex. 1943), in which the Supreme Court held that, following a condemnation action, landowners could not recover in subsequent suit for any damages that reasonably could have been foreseen at the time of the prior condemnation action.

Justice Brister returned to the Court's efficiency concern, asking Mr. Hoaglund whether a three-month continuance would be more efficient than closing the whole case down and requiring the State to pay several hundred thousand in fees and expenses. Mr. Hoaglund responded that that the trial court did not have appellate jurisdiction to proceed and, thus, could not grant the proposed continuance. Justice Brister came back to the efficiency issue: "So we need to do it the more expensive and inefficient way because that's what the statute requires?"

Mr. Hoaglund disagreed with the Court's characterization that this was the more expensive and more inefficient way. For this particular case, it may seem draconian to throw out the whole case and start again. However, the Supreme Court should be more concerned with the State's jurisprudence in these cases than the impacts on particular litigants. It should be obvious that, over the long run, it will be more efficient to require condemning authorities to finalize the plans for their proposed public facilities before putting property owners through the expense, effort, and inconvenience of an involuntary acquisition procedure. Moreover, even in the instant case, the question is not which process would be more inefficient or expensive but rather who should have to bear the cost. If the trial court does not dismiss the case and award the property owner its litigation fees and expenses and instead grants a short continuance, then the inefficiency and expense is simply shifted from the condemning authority, whose conduct resulted in the inefficiency and increased expense, to the property owner who, having had to pay fees and

expenses to prepare for one plan will have to pay additional fees and expenses to prepare for the next plan and potentially the one after that.

Conclusion

The Court's decision will turn on one of two arguments. If the Court gets it right, it will have to reject the State's argument that the special commissioners' hearing is not special and that the only endgame is just compensation. The timing of when just compensation is paid is clearly important: the Texas Constitution requires a condemning authority to pay just compensation *before* it may occupy and use property for public use. The amount of just compensation is also clearly important. If the statutory framework is to continue to have relevance to these proceedings, if the special commissioners' hearing is special, then the Court must recognize the trial court's ability to ensure that the proceeding to set the amount of just compensation before the condemning authority may take possession fully and fairly protects property owners during any subsequent litigation of the compensation issue.

If the Court gets it wrong, it will be because of the perceived inefficiency of the remedy: dismissal of the case and payment of the property owner's substantial fees and expenses, what the Court has characterized as a "complete redo." One problem with this concern is that not dismissing the case is just as inefficient. The only difference is who has to bear the brunt of the inefficiency. It is not clear why this cost should be shifted to the property owner when inevitably it will be the condemning authority whose conduct has resulted in the inefficiency, whether by failing to adequately anticipate planning issues or by its litigation tactics. Leaving the possibility of nefarious condemning authorities aside, another problem with the Court's efficiency concern is the diminished incentive for condemning authorities to "get it right" the first time. Government needs to be flexible and adaptive. Government also needs to exercise diligence in the planning of public projects that will require the involuntary acquisition of private land. A condemning authority should not be permitted to take private land without a specific, planned use for the property. This is not to say that plans cannot change, but the incentives should be structured to reward careful, consistent planning so that such changes are few and far between. In the few instances when such a change is required to better serve the public use, it is only fair that this public burden be borne by the public as a whole and not by the individual property owner.

Board of Regents of University of Houston System v. FKM Partnership, Ltd.

The State's Taking

This is a whole taking case. FKM challenged the University's legal authority to take its property, primarily for three reasons: (1) the University could not sustain its constitutional and statutory burden to prove that its condemnation of FKM's property was necessary to serve the "public purpose" declared by its governing board; (2) the University altered the compensation facts for trial from those considered at the administrative level, injecting materially different compensation issues before the trial court that were never considered by the special commissioners, to FKM's substantial prejudice; and (3) the University did not bring its condemnation action in good faith nor did it ever negotiate with FKM to acquire from it the five-

foot wide strip it sought in its amended condemnation petition, wholly ignoring the “good faith” negotiation requirement.

The facts are aggressive. In 1999, the University filed its condemnation case to take all of FKM’s 1.0792 acre tract. As reflected in its own minutes, the University’s Board declared that the public use for which the property was needed was for “creating the Texas Highway 35 right-of-way.” However, at the time the University filed its condemnation case, all of the right-of-way needed for Highway 35 had been acquired by the Texas Department of Transportation and Highway 35 was in operation. It simply could not have been necessary for the University to acquire FKM’s property for its stated purpose as declared by the University Board. In discovery, the University conceded these facts. It filed an amended petition dismissing the University’s condemnation case as to more than 97% of FKM’s tract. Following this amendment, the University only sought to condemn a five-foot wide strip of land located on the opposite side of FKM’s property from Highway 35. The amended petition additionally stated a new purpose for its taking of this strip completely different from any declared by the University’s Board. The University’s Board never authorized the acquisition of the five-foot wide strip for any purpose.

Additionally, the University’s amended petition injected into the case two entirely new compensation issues never considered by the special commissioners during the administrative phase of the case: (1) the market value of the five-foot wide part taken; and (2) the difference in market value of FKM’s remaining property before and after the taking. Prior to the amendment, the only compensation issue to be determined was the market value of FKM’s whole property. The University never made any compensation offer to FKM for the five-foot wide strip sought in its amended petition or for any damages to its remainder property that may be caused by the taking.

The trial court granted FKM’s motion to dismiss, finding it was without authority to grant the relief the University was requesting in the amended petition.

The Intermediate Appeal

In a split decision, the court of appeals reversed and remanded, holding that the none of the University’s conduct was “jurisdictional” and therefore should not result in a dismissal of the condemnation case. Instead, the majority fashioned a rule requiring the trial court to abate the proceedings in the trial court to afford the condemning authority a “reasonable time” to shore up the defects in its condemnation case, the absence of any proof of a public necessity and the lack of any pre-suit negotiations for the five-foot-wide part taken. The majority also held that the trial court could consider materially different compensation issues from those considered by the special commissioners even if the property owner is substantially prejudiced thereby. One justice dissented, contending that the majority had confused the requirements of appellate review of the compensation issues with the concept of trial *de novo*.

Dixon Montague argued the case on behalf of the property owner, and one of the few questions asked by the Court came from Justice Brister. In response to Mr. Montague’s argument that, unlike many condemning authorities, the Legislature has required that the University must plead and prove a public necessity for its taking of private land, Justice Brister asked whether it would be a different result if the statute allowed the University to acquire such

property that it may deem to be necessary. This question elicited an exposition of the facts of the University's public use declaration.

In most cases, a different result might obtain because of the general presumption favoring a condemning authority's declaration of a public use. However, in this case, the facts defy such devotion to the condemning authority's declaration of public use. Mr. Montague noted that the first thing you have to do is to look to the condemning authority's governing board to see what it is they wanted to condemn and for what purposes. The University's Board speaks through its minutes, and the minutes provided that the public use was for right of way for State Highway 35. The problem was that, by the time the University filed its condemnation petition, all of the right of way needed for State Highway 35 had been acquired and the highway was in operation. When this was pointed out to the University, the University amended its condemnation petition to take just a five-foot strip of land to use as landscaping. Under these facts, Mr. Montague argued that the University was trying to avoid its obligation to pay the fees, expenses, and temporary damages mandated under the Texas Property Code.

Initially, the Court seemed cool to this argument. Justice Medina noted that the Court heard similar arguments in *PR Investments* regarding the State's right to change its plans and asked how this was any different. The major distinction offered by Mr. Montague was that in this case the property must be shown to be necessary for a public use, whereas there was no dispute as to the public use in *PR Investments*. Mr. Montague argued that the University's amended petition presented the trial court with a condemnation proceeding that was not necessary for the reason stated in the University's declaration of necessity and was not authorized by any act of the University's governing body. This led to Justice Brister's contention that the taking was always authorized and always necessary but, like *PR Investments*, the condemning authority had changed what the taking was necessary for. Mr. Montague responded that this contention was precluded by the provision of the Texas Education Code limiting the University's power to condemn to property necessary for a public use, thus requiring the University to plead and prove a public necessity.

Mr. Montague reiterated arguments made in *PR Investments* regarding a change in the compensation facts from what was presented at the special commissioners' hearing, but this issue did not generate any additional interest from the Court.

As in *PR Investments*, Danica Milios argued the case on behalf of the condemning authority, and she sought to establish three principles that would require the Court to rule in her favor. First, she argued that a condemning authority's declaration of public necessity is entitled to conclusive effect absent proof of arbitrary and capricious conduct by the condemning authority. Second, she argued that a condemning authority always has the right, unless the condemning authority has taken the property owner out of the status quo, to reduce the amount of property to be taken. Finally, she argued that the property owners cannot recover fees and expenses in the absence of a direct statutory provision awarding those fees and expenses.

The Court was skeptical. Justice O'Neill led the charge, asking why it should not treat a 97% dismissal as a partial dismissal for the award of fees. According to Ms. Milios, this is an issue for the Legislature. Because the Legislature could have addressed an award of fees and expenses in the event of a partial dismissal, and did not, Ms. Milios argued that the Court could

not endorse an extra-statutory award of fees. Justice O'Neill was not satisfied that such an interpretation of the statute would curb the potential for abuse. She was concerned that the State might say, "Whoops, we really don't need it but we also really don't want to pay those fees, so let's dismiss all but a square inch," and that, under Ms. Milios's argument, the State would be protected from having to pay any fees or expenses. Ms. Milios responded that Justice O'Neill's hypothetical presented a "very different question" because the condemning authority clearly could not accomplish its declared public purpose with the square inch.

This little bit of parsing led to Justice Medina's reading of the minutes to Ms. Milios: "The minutes said the taking was for State Highway 35." Ms. Milios argued that this discrepancy was no concern of the Court's. Instead, according to Ms. Milios, the University need only demonstrate that it made a determination of public necessity and not that there actually was a public necessity. The Court's aversion to this argument was palpable. Justice Brister asked whether there was a difference between anything the University may deem necessary and proper and anything that *is* necessary and proper. Ms. Milios's response, that the distinction between the University's declaration of necessity and reality cannot require the courts to look behind the legislature's delegation of the power to condemn, was not well-received. Justice Brister evoked Justice Souter's post-*Kelo* experience, noting that Justice Souter had gotten into a little trouble by taking the condemning authority's word for it and asked why he should take the University's word for it.

Then things got a little weird. Ms. Milios argued that the fact that the University reduced the size of the acquisition does not take away from the validity of the original necessity determination, ignoring the fact that this determination that was directly contradicted by facts conceded by the University. Instead, according to Ms. Milios, the University's reduction of the acquisition simply reflected a "business decision" that it could not afford to take all of FKM's property. Justice Hecht asked then, if this was the case, why the University would not abandon acquisition of the entire tract. Ms. Milios began to argue that the five-foot strip gave the University the ability to control both sides of the Calhoun Street right of way. Justice Hecht interrupted this response to note that, if the University had abandoned its entire acquisition, "it would have to pay attorneys' fees, right?"

Justice Hecht then followed up on Justice O'Neill's question regarding the payment of fees for a 97% dismissal. First, he asked why, if the University made a different decision for business reasons, it should not dismiss that part of the case, pay the fees and expenses, and go on. He continued to express the concern that the University was running an end around the statutory protections afforded by the Legislature:

It looks to me as if this is very close to trying to undo the protection provided by statute that if it does get dismissed for some reason you should have to pay the costs of the landowner for having to go through all of this for what ends up being nothing.

Ms. Milios's response, that this only presented a question for the legislature since partial takings could be recognized but are not, did not seem to satisfy Justice Hecht:

Seems like it is different to say you need 1.8 acres to construct a highway, and then to say no, actually we only need 2,000 square feet to plant some trees. It just seems so different.

Ms. Milios conceded that the condemning authority might need a new resolution although she apparently distinguished his scenario under Justice Hecht's hypothetical from the facts of this case.

According to Ms. Milios, the University's reduction in the size of the acquisition was the "much better decision for everyone." This ignores the burden that her argument places on the property owner. Justice Hecht did not:

And the only people who are out are the landowners who went through all of this for essentially nothing.

Ms. Milios responded that the Legislature's failure to provide for an award of fees upon a partial dismissal was dispositive of this issue. Additionally, she argued that awarding fees might result if a "mixing up" of incentives for condemning authorities, who might not dismiss if the fee obligation would cost more than the property to be acquired. This drew a sharp response from Justice Medina, who noted that it would be better to have condemning authorities getting it right the first time.

Justice O'Neill returned to her hypothetical about a reduction of the taking to one square inch. She asked Ms. Milios whether, under her argument, even a foot would be sufficient to prevent award of fees. Ms. Milios said that it would, if the condemning authority could argue that its public purpose would be served by the foot. This apparent contradiction to her earlier argument, that courts could not look past the declaration of public necessity, resulted in another hypothetical from Justice Hecht. Assuming the Court is inclined to agree with her argument that courts should not get into the business of determining public necessity, Justice Hecht asked what the courts could do when the condemning authority says its purpose is A, and it cannot possibly be A. Referring to Justice O'Neill's question about the square inch, Justice Hecht stated that the condemning authority would not have any real use for the inch. Ms. Milios conceded that, in that scenario, the court could look behind the use. Justice Hecht followed up on this concession, asking whether, under her argument, the court could not make the same determination if, instead of one square inch, it was 100 square feet.

According to Ms. Milios, the only time the court should look behind the determination is if property owner proves the condemning authority acted arbitrarily and capriciously. In the absence of such proof, the condemning authority's declaration of public necessity is entitled to conclusive effect.

On rebuttal, Mr. Montague refuted this argument, reminding the Court that under the statutory provision delegating the power of eminent domain to the University, Section 111.38 of the Texas Education Code, necessity has to be proved. Justice Brister attempted to get Mr. Montague to concede that, in the abstract, landscaping would qualify as a public use. Mr. Montague responded that it would not if the University had only resolved to need the property for right of way for State Highway 35. Justice Brister clarified his question: it *could* be

necessary to take a five-foot strip of land for landscaping. Mr. Montague would not go along with this position under the facts of this case. According to Mr. Montague, the University's reservation to FKM of the paramount right to use the strip for accessing Calhoun Street rendered any true public use of the strip for landscaping impossible.

Justice Medina asked for a response to Ms. Milios's argument that the relief requested by the property owner needs to be argued in the legislature and that any act by this Court would be tantamount to judicial activism. Mr. Montague noted that the Legislature has already decided by requiring the University to prove a public necessity.

Conclusion

The Court struggled with the University's argument that a condemning authority's declaration of public use is entitled to conclusive effect even when that declared public use is not true. Similarly, the Court did not seem convinced that the trial court would have no recourse where a condemning authority had reduced its taking to a nominal amount of property simply to avoid the obligations of the Texas Property Code triggered by a dismissal of a condemnation action. A condemning authority's right to reduce the amount of property to be acquired is not unlimited. Importantly, there must be a public use for the remaining portion of the property to be condemned. If the trial court determines that the reduction in taking is a contrivance implemented in place of a complete dismissal to evade the fee obligations imposed by the statute, the trial court may properly dismiss the case and award litigation fees and expenses. If not, as reflected in the questions from multiple justices, the potential for abuse threatens the entire statutory framework that is designed and intended to protect the rights of private property owners whose property is needed for a public use. In the absence of a public use, it is difficult to see the trial court's alternatives to a complete dismissal of the condemnation case.

The difficulty in reaching this result may be the implication that the University's reduction of the part taken was such a contrivance. Even if it was not and some public use could be conceived to support the University's taking of the five-foot strip, the Court is unlikely to push the burden of the University's decision onto the property owner. FKM did nothing more than defend itself and its property at substantial cost from a whole taking that was not supported by the facts or by the law. Even if the Court is unwilling to hold that the reduction in the taking was a contrivance requiring dismissal of the case, it clearly recognized the unfairness in forcing FKM to bear this cost. A reduction in the size of a taking is in fact a dismissal of the condemnation as to the property no longer described in the condemning authority's petition. In cases where the reduction changes the nature of the case, such as this one, the property owner should be permitted to recover its fees and expenses. If it cannot, then the property owner is materially prejudiced, and the reduction in taking cannot be permitted. If the reduction in taking is due to a lack of necessity for the whole property, as in this case, this means the entire case must be dismissed because the condemning authority cannot proceed to take the whole property without a public use to support its taking.

In the end, FKM should recover its fees and expenses spent defending itself and its property from the University's abandoned taking. The interesting aspect of the case will be whether these fees are awarded as part of a dismissal of the entire case or in response to the University's partial dismissal. On this question, time will tell.

The questions from the Court indicate real discomfort with the facts presented on the issues of public necessity and the University's reduction of the size of its taking. The Court did not seem ready to limit a trial court's inquiry into the public use determination even when the purported public use is an impossibility. The court seemed unwilling to embrace the State's argument that the trial court was without recourse to address a dismissal of 97% of the property to be condemned. On a visceral level, the University's public use determination and almost total reduction in the amount of land to be acquired seem like continuances designed to erode the fee-shifting obligation of the Texas Property Code. The court was sensitive to the potential for abuse and should be expected to address this potential in its opinion.