Recent Developments in Eminent Domain: Public Use

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SINCE THE U.S. SUPREME COURT'S DECISION in *Kelo v. City of New London*,[1] much of the focus in eminent domain litigation has been on the search for standards for determining when a condemnor has properly exercised the power to take when there are substantial allegations of pretext or a private taking—issues the Court left open in *Kelo*. The last few years have produced a number of cases from state courts articulating those standards. But that trend appears to be slowing, and this past year did not see as many reported cases on the issue. This article summarizes recent cases related to the ability of condemnors to take property, including challenges under the Public Use Clause, as well as other issues related to the power to take.

I. Texas: A Claim of "Common Carrier" Must Be Supported With Facts

Texas, like many other states, delegates the power of eminent domain to certain utilities. Under a Texas statute, a pipeline company may take property to transport carbon dioxide "to or for the public for hire."[2] A dispute arose between a property owner and a pipeline company after the owner objected to the taking of its property for a pipeline to transport carbon dioxide, claiming that there was no evidence that the pipeline would be used by the public. The pipeline company asserted it met the definition of "common carrier" because it accepted the regulatory jurisdiction of the Texas Railroad Commission, and by doing so, rendered the carrier's pipelines legally open for public transmission without any inquiry about whether the pipeline was actually open to the public. In lawyer's parlance, the pipeline company claimed to be a

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1. 545 U.S. 469 (2005).
2. TEX. NAT. RES. CODE ANN. § 111.002 (West 2007).

common carrier as a matter of law. The trial court agreed with the pipeline company, and the court of appeals affirmed. Without ever mentioning the Texas constitutional requirement that private property can only be taken for public use, the majority opinion concluded that the taking would be for a public use because "when determining public use, the existence of the public's right to use the pipeline controls over the extent to which that right is, or may be, exercised."[3]

The Texas Supreme Court reversed, concluding that the Texas Constitution's public use clause required the trial court to make an actual factual inquiry into the company's claim that the pipeline would be a public use or available for use by the public: "[u]nadorned assertions of public use are constitutionally insufficient. Merely registering as a common carrier does not conclusively convey the extraordinary power of eminent domain or bar landowners from contesting in court whether a planned pipeline meets statutory common-carrier requirements."[4] The court remanded the case for consideration of that issue.

This decision may not represent a significant limitation on the ability to take property, because there are other methods—such as "blight" designations—to trigger the power to take.[5] However, with this opinion, the Texas Supreme Court foreclosed the easy path. The court held that a pipeline owner cannot conclusively acquire the right to condemn private property by checking the right boxes on a one-page form.[6] In order to take property, a pipeline company will have to make a factual showing that will satisfy a reviewing court.[7] Thus, this case is something of a rarity in eminent domain law, where courts are generally reluctant to undertake anything more than cursory review of the reasons advanced to support a taking. Whether this opinion augurs a new day in Texas on eminent domain standards remains to be seen.

II. Colorado: Necessity in Private Takings

Employing a similar rationale, in *Glenelk Ass'n, Inc. v. Lewis*,[8] the Colorado Supreme Court weighed in on the standard of proof in

3. Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 296 S.W.3d 877, 881 (Tex. App. 2009), *rev'd*, 363 S.W.3d 192 (Tex. 2012).

4. Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 363 S.W.3d 192, 195 (Tex. 2012).

5. Ilya Somin, *Eminent Domain and the Keystone Pipeline Project*, THE VOLOKH CONSPIRACY (May 9, 2012, 3:06 PM), http://volokh.com/2012/05/09/eminent-domain-and-the-keystone-pipeline-project/.

6. *Texas Rice Land Partners, Ltd.*, 363 S.W.3d at 199, 204.

7. *Id.* at 202, 204.

8. 260 P.3d 1117 (Colo. 2011).

private-way-of-necessity condemnations. The court concluded that a property owner who claimed to be landlocked could not condemn a private access corridor over a neighbor's land without proof of a "concrete development proposal" showing that the access corridor is necessary.[9]

Lewis owned a 334-acre agriculturally-zoned parcel, and had the right to build one dwelling per ten acres. Other access options were apparently not feasible, so Lewis and his neighbor Glenelk negotiated for purchase of an easement, but failed to reach an agreement. Under Colorado law, like the law of many other jurisdictions, one private landowner may institute a condemnation action against a neighbor if it is necessary to gain access to a landlocked parcel, and Lewis brought suit to condemn the easement and sought immediate possession of a portion of Glenelk's land for an access road. Lewis and other witnesses testified that he had a desire to develop his property, but did not have any present or contemplated plans for doing so:

> At the hearing, Lewis testified that he "would like to develop" the Lewis property, but he did not specify the scope of development envisioned. He answered questions from his attorney concerning the type of access necessary to develop the property in thirty-five acre residential parcels. His son, Norman Lewis, testified that he had researched the possibility of subdividing the Lewis property into ten acre sites and that the easement sought was designed to provide a twenty foot wide travel surface, including shoulders. Civil engineer Chris Purrington, who Lewis hired to design the easement, testified that the travel surface of the roadway he designed is "just about," or "more or less" twenty-five feet wide. Lewis sought to condemn a seventy foot wide easement to accommodate "ingress, egress, utilities, drainage, maintenance, snow storage, and emergency access for the benefit of the Lewis property, over, under, and across the Glenelk property."[10]

The trial court denied the request for immediate possession, and in his motion for reconsideration Lewis argued that "[w]hile it may be unclear whether or not the Lewis property will ultimately be developed for one single-family residence or as many as thirty single-family residences . . . such uses of the Lewis property are clearly 'practical uses.'"[11] Based on this and the earlier testimony, the trial court concluded that Lewis' development plans were "speculative" and were not sufficiently realized to make it "necessary" to condemn an access, and dismissed the case. The court of appeals reversed, concluding that it was enough that the proposed easement to be condemned was consistent with the relevant zoning regulations.

9. *Id.* at 1124-25.
10. *Id.* at 1119.
11. *Id.* at 1120.

The Colorado Supreme Court rejected the court of appeals' lenient test of necessity, holding that in a private condemnation, the condemning landowner must show "necessity," which means:

> the condemnor must demonstrate a purpose for the condemnation that enables the trial court to examine both the scope of and necessity for the proposed condemnation, so that the burden to be imposed upon the condemnee's property may be ascertained and circumscribed through the trial court's condemnation order.[12]

Proof of necessity "turns on the unique facts and circumstances of each particular case,"[13] and the scope of the condemned easement must be limited to the property that is "indispensable" to the condemnor's intended use of his own property.

Because Lewis could not articulate a concrete development proposal and did not begin any process for land use approvals, the Colorado Supreme Court found it impossible to say that he met his burden of showing necessity. Because his proposal was "variable" (somewhere between one and thirty dwellings on the property), the trial court could not evaluate whether the easement to be taken was limited to what was necessary.[14] Where "neither the road travel surface width, nor the intended magnitude of development envisioned by Lewis is clear,"[15] the trial court correctly dismissed the condemnation action due to the "evidentiary shortcomings" in the record.[16] The supreme court rejected the court of appeals' rationale that compliance with zoning regulations is the test; zoning regulations limit the scope of the condemned easement, but are defined by the intended use.[17]

This case is important because it clarifies that a private landowner cannot condemn the land of her neighbor when all she has are vague, undefined plans to develop her own land. A claim that access is necessary should be reviewed by a court with an eye towards actual development proposals, and not pie-in-the-sky asserted plans.

III. California: Withdrawal of Deposit By One Condemnee Does Not Waive Public Use Objections By Others

Many jurisdictions have a rule that a property owner's withdrawal of any part of the deposit in an eminent domain case operates as a waiver

12. *Id.* at 1120.
13. *Id.* at 1122.
14. *Id.* at 1123-24.
15. *Id.* at 1124.
16. *Id.* at 1124-25.
17. *Id.* at 1124.

of all defenses except the amount of compensation. In *Los Angeles County Metropolitan Transportation Authority v. Alameda Produce Market, LLC*,[18] the California Supreme Court determined the effect of a withdrawal of a deposit by one condemnee on the rights of other condemnees. In California quick take cases, a public condemnor may seek immediate possession by depositing probable compensation with the court.[19] Any defendant may ask the court to withdraw "all or any portion of the deposit."[20] Section 1255.260 of the Code of Civil Procedure provides that "[i]f any portion" of the deposit "is withdrawn, the receipt of any such money shall constitute a waiver by operation of law of all claims and defenses in favor of the persons receiving such payment except a claim for greater compensation."[21]

To implement a federal consent decree to improve bus service, the transportation authority authorized the taking of land in downtown Los Angeles owned by Alameda Produce Market. It filed an eminent domain complaint, sought an order of immediate possession, and deposited the estimated compensation with the court. Three lenders holding liens on the condemned property who were named as defendants in the case sought to withdraw a portion of the deposit. Alameda Produce Market was informed of the request, and that its failure to object would result in a waiver of its rights in the case except to the amount of compensation. Alameda did not object. The transportation authority and the lenders eventually stipulated to a withdrawal of a majority of the funds. After a bench trial, the trial court dismissed the complaint because the transportation authority had not negotiated in good faith with Alameda Produce Market. The court rejected the authority's argument that the lenders' withdrawal of a portion of the deposit waived Alameda Produce Market's right to object. The court of appeals reversed.

The California Supreme Court reversed, concluding that the withdrawal by the lenders did not affect the right of the property owner to object to the taking.[22] The court held that the statutory language—that a withdrawal operates as a waiver "of all claims and defenses in favor of the persons receiving such payment except a claim for

18. 52 Cal. 4th 1110 (Cal. 2011).
19. CAL. CIV. PROC. CODE §§ 1255.010, 1255.410 (West 2002).
20. Los Angeles Cnty. Metro. Transp. Auth. v. Alameda Produce Mkt., LLC, 52 Cal. 4th 1100, 1104 (Cal. 2011) (quoting CAL. CIV. PROC. CODE § 1255.210 (West 2002)).
21. CAL. CIV. PROC. CODE § 1255.260 (West 2002).
22. *Los Angeles Cnty. Metro. Transp. Auth.*, 52 Cal. 4th at 1114-15.

greater compensation"[23]—revealed that the drafters of the statute did not intend a withdrawal by one defendant to be held against others.[24] The court rejected the Transportation Authority's argument that the legislature did not use the phrase "persons withdrawing the money," language that it claimed the legislature would have used had it intended that result. This construction is "in tension with the statutory scheme as a whole," because other provisions in the quick take statute show that the notice and waiver provisions only govern the withdrawing party.[25]

This is an important case, because it recognizes that in situations where there are more than one interest in a single property, "[t]he various defendants may not be aligned in protecting their interests."[26] This case made that point very clear, since the lenders were more concerned with protecting their financial interests than trying to prevent the taking of the property. It is also a reminder that waivers of the right to object to the power of the condemnor to take the property, or the necessity of the taking, should not be lightly inferred.

IV. Appealability of Public Use Determinations

In some states, the question of whether a taking is "for public use" is entitled, by statute, to full resolution before addressing the question of just compensation.[27] This makes sense given that questions of value come into play only after final determination of whether the condemnor can take the property at all. But this is not a matter of statute in some jurisdictions, including North Carolina and Arkansas, which means that it is up to the courts to determine whether a trial court's interlocutory public use determination is immediately appealable.

A. *North Carolina: Immediately Appealable*

In *Town of Apex v. Whitehurst*,[28] the North Carolina Court of Appeals held that "[a]s we have concluded that the determination of whether a taking is for a public purpose is an inquiry of vital importance in condemnation cases, such questions affect a substantial right and are

23. *Id.* at 1104 (quoting CAL. CIV. PROC. CODE § 1255.60 (West 2002)).
24. *Id.* at 1106-07.
25. *Id.* at 1108.
26. *Id.* at 1113.
27. *See, e.g.*, HAW. REV. STAT. § 101-34 (2011) (public use challenges are entitled to immediate trial, and as-of-right interlocutory appeal).
28. 712 S.E.2d 898 (N.C. Ct. App. 2011).

immediately appealable."[29] The court also held that issues surrounding the scope of the taking are also subject to immediate appellate review (in this case, the property owner filed an inverse condemnation claim asserting the condemnor's taking of an easement for power lines destroyed the "Sylvan refuge" of her forested land). It would not make sense for the jury to consider valuation until they knew how much property was in fact taken. The court dismissed the appeal, however, since the property owner missed the thirty-day window to appeal from the trial court's orders.

B. *Arkansas: Not Immediately Appealable*

In *Thomas v. City of Fayetteville*,[30] the city was attempting to take property for a bike trail. It deposited estimated compensation in court, and sought and obtained immediate possession. The owner disputed whether the city had the power to take his land, but the trial court rejected these arguments. The owner filed an interlocutory appeal on the public use and necessity issues. The city moved to dismiss for lack of appellate jurisdiction: the valuation phase of the trial was not finished, so there was no final judgment and it was too early to appeal.

The Arkansas Supreme Court agreed. Because the issue of compensation remained for the trial court to determine, the judgment allowing the taking was not final. Piecemeal appeals are generally not favored, and the court refused to adopt the property owner's call for an exception because disallowing the appeal would "divest him of a substantial right in such a manner as to put it beyond the power of the court to place him in his former condition."[31] In other words, allowing the city to take and modify the property did not mean that the city could not restore the land if the owner ultimately prevailed on the public use issue. Further, the city had not conceded that commencing construction would render it impossible to restore Thomas's property to its previous condition, and Thomas had not presented any evidence that would prove such an effect.[32] The court dismissed the appeal without prejudice.

V. Ninth Circuit: No Contract to Condemn

In what could be the final chapter of the Hawaii "land reform" process that started in the 1960's, the U.S. Court of Appeals for the Ninth

29. *Id.* at 902.
30. No. 11-930, 2012 WL 859633 (Ark. Mar. 15, 2012).
31. *Id.* at *5.
32. *Id.* at *5.

Circuit held that the City and County of Honolulu did not violate the Contracts Clause of the U.S. Constitution[33] when it repudiated its agreement with condominium leaseholders to condemn the fee simple interests underlying their condominiums. In *Young v. City of Honolulu*,[34] the court concluded that in its agreements with the leaseholders, the city did not make an unconditional agreement to condemn, but rather the agreement was conditioned on the city council first determining that the taking would further the public interest.[35] Since the city council had earlier made the determination that such takings were not in the public interest when it repealed the ordinance authorizing them, the court held that the city did not impair its obligations.

Some background: the story begins long ago when the Hawaii legislature enacted the statute that was challenged and sustained in *Hawaii Housing Authority v. Midkiff*.[36] Finding that the economic ills purportedly caused by the concentrated ownership of private single-family residential property in Hawaii would be bettered by individual land ownership, in the Hawaii Land Reform Act,[37] the legislature allowed homeowner/lessees to petition the Hawaii Housing Authority to exercise eminent domain on the homeowner's behalf and condemn the fee simple interest underneath their homes from the lessor, and transfer it to the lessee upon payment of just compensation. After that statute was upheld by the U.S. Supreme Court against a Fifth Amendment public use challenge in *Midkiff*, and under the Hawaii Constitution's public use clause by the Hawaii Supreme Court in *Hawaii Housing Authority v. Lyman*,[38] efforts were made to pass similar legislation affording condominium owners the same ability to force condemnation of their leasehold interests.

At the state level, those efforts were ultimately unsuccessful, but the City and County of Honolulu eventually enacted a local version.[39] The ordinance relied on the same "anti-oligopoly" rationale as the Land Reform Act, and like the Land Reform Act, the ordinance was challenged under the public use clauses of the U.S. and Hawaii Constitutions. And, as in *Midkiff* and *Lyman*, those challenges were rejected by

33. U.S. CONST. art. I, § 10, cl. 1.
34. 639 F.3d 907 (9th Cir. 2011).
35. *Id*. at 915.
36. 467 U.S. 229 (1984).
37. HAW. REV. STAT. ch. 516.
38. 704 P.2d 888 (Haw. 1985).
39. HONOLULU, HAW., REV. ORDINANCES ch. 38 (1990).

both the federal and state courts.[40] Thus, under chapter 38, the owners of many Honolulu condominium projects were permitted to condemn and take the leasehold interests from their lessors.

The way the process worked was that the condo owners applied to the city to "convert" (condemn) their leases, and entered into written contracts with the city in which the condo owners each agreed to pay the city $1,000, in return for which the city promised that after its acquisition of the lease, it would convey it to the condo owners. In these agreements, the city reserved its ability to condemn, and conditioned it upon a determination that the condemnation would further the public interest. The city council virtually never determined that a condo condemnation would not further the public interest.

By 2005, however, public sentiment regarding eminent domain had turned, and the city council repealed chapter 38. At the time of repeal, several condominium apartment owners had begun the process to condemn their leaseholds, had entered into contracts with the city, and claimed they were entitled to continue the process through to completion. In *Young*, the owners had received the city's preliminary approvals, but final approval by the city council was withheld because the council was already considering repealing chapter 38. The ordinance repealing chapter 38 eventually contained a provision allowing any conversion proceeding which has been approved by the city council to be completed, but because the *Young* condo owners had not received council approval, the taking was denied.

When the city refused to condemn, several condo owners sued, alleging that the city had bound itself to take the leaseholds, and that its repeal of chapter 38 violated the Contracts Clause. The district court dismissed because the city-condo owner contracts were void under the reserved powers doctrine (the government cannot contract away an essential sovereign power, like eminent domain),[41] but the Ninth Circuit held the contracts were valid and did not violate the reserved powers doctrine, and sent the case back for a determination of the merits.[42]

On remand, the district court again ruled against the condo owners, concluding that the city did everything it agreed to do. The Ninth Circuit affirmed. While the standard of review when a government is

40. *See* Richardson v. City of Honolulu, 124 F.3d 1150 (9th Cir. 1997); *see also* Richardson v. City of Honolulu, 868 P.2d 1193 (Haw. 1994).

41. Matsuda v. City of Honolulu, 378 F. Supp. 2d 1249, 1255 (D. Haw. 2005).

42. Matsuda v. City of Honolulu, 512 F.3d 1148, 1156-57 (9th Cir. 2008).

using its regulatory powers to impair contracts to which it is a party is somewhat high, the court concluded the city's repeal of chapter 38, and its subsequent refusal to further process the condo condemnations was not an "impairment" of the contract, because the city did not agree to condemn the leaseholds without first making an inquiry into whether the takings would serve a public purpose.[43] The city's repeal of chapter 38 was its determination that the condo conversion takings no longer did:

> Contrary to the Lessees' contention, this ordinance did not legislate away the City's contractual obligations. Rather, the Repeal Ordinance simply reflects the City Council's judgment that no further condemnations under chapter 38–including condemnation of Lessees' property–would promote the public interest. The Agreements explicitly contemplated that the City Council might make such a determination, and there is nothing in the record to suggest that the Council did so in bad faith or without due care.[44]

There are two lessons from this case. First, public sentiment—and the legislative bodies that reflect that sentiment are a sometimes fickle thing. There was nothing about these condemnations that made them any different in kind from the thousands of condemnations that had taken place under Chapter 38, all of which were determined to be "for public use," except that they were not finished before the City repealed Chapter 38. What the government claims will serve a public purpose today may not tomorrow. Second, courts will strive hard to avoid enforcing the Contracts Clause, and it is a rare case in which the government will be found to have violated it. Caveat emptor when contracting with the government; it's not your usual contracting party, since it has the power to alter its own obligations by its regulatory powers, and there is little a court will do to stop it.

VI. Public Use Spinoffs: Two First Amendment Cases

A. *Eighth Circuit: Anti-Eminent Domain Mural is Protected Speech*

The City of St. Louis considered an anti-eminent domain message painted on the side of a building a "sign." The city's building inspection department issued a citation to the people who commissioned the painting on a residential duplex, telling them they needed a permit. So they asked the city for one. The city denied the permit because: the zoning code does not allow such signs, the sign was too big, the build-

43. *Young*, 639 F.3d at 916.
44. *Id.* at 915 (footnote omitted).

ing didn't have street frontage, and signs could only be incidental to the building's use (the building was a two-family home). The property owner appealed to the board of adjustment, which denied relief on the ground that the mural was not exempt as a "work of art," a "civil symbol," or (get this) a "crest." Those things are not subject to the sign code. Paint a big flag, a mural, (or your family crest?) and you don't need a permit. But this is a sign. And signs need a permit.

The sign owners filed a lawsuit in state court seeking relief for federal free speech and equal protection violations, for violations of the Missouri Constitution's parallel provisions, and for an administrative writ under state law; and the city removed the case to federal court. The federal district court granted the city's motion for summary judgment on the ground that the city's sign code doesn't violate the First Amendment, and the board's decision was not arbitrary or capricious.[45]

The U.S. Court of Appeals for the Eighth Circuit reversed. In *Neighborhood Enterprise, Inc. v. City of St. Louis*,[46] the court first held that the sign proponents have standing to challenge the constitutionality of the entire sign ordinance, not just the parts of the code the city claimed the sign violated. On the merits, the court held that the code's definition of "sign" is not content neutral and therefore would be reviewed with strict judicial scrutiny. Applying strict scrutiny, the court concluded that the ordinance is not content neutral because "the message conveyed determines whether the speech is subject to the restriction,"[47] in that to determine whether something is a "sign" or a "non-sign," one had to determine what it says. A similar mural would not be a "sign" if it were a national symbol or "crest."[48] The court rejected the city's claim that its interest in traffic safety and aesthetics were compelling. Important? Yes. Compelling? No. Even if these interests were compelling, however, the ordinance would still fail strict scrutiny because it was not narrowly tailored: there was no explanation as to how the interests of traffic safety and aesthetics were served by the content-based exceptions in the ordinance. An allowed, similarly sized flag might be as distracting to drivers as a disallowed sign. The court remanded the case to the district court for a determination whether the ordinance's severability clause allowed the other parts of the ordinance to remain in effect.

45. Neighborhood Enter., Inc. v. City of St. Louis, 718 F. Supp. 2d 1025, 1040 (E.D. Mo. 2010), *rev'd*, 644 F.3d 728 (8th Cir. 2011).
46. 644 F.3d 728 (8th Cir. 2011).
47. *Id.* at 736.
48. *Id.* at 736-37.

B. *Texas: No Defamation Claim For Anti-Eminent Domain Book*

Note to appellate practitioners: it is not a good sign when an opinion's treatment of your arguments starts with the phrase "[t]o the extent we are able to discern the arguments, we address them below." As that statement telegraphed, it did not go very well for the appellee in *Main v. Royall*.[49] In that defamation case, the Texas Court of Appeals held that the author of a book critical of eminent domain is a member of the electronic or print media asserting a First Amendment claim, and was therefore entitled to interlocutory appeal of the denial of a motion for summary judgment, and that the book for the most part was not defamatory as a matter of law.

Carla Main, the author of *Bulldozed:* Kelo, *Eminent Domain, and the American Lust for Land*, was sued for defamation by one of the book's subjects because "the gist of the book as a whole and the gist of individual portions of the book defamed him by implying that he formed a partnership"[50] to develop a marina by condemning property in Freeport, Texas. Under Texas law, a "gist" claim alleges that, while all of the facts in a publication may be correct, the overall context is defamatory.[51] He also alleged that specific facts related in the book defamed him. Main asserted a First Amendment defense.

After the trial court denied the author's motions for summary judgment, she filed an interlocutory appeal. A Texas statute authorizes appeals from the denial of a motion for summary judgment when "a member of the electronic or print media, acting in such capacity" asserts a free speech or free press defense.[52] In a case of first impression, the court of appeals held that "the legislature intended section 54.013 (a)(6) [sic] to include authors and publishers of traditional books as 'member[s] of the electronic or print media' and that Main [and her publisher]"[53] qualify.

On the merits, the court held that the "gist" claim failed. "[W]e . . . conclude that the gist of *Bulldozed* is not about [Royall]."[54] The court concluded that the book was more about the property owners' fight against the City of Freeport, and about the history of eminent domain abuse nationwide. Although portions of the book focused on the plain-

49. 348 S.W.3d 381 (Tex. Ct. App. 2011).
50. *Id*. at 393.
51. *Id*. at 393-94.
52. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(6) (West 2008).
53. *Main*, 348 S.W.3d at 387.
54. *Id*. at 394.

tiff Royall, "a person of ordinary intelligence would not read the entire book, or even the portions about the marina controversy, and conclude that the gist was that Royall"[55] was in a partnership to take the property.[56] The court reversed the denial of summary judgment, and held that the "gist" of the book was not defamatory as a matter of law.

The court also held that most of Royall's allegations that specific portions of the book defamed him were also groundless, and that the trial court should have granted Main's motions for summary judgment on most of the claims. The court of appeals upheld the trial court's denial of summary judgment on a few of Royall's allegations, and Main did not challenge the trial court's denial of summary judgment on other allegations, so the court remanded the case to the trial court for further proceedings.

VII. Conclusion

This year was not one with major changes in post-*Kelo* public use doctrine. Whether this represents a trend, and the attention of the courts and the public have moved on to other issues, remains to be seen.

55. *Id.* at 394.
56. *Id.*