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Supreme Court of Texas.
FKM PARTNERSHIP, LTD., A Texas Limited Partnership, Petitioner,
v.
BOARD OF REGENTS OF THE UNIVERSITY OF HOUSTON SYSTEM, Respondent/Cross-
Petitioner.
No. 05-0661.

March 21, 2007

Appearances:

H. DIXON MONTAGUE FOR PETITIONER.
DANICA LYNN MILIOS FOR RESPONDENT.

Before:

CHIEF JUSTICE WALLACE B. JEFFERSON, NATHAN L. HECHT, HARRIET O'NEILL, DALE WAINWRIGHT, SCOTT A. BRISTER, DAVID MEDINA, PAUL W. GREEN, PHIL JOHNSON, DON R. WILLETT, TEXAS SUPREME COURT JUSTICES, EN BANC.

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CHIEF JUSTICE JEFFERSON: Be seated please. Court is ready to hear argument in 05-0661, FKM Partnership Ltd v. Board of Regents of the University of Houston System.

SPEAKER: Court, Mr. Montague will present arguments for the petitioner. Petitioners have five minutes for rebuttal.

ORAL ARGUMENT OF H. DIXON MONTAGUE ON BEHALF OF THE PETITIONER

MR. MONTAGUE: May it please the Court.

Under the primary aspects of this case, it is the necessity to condemn a person's property. Constitution Article I, Section 17 requires that a condemning authority if it seeks to acquire a person's property for [inaudible] establish the necessity for what they [inaudible]. In connection with the University of Houston, the legislature has determined that the University of Houston must prove necessity, unlike the imposition on some condemning authorities, if that proof is presumed by the governing board's finding of the taking or the necessity for the taking. In this instance, however, in 111.38 of the Texas Education Code, it specifically says that necessity is one of the elements of the case. The Boston Court --

JUSTICE: So the -- so the difference is, if it's said, which it may deem necessary makes this different from Higginbottom ?

MR. MONTAGUE: [inaudible] That's exactly it. And matter of fact, Your Honor, if you look at the Whittington v. City of Austin case, which you all recently reviewed, it goes through the tension between those two. And here the first thing that you do in order to determine what the necessity is for the particular project is you turn to the governing board of the authority who seeks to condemn, in this instance, the Board of Trustees of the University of Houston. And it is specifically, through the minutes of that board to which you must turn because that board speaks through its minutes. And in those minutes, we discovered in the condemnation case that the declared purpose, the necessity, for this particular taking was the State Highway 35. However, at the time the condemnation proceeding was filed, all of the land necessary for State Highway 35 had been acquired and was in operation. When that was pointed out to the university, when it was discovered that that was the case, university responded by amending its condemnation petition and instead of taking all of FKM's property which had said it needed for State Highway 35, it amended its petition to take a five-foot-wide strip along the opposite side of the property fronting State Highway 35 for what it said was to use as landscaping.

Now, if you look at the facts, the obvious reason is what the state was trying to do -- what University of Houston was trying to do, is to avoid its obligation to pay the fees and expenses and the temporary damages that the statute, the property code mandated that it pay when it failed to prove the necessity of its condemnation proceeding. So, we went forward in the condemnation case.

JUSTICE: We will get back to this. But as a similar argument, the state has a right to change its plan. That -- that's raised too here as well in this case, correct?

MR. MONTAGUE: That's correct. It is raised in this case, but --

JUSTICE: Isn't that what they did?

MR. MONTAGUE: The distinction between the PORI case and this case is the burden that you got to prove, the necessity for the taking. That's -- that's the distinction, and there was no question in PORI that the property was necessary for a highway purpose. In this instance, the question was, was it necessary for --

JUSTICE: -- beautification of the --

MR. MONTAGUE: I'm sorry?

JUSTICE: -- beautification of the school's property.

MR. MONTAGUE: Well, that's correct. Because the only board resolution that there was, is that it was necessary for State Highway 35. There was no other board resolution at all. As a matter of fact, when the trial court was conducting the right to take hearing, the trial judge turned to counsel for University of Houston and said, Is there another board resolution other than the one that states that the only necessity for the acquisition of this property is for State Highway 35? And the university's counsel candidly responded, "No, there is not." So, the only purpose for which the University of Houston authorized this taking was for State Highway 35. And as you see, from the point in time that it was revealed that this property was in no way needed for that purpose, the response was to amend down to a five-foot-wide strip. The response the University of Houston gives is that, Well, you can look outside of the board resolution in order to determine the necessity, that it really does not matter that the board speaks through its minutes and the minutes confine the necessity of the taking only to State Highway 35. Go outside of that to see what the recommendation was of the administration and turn to this Number 2 tab in your collection of exhibits that I have and it says, "The administration suggested the

property was necessary not only for the taking of State Highway 35 but also for the closing of Calhoun Road at Elgin Boulevard." What the response, Calhoun road had already been closed at Elgin Boulevard at the time the condemnation petition was filed. And if you look at the excerpts of the testimony of both Dr. Arthur Smith and Randy Harris, which are also part of the tabs in these exhibits that you have before you, the two people who signed the recommendation to the administration, stating what the purpose was as far as the administration was concerned, that it was necessary to take FKM's property, both of them said that it was not necessary for State Highway 35 and it was not necessary for closing Calhoun Road because both had already been done at the time the condemnation petition was filed. So where does that leave us? It leaves us with the condemnation proceeding, the taking of property that was not necessary and was not authorized by the governing board of the condemning authority and there is absolutely no proof that the condemning authority --

JUSTICE BRISTER: Well, they authorized it and say it was necessary, but isn't it like our first case? They just changed what it was necessary for, first it was 35, now -- then it was for Calhoun, now it's for landscaping. They just -- it's always been necessary, they've just changed the use they intended to put it to.

MR. MONTAGUE: The distinction between taking by the Texas Department of Transportation and the taking by the University of Houston is the legislature specifically stated that in the instance of the University of Houston, it has to specifically prove what the necessity is for the acquisition, and it has to declare that through its governing board, the Board of Trustee.

JUSTICE BRISTER: Which -- is that -- where is that?

CHIEF JUSTICE JEFFERSON: Where -- I'm sorry. Where --

JUSTICE BRISTER: Where is that requirement?

MR. MONTAGUE: It's in the -- the law that came out of this Court. You can see it summarized well in the Whittington v. City of Austin case, in which it states, as well as the Higginbottom case. The Higginbottom case says the same thing that if there is a requirement of proof of necessity, then it is incumbent on the condemning authority to plead and prove that. The condemning authority in this instance did plead necessity. They pleaded necessity for something other than that which the governing board stated was necessary. But if you look at what the facts are in this case at the end of the day when the University of Houston substantially decreased the amount of its taking from 10 percent of FKM's property down to 3 percent of its property, look what the facts are with respect to the use of that property and I think the court, the trial court, has some discretion in weighing the necessity of that also, aside from the governing board.

But in this instance, in the pleading that was filed, the fourth amended condemnation petition which is also included amongst these exhibits that you have before you, the condemning authority reserved to FKM, an easement appurtenant from each property to Calhoun Road for access going on and off of the FKM property, thus announcing to the world that Calhoun Road was going to be a road that the University of Houston would continue to maintain and to allow FKM access to. Moreover, it's said that the easement appurtenant that was reserved to FKM was paramount to the University of Houston's need for this property for landscaping.

On appeal -- on appeal, the University of Houston has fashioned the argument that there is a statute that is in the Education Code 51.904 which is also included amongst these materials that are given to

you under tab 6.51.904 was a statute created primarily for the benefit of Texas Southern University when it was closing a street through its campus on which to put a building. But in that instance, 51.904 specifically states that a university, in excess of 20 acres, if it owns the property on each side of a street can, and these are very important words in 51.904, can vacate, close, and abandon a public street for use by the university, for use of that land by the university. However, in no instance here was the University of Houston vacating, closing, and abandoning Calhoun Road.

To the contrary, in the pleading, the last pleading that it filed in this case, it specifically said that they're reserving to FKM an easement appurtenant right to access Calhoun and use it as a point of access on and off of their property. The University of Houston's response is that, well, it needed to go through this exercise in order to convert a portion of Calhoun Road, somewhere between a four-to-six lane roadway into parking on some of those lanes for students and faculty. However, there is absolutely no requirement whatsoever that a governmental entity like the University of Houston has to own the property on each side of the street that it owns in order to use a portion of that street for parking. This Court may recall its opinion in *City of Belmont v. Marks* which gives the governmental authority the right to do about anything that it wants to with its public streets, from changing them to two-way to one-way streets, from using some for parking and some not. So the government has the authority to use its streets in any way that it wants to so long as it does not impair -- materially impair the access of those who abut it.

JUSTICE MEDINA: Is that property set up now? And I'm just going on my memory, there is a parking on Calhoun and there's a strip center, some type of food places, I think a bookstore. Who owns that?

MR. MONTAGUE: That's -- the bookstore was FKM's. That's the Rother's Bookstore, that's right there. And as you may recall, Justice Medina, it is the access that you may remember that came on and off of Calhoun to the bookstore, all along the front of the bookstore.

JUSTICE MEDINA: Right.

MR. MONTAGUE: And that is what the University of Houston reserved to FKM in connection with this, which gives me [inaudible] as to where these trees are going to go, the landscape, this five-foot wide strip. But be that as it may, it reminds me much of land [inaudible] opinion, in the semi-investment company case, which is also much the same facts as is in this case. But the bottom line here is, if there is no necessity for the acquisition of one's property, if that is not pleaded and proved, then the condemning authority should not be allowed to take the property.

Also, implicated in connection with this case is *State v. Nelson*. If there is a substantial change in that which the Special Commissioner has considered in connection with the compensation to which the property owner is entitled, then it is incumbent on the trial court to dismiss the condemnation case and send it back to the Special Commissioners for the determination of that compensation. Otherwise, if that is not done, what you are going to do is render the Special Commissioners' process a nullity. And if it's that the case, if it really doesn't matter what happens to the Special Commissioners hearing, then in condemnation cases, people were gonna just forego going to the Special Commissioners' process because as the court has recognized if the condemning authority is allowed to change its plans thereafter and the condemnor is not with to those plans that are presented to the Special Commissioners, then why do go to the Special

Commissioners here. What's the necessity of it? Because this Court says you can change it, your plans at anytime thereafter. So why not forego the Special Commissioners' process and just take it up to the appellate ladder, which is completely contrary to what this Court said in State v. Nelson. That one of the primary reasons for the Special Commissioners' process is to avoid clogging up the judiciary with these compensation cases, to try to get the parties to resolve their compensation differences at the administrative level. And if there is no assurance to the property owner that those facts that are presented at the Special Commissioners hearing are facts to which the condemning authority will be bound, then there is absolutely no reason to go to a Special Commissioner hearing if there can be a change.

CHIEF JUSTICE JEFFERSON: Are there any questions? Thank you, Counsel. The Court is ready to hear arguments from the respondent.

ORAL ARGUMENT OF DANICA LYNN MILIOS ON BEHALF OF THE RESPONDENT

SPEAKER: May it please the Court. Ms. Danica Milios will present arguments for the respondent.

MS. MILIOS: May it please the Court.

Proper resolution of this case depends upon application of three basic background principles. First, the condemner's declaration of public necessity is entitled to conclusive effect, absent proof that the condemning authority acted arbitrarily or capriciously. Second, a condemning authority always has the right unless he has -- unless the -- the condemning authority has taken the landowner out of the status quo, the condemning authority may always reduce the size of the acquisition. And third, landowners in condemnation cases like parties in all cases are not entitled to attorney's fees unless those fees are expressly provided for by statute.

JUSTICE O'NEILL: Well, why shouldn't we treat the abandonment of 97 percent of the proposed condemnation as a partial dismissal under the statute?

MS. MILIOS: Because the statute doesn't say anything about partial dismissal. The statute says that this maybe awarded if the condemning authority dismisses its condemnation proceedings. The legislature has available to it several models, other states, the Model Code that expressly include fees and award fees for partial takings, and the legislature has made a conscious choice not to adopt that.

JUSTICE O'NEILL: But one of the things we're looking at here is potential for abuse and what if the state goes in and says, Whoops, we really don't need it, but gosh we don't want to pay attorney's fees so let's keep an inch of this property and that will keep us from having to do this. Certainly, that would be an abusive procedure.

MS. MILIOS: That would be a very different question because the state, the court within -- the trial court would look at whether the state could accomplish its public purpose with that one-square inch and given the likelihood that it probably could not, then it would be within the trial court's discretion to say, Well, you've actually dismissed this case and find that there was no public purpose or public necessity that has been established and dismissed the case properly under 21.012, not because the university or the condemning authority had reduced. But in this case, we don't have anything like that. If the university had condemned all of the property that it originally sought,

it would have obtained five acres. Now, it is true, and those five acres were not for Highway 35, they were not for closing Calhoun Road -

JUSTICE: That's what the board -- that's what the minutes said, I just read.

MS. MILIOS: Look at the very last line on page -- look at page 42, tab -- tab 2 that FKM has provided the Court. The very last -- pardon me -- the second to last sentence states, "The acquisition of these tracks by condemnation will complete the acquisition of the east campus areas consistent with the Texas Higher Education Coordinating Board master plan for the University of Houston." If the Court will look at the rest of the document, this document was attached to the university's motion for partial summary judgment. The rest of the document that were attached to the motion [inaudible] flesh out what that master plan was. The master plan, from the early 1980s, the university conceived itself of owning all of that property of the Highway 35 and the university is authorized by the legislature to make that determination for itself. Education Code Section 111.38 is the university's authorization to condemn property and it states, "The board has the power of eminent domain to acquire for the use of the university any land necessary and proper for carrying out its purposes." There is nothing in that statute to imply that the university has to come to the trial court and convince it that it really does need the property. Yes, the university has to demonstrate that it made the determination, and its --

JUSTICE BRISTER: But isn't there a difference between anything the university may deem necessary and proper and anything that is necessary and proper?

MS. MILIOS: That distinction cannot require the courts to look behind the legislative branch of authority to determine what is necessary for the university. The court would be setting itself up to have trials about whether or not the university really needs property.

JUSTICE BRISTER: Well, you know, I mean, Judge Sutter got himself in a little trouble by just taking an authority's word for it that -- that shopping center needed all these people's houses and I certainly don't want to get in that same situation. So why should I let you all decide if it's necessary to take my house or my neighbor's house or somebody else that may be mad at me later?

MS. MILIOS: The hypothetical is different, Justice Brister, because that is taking for a private use. In this case, there's no dispute that the university -- the trial court could stop that. There's no dispute in this case that the university is trying to take this property for private use. The university can't take property for private use. It can only take property for university purposes and the university's master plan that it's had in effect since the early 1980s has envisioned it taking the property up to the highway, that really the natural border, for the university to afford space and, yes, parking for its use, perhaps dormitories. I mean --

JUSTICE: But you've already abandoned what you originally claimed, five acres --

MS. MILIOS: You're right, I did never finish my --

JUSTICE: -- so you're not --

MS. MILIOS: -- I didn't --

JUSTICE: -- you're not contending that it was necessary to take the five-foot strip had you started off the process just to take the five feet.

MS. MILIOS: The fact that the university reduced the size of the

acquisition does not take away from the initial necessity determination. It only demonstrates that the university has made a business decision that it cannot afford to take all of FKM's property. But let me follow up with where I was going a few minutes ago before I got off-tracked. When the university reduced its acquisition to take the five-foot strip of property of FKM's property along Calhoun, that will enable the university to take possession of -- to own Calhoun Street. It's not going to close Calhoun Street, that was never its -- that phrase has been taken out of context. In the master plan, the university talks about how it wants to change Calhoun from a six-lane city street to a two-lane university street and have four acres of parking. So, the original plan to condemn all of the property under the -- what the board authorized, the taking of all of these properties to complete the acquisition of the east campus areas was going to give the university five acres. Well, that got very expensive. The land prices went from \$7 a square foot, to \$12 a square foot, to \$20 a square foot, far in excess of what the university had to spend, and it realized that it could obtain four acres of parking by only condemning FKM's strip of property along Calhoun. Yes, the university has given FKM driveway access to Calhoun. It's required to do that so it doesn't cut off its access and, yes, the university plans to put landscaping or something along the sides of the street, but that's not what it's taking the property for, it's not taking it for landscaping. It's taking it, the strip of property along Calhoun, so it can own Calhoun.

CHIEF JUSTICE JEFFERSON: Okay, so why not abandon the entire track?

MS. MILIOS: Because if it abandon the entire track then it wouldn't be abandoning that -- it would be abandoning that five-foot strip. The university --

CHIEF JUSTICE JEFFERSON: Then it would have to pay attorney's fees, right?

MS. MILIOS: That's right. The university needs the five-foot strip. Go back to --

JUSTICE HECHT: Why shouldn't it -- why shouldn't -- if the university has made a different decision, for business reasons which we can't fault them for that, why shouldn't they just dismiss part of the case and pay for the mistake involved?

MS. MILIOS: Well, the university is not required to dismiss its entire condemnation proceedings. If by an amendment it can reduce the size of the acquisition to the five-foot strip and take that property. It did that.

JUSTICE HECHT: It looks to me -- it looks to me as if this is very close to trying to undo the protection provided by a statute but if it does get dismissed for some reason, you should have to pay the cost of the landowner for having to go through all of these for what ends up being nothing.

MS. MILIOS: Well, that really is a question for the legislature, Justice Hecht. The legislature knows that partial takings or partial dismissals are possible. Other states recognize them, the Model Code recognizes them, and the legislature has had ample opportunity to provide for attorney's fees for partial dismissal. It's not ever done that. The language of the statute is completely clear when a condemning authority dismisses its condemnation proceedings.

Now, you know from the amicus brief that was recently filed, that one of the tracks that the university condemned as part of this grand scheme, it did dismiss because again, business seizures, rising cost of land, they could not afford it, and the university paid the attorney's

fees and the damages to the landowners in that case. It's not that the university is afraid to pay attorney's fees if that's what's necessary, but in this case it's not required to dismiss its condemnation proceedings. The university is always allowed to reduce the size of the acquisition, go back to Texas Power & Light v. Cole, the case we talked about in the power case. As long as the condemning authority hasn't taken the landowner out of the status quo, like changing the land, the condemning authority always has that option. Yes, in this case it seems drastic --

JUSTICE HECHT: But to say -- it seems like it's different to say, Well, we need 1.07 acres to construct a highway and then you say, Well, no, actually we only need -- what would it be -- 20,000-square feet or something, 2,000-square feet to plant some trees. It just seems so different.

MS. MILIOS: Well, in that case, you actually might have a problem because you have a change of views. And in that case the governing -- the authorizing board might have to have another resolution authorizing the taking for that different public purpose. In this case, the public purpose has always been parking for the students, expansion of the campus to the east campus, to the east side of the campus; that has not changed. The scope of the project has changed. The university could not afford to acquire all of the property. It could afford to acquire a smaller strip and thereby take possession of Calhoun Road, change it from a six-lane road to a two-lane road, reserving four acres of land for parking. That's a much better decision for everyone. It's a better decision for the landowners because they get to keep their property, that facilitates the goal of the legislature in keeping more land in private property, and it results in the university spending less public resources to essentially obtain very close to what it had initially set out to do in the first place.

JUSTICE HECHT: And the only people that -- or the landowners who went through all this for essentially nothing. I mean --

MS. MILIOS: The legislature knows that partial dismissals are going to happen, Justice Hecht. And I recognize that this one is a big one, but if the Court tries to make distinctions, if the Court says, Well in any partial dismissals, we're gonna read the statute as authorizing fees, then every time the condemning authority reduces the size of the acquisition, no matter how small, there is going to be a fee fight. And then you have the added mixing up of the incentives because then the condemning authority won't dismiss or won't reduce the size of the acquisition, if that would end up costing more than the property. So then, we have the reverse. We have condemning authorities taking more land than they really need and less lands staying in private ownership.

JUSTICE HECHT: We mainly have condemning authorities getting it right the first time instead of being a period of time to figure out what is right.

MS. MILIOS: Everyone, of course, would agree that condemning authorities need to take care and assess their needs properly and they do that. There's no showing in this case that that didn't happen. All of the evidence attached to the university's motion for summary judgment shows the Court how the university board study for years what it needed to do and how it was going to accomplish this. And the rising cost of land took the university by surprise and it had to make a business decision. But calling this case an effective abandonment really puts the Court in the same box as allowing fees for a partial dismissal because then in every case, we're gonna to have a fight about

whether it's an effective abandonment. This case might seem easy; it's 97 percent, but what about 75 percent? Is that close enough?

JUSTICE O'NEILL: Well, what about an inch? I mean --

MS. MILIOS: Well, that goes back to -- if that case the trial court would [inaudible] --

JUSTICE O'NEILL: It strikes -- it strikes me under your argument even that little bit, if it -- if it is was within its original purpose, even a foot --

MS. MILIOS: If the condemning authority had a public purpose that it could accomplish with that foot, then I would agree. Then in that case, there would be no vehicle toward the landowner's fees. But in this case, for example, if the university tried to take one-square inch of property, how would that, how could the university stand here and argue that that's advancing its public purpose of expanding the campus to the east side and providing parking? It doesn't --

JUSTICE HECHT: Well, that seems to me to be an exception to your argument that Court shouldn't get in the business of deciding public necessity. And if we're inclined to agree with that, it still seems to me that there's something left open for when that condemnor says, Well, our purpose is A and it can't possibly be A, then you can't just presume A because I said so. Sure, as you just have said --

MS. MILIOS: You can't presume the public necessity?

JUSTICE HECHT: Yes. I mean, you just now said they wouldn't have any use for the inch.

MS. MILIOS: That's use. The Court can absolutely look behind that and say, "Is there really a public use going on here?" If the university were to try to say, declaring as university property, one-square inch is going to allow it to accomplish its use, its purported use that the board authorized -- per this record page 42 -- of expanding the campus, the Court could look to that and say, well, no, you could have no reasonable basis to say that one-square inch is going to allow you to expand the campus.

JUSTICE HECHT: But we can't make the same decision if it is a 100-square feet?

MS. MILIOS: Because the university has demonstrated that it can obtain its -- it can reach its -- its stated purpose because it will acquire four acres of property by closing Calhoun Road. Now, if the Court is concerned because the university started out with one board resolution and then changed the scope for the taking after the fact, the Court could -- it would not be remarkably efficient, but the Court could require another board resolution authorizing the university to reduce the size of the acquisition to take the lesser amount of property because that would allow it to obtain or to fulfill its original public purpose but to a lesser extent. If that is the Court's inclination, then the proper resolution goes back to [inaudible]. We abate this case and allow the governing board to reinstitute or reissue another declaration of public necessity.

JUSTICE JOHNSON: And that's what the Court of Appeals' opinion instructed.

MS. MILIOS: Yes. Essentially. It's actually very unclear to me what -- the Court of Appeals determined that there was a fact issue on public necessity. I don't know what that fact issue was. The court was not very clear.

JUSTICE JOHNSON: It says, "We reverse and remand that the County Court on remand, the County Court is instructed to abate the proceedings to permit the university a reasonable time to satisfy the statutory requirements and to limit its hearing on damages to

determination of FKM's damages related to the portion the university sought to condemn and for the period of time it had been use of that."

MS. MILIOS: Right. And I agree with that, I think that's --

JUSTICE JOHNSON: So, what's confusing about that?

MS. MILIOS: What -- what I find confusing about the Court of Appeals' opinion is its description of the university's proof as not being sufficient to demonstrate that the university demonstrate that it did declare public necessity. I'm not sure what the Court of Appeals meant other than to say that the university didn't re-declare public necessity for the reduced taking.

JUSTICE JOHNSON: But with the effect -- the abatement is not something the state is adverse to?

MS. MILIOS: No. That is correct. The only reason a court should ever take it upon itself to look behind the condemning authority's declaration of public necessity is if the landowner has proof that the condemning authority acted arbitrarily and capriciously. It's not enough for the landowner to disagree with the university's conclusion. It is not enough for employees of the university to disagree with the board's conclusion. There has to be no reasonable basis for the condemning authority to have taken the action that it did and the landowners simply cannot demonstrate that here. Because of that, the University of Houston's declaration of public necessity is entitled to conclusive effect, so put that aside.

The next question is, can the university reduce the size of the acquisition? In *Cole*, the court unequivocally held that it could and it could very substantially limit the damages the landowners were entitled to recover by reducing the size of the acquisition thus saving public money in the coffers and keeping more land in private ownership. If the university was authorized to reduce the scope of its acquisition, therefore, its petition was never dismissed and there was no finding of any lack of a right to condemn, then there is absolutely no basis in this case for the Court of Appeals to have remanded through the trial court, and this is the only disagreement we have with the Court of Appeal's judgment, Justice Johnson, is -- for the fining of fees and temporary damages --

JUSTICE O'NEILL: We talked in the last case about the trial court's inherent authority, and in a typical case if you're about to go to trial and the other side abandons or dismisses 90 percent of their claim, I would think the trial court would have the inherent authority to award based on expenses to the other side and preparing to defend that claim. Why would that inherent authority not apply here?

MS. MILIOS: That inherent authority has to -- what you're talking about is a fee shift, and that inherent authority is not in the Property Code anywhere. It is available as an example to the legislature in the Model Code, exactly what you are suggesting. The Model Code has the provision that says if the condemning authority changes the scope of its petition so much that dismissal is justified -

CHIEF JUSTICE JEFFERSON: Could there be a sanction at all under Justice O'Neill's --

JUSTICE O'NEILL: Well, but why wouldn't it come under their trial like other civil cases? If you can do that in other civil cases, why didn't it come under that?

MS. MILIOS: Well, this amendment came long before any discovery cut off. There was -- parties can amend their pleadings all the way through trial and there has not been any abusive behavior by the state in reducing it. There wouldn't be any sanctionable conduct in -- you

don't shift attorney's fees to the other side. I mean, if -- if I sue three defendants and then I amend my pleadings and let two go, I don't pay their attorney's fees. There is only a fee shift if it's expressly provided for by statute. The only statute that applies here is Section 21.019 and for temporary damages 21.044. By the expressed terms of those statutes, they are not applicable to these circumstances because the condemnation proceedings were not dismissed and there has been no judgment denying the right to condemn.

If the Court has no questions, I'll get back the rest of my time.
CHIEF JUSTICE JEFFERSON: Thank you, Counsel.

REBUTTAL ARGUMENT OF H. DIXON MONTAGUE ON BEHALF OF THE PETITIONER

MR. MONTAGUE: With all due respect to Ms. Milios, the University of Houston's necessity finding falls in the category of my dog ate my homework. The necessity here has to be proved. It's a requirement under 111.38. It's not a presumption that is made in favor of the condemning authority if it is the University of Houston. As you can see and looking at a condemnation statute like that which gives the Texas Department of Transportation the power to condemn, there is no necessity language in that statute nor is there for pipeline or power line company nor is there for most condemning authorities. Remember the legislature just conferred the power to condemn just gave the University of Houston the power to condemn in 1971. It did not give it to Texas Southern University. It only gave it to Texas A&M University in 2001. It is something that the legislature should be said -- should be used very guardingly and in connection therewith there is a greater amount of proof that is required by that condemning authority in order to prove the requisite elements in order to be able to condemn, one of which is, necessity.

Now, Ms. Milios --

JUSTICE BRISTER: But landscaping would qualify?

MR. MONTAGUE: Sorry?

JUSTICE BRISTER: Landscaping would qualify?

MR. MONTAGUE: Landscaping would not qualify under this instance in connection with what the board resolved.

JUSTICE BRISTER: Right. But assuming the board resolved the right way and been consistent throughout, they could, it could be necessary to a public purpose to take a five-foot strip so that the streets around UT are pretty rather than ugly.

MR. MONTAGUE: Under these circumstances, that would not be true in light of the reservation that the University of Houston gave to FKM reserving into it the right at any point along that five-foot-wide strip, to use that five-foot-wide strip to access that property. So, any pretty trees that were put up, FKM could knock them down in light of the rights that were conferred in the petition.

Ms. Milios directed your attention to the recommendation -- the recommendation of the administration to the board under tab 2. If you will look at the foldout right behind it, it states what the board's decision was in response to that recommendation. That is very important because as you will see in the record when Mr. Harris and Dr. Smith were asked time and again, is it true that at times, the university board will listen to a recommendation that the administration makes with regard to a certain matter and reject part of it and accept part

of it in acting, and they further stated that the way to determine what the University of Houston board did is to turn to the minutes of the board. And if we turn to the minutes of the board here, it states in unequivocal language that acquisition by condemnation of tree tracks of land located on Calhoun Road is necessary. It says the acquisition of these tracks is necessary to complete the University of Houston's obligation for creating the Texas Highway 35 right of way period. It doesn't say to close Calhoun, it doesn't say for landscaping, it does not mention anything about a master development plan of the university. It says, we're taking it solely for Highway 35 and that's the only thing that is authorized.

JUSTICE MEDINA: Let me ask you this. The argument made by opposing counsel seems to me that whatever relief you're seeking needs to be sought across the street and that for this Court to do anything, as I understand your argument, would be tantamount to some type of judicial activism. What's your response to that?

MR. MONTAGUE: 111.38. The legislature has already decided what the requirements are that are imposed on a condemning authority like the University of Houston in a case such as this, which is to prove not only public use but public necessity. It has the burden to plead and prove those elements in a condemnation case, and the University of Houston, following through with 111.38 did state in its condemnation petition what was necessary. And we had to go to the Court with special exceptions to get the university to state with specificity that which was needed and it said, Essentially, we're taking this property for landscaping. With respect to, and this is a very important point also -

CHIEF JUSTICE JEFFERSON: I didn't see any questions directed your way and your time has expired. So, the cause is submitted and the Court will take a brief recess.

SPEAKER: All rise.

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