

2009

Highlands at Jordanelle, LLC, a Utah limited liability company v. BV Jordanelle, LLC, a Utah limited company : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

Brief of Appellant, *Highlands at Jordanelle v. BV Jordanelle*, No. 20090031 (Utah Court of Appeals, 2009).
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IN THE UTAH COURT OF APPEALS

THE HIGHLANDS AT JORDANELLE,
LLC, a Utah limited liability company,

Appellant,

vs.

BV JORDANELLE, LLC, a Utah limited
liability company,

Appellee.

Case No. 20090031-CA

BRIEF OF APPELLANT

Appeal from a Final Order of the Fourth District Court, Wasatch County,
State of Utah, Judge Derek P. Pullan

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FILED
UTAH APPELLATE COURTS

DEC 21 2009

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PARTIES TO THE PROCEEDING

The caption identifies all of the parties to this appeal.

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JURISDICTION OF APPELLATE COURT

The Utah Court of Appeals has jurisdiction over this appeal under Utah Code Ann. § 78A-4-103(2)(j) and pursuant an Order of the Utah Supreme Court entered January 14, 2009.

ISSUES PRESENTED FOR REVIEW

- I. Did the trial court err in ruling that as a private entity The Highlands at Jordanelle may not exercise the right of eminent domain for a public road to its residential development?**

Standard of Review: Legal conclusions used to support a decision on a default judgment are reviewed for correctness. *Chatterton v. Walker*, 938 P.2d 255, 257 (Utah 1997).

Preservation Below: This issue was preserved below in Appellant's Motion and Memoranda filed in the District Court. (R. 38-72, 77-89.)

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES.

The following authorities are determinative or of central importance to this appeal:

1. Utah Code Ann. § 78B-6-501.

(A copy is attached as Addendum 1.)

STATEMENT OF THE CASE

A. Nature of the Case.

Appellant The Highlands at Jordanelle, LLC (the “**Highlands**”) brought suit against neighboring landowner PWJ Holdings, LLC (“**PWJ**”) to secure a right of way to its property via eminent domain. The right of way would be dedicated to Wasatch County as a public road. PWJ failed to file an answer or otherwise respond to the Complaint, and the Highlands filed a Motion for Default Judgment with the District Court in October, 2008. The Court held a hearing on December 2, 2008, which PWJ did not attend. On December 29, 2008, the District Court issued a ruling and order (the “**Ruling**”) in which it denied the Highlands’ Motion, concluding the Highlands lacked authority to exercise the right of eminent domain. The main issue on appeal is whether the Highlands may exercise the right of eminent domain to condemn property for a public road to its residential development.

B. Course of Proceedings.

The Highlands filed this action in the Fourth District Court for Wasatch County to secure a public road to its residential development via eminent domain. When PWJ failed to respond, the Highlands filed a Motion for Default Judgment. The Honorable Derek P. Pullan denied the Motion and ruled that the Highlands lacked authority to condemn property under Utah Law. Judge Pullan entered the Ruling on December 29, 2008 dismissing the Highlands’ case with prejudice. This appeal followed.

By Order entered December 3, 2009, this Court approved the substitution of BV Jordanelle, LLC (“**BV Jordanelle**”) as the Appellee in place of PWJ.

C. Disposition Below.

The District Court entered its Ruling on December 29, 2008 which contained an Order dismissing all of the Highlands’ claims with prejudice. The Court also denied the Highlands’ proposed Judgment by express reference to the Ruling. (*See* Addendum 2.) The Ruling was a final order under Utah R. App. P. 3(a) because it ended the litigation on the merits and left nothing for the District Court to do but execute the judgment. *Crosland v. Peck, et al.*, 738 P.2d 631, 632 (Utah 1987).

STATEMENT OF RELEVANT FACTS

The following statements of fact are taken nearly verbatim from the District Court’s Ruling. They are the undisputed facts as found below upon which the District Court based its Ruling and Order.

1. The Highlands owns certain real property located in Wasatch County, State of Utah (the “**Highlands Property**”). (R. at 106.)
2. The Highlands Property is part of a master planned residential development known as The Highlands at Jordanelle. (*Id.* at 105.)
3. PWJ (now BV Jordanelle) owns real property in Wasatch County, State of Utah (the “**PWJ Property**”) which lies directly [west] of the Highlands Property. (*Id.*)

4. The PWJ Property is part of a larger master planned residential development known as “Talisman.” (*Id.*)

5. Wasatch County approved the master plan for The Highlands at Jordanelle on July 16, 2008. (*Id.*)

6. A public road called the Talisman Parkway crosses the eastern portion of the Talisman development. The Talisman Parkway has been dedicated to Wasatch County as a public road. (*Id.*)

7. The Talisman Parkway comes within 202.9 feet of the Highlands Property. (R. at 105.)

8. The Highlands brought suit to condemn an easement running from the Talisman Parkway, 202.9 feet across the PWJ Property to the Highlands Property (the “**Easement**”). The Easement would be 60 feet wide. (*Id.*)

9. The purpose of the Easement would be for a new public road connecting the Highlands Property to an existing public road, the Talisman Parkway. (*Id.*)

10. The Easement would be used for access to the Highlands Property and the planned residences to be constructed in the development. (*Id.*)

11. The Easement will also be used to install electric, sewer and other utilities. (*Id.* at 104.)

12. As part of the master plan for The Highlands at Jordanelle, Wasatch County approved the proposed access point to the Talisman Parkway at or near the location of the proposed Easement. (*Id.*)

13. As part of the Wasatch County development process, the Highlands is required to dedicate all roads in its development, including the Easement, to Wasatch County as public roads. (R. at 104.)

14. The Wasatch County development code requires the Highlands to have two points of access in and out of the development. The Easement would serve as one of these points of access. (*Id.*)

15. The value of the Easement is \$18,750. (*Id.*)

16. Through its principals and legal counsel, the Highlands made numerous efforts to secure the Easement from PWJ and the other partners in the Talisman development. PWJ refused to discuss it with the Highlands. (*Id.*)

17. On September 23, 2008, the Highlands filed this action. The Complaint states one cause of action entitled “Condemnation.” (*Id.*)

18. The Clerk of the Court signed an Entry of Default against PWJ on October 16, 2008. (R. at 103.)

19. The Highlands filed a Motion for Default Judgment on October 21, 2008. (*Id.*)

20. The Honorable Derek P. Pullan of the Fourth Judicial District Court for Wasatch County, State of Utah, entered a Ruling on December 29, 2008 denying the Highlands' Motion. (*Id.*)

SUMMARY OF ARGUMENTS

Under Utah case law dating back more than 100 years, condemnations by private persons and entities have been upheld repeatedly under Utah Code Ann. § 78B-6-501 and its predecessor statutes. The focus of inquiry in those cases, as in the statute itself, is whether the property is sought to be condemned for a “public use” enumerated in the statute. At least 2 of those Utah Supreme Court decisions were challenged and upheld in the United States Supreme Court. Because the property sought to be condemned here is for a clear public use – a road, street, or byroad – the statute gives the Highlands the right of eminent domain.

Established principles of statutory construction require a reversal of the District Court's interpretation. Nowhere does Section 78B-6-501 state a limitation on *who* may exercise the right of eminent domain. Rather, it focuses on whether the proposed *use* is a “public use.” If the Legislature meant to limit the right of eminent domain to only government entities, it easily could have stated that intent, but has not done so. Separate statutes giving eminent domain authority to counties, cities, and towns for specified purposes do not change the meaning of Section 78B-6-501.

Moreover, in the face of numerous Utah Supreme Court decisions approving condemnations by private parties, the Utah legislature has never amended Section 78B-6-501 or its predecessors to limit the right of eminent domain to government entities. Thus, the Legislature is presumed to have been satisfied with those prior judicial interpretations of the statute and to have adopted them as consistent with its own intent.

The “necessary implication” reasoning of the District Court misunderstands the case law described above. Utah decisions approving private condemnations for the development of water and mineral resources have focused on the importance of those resources to the general public good, thereby concluding the proposed condemnations were for “public uses.” The cases cannot be read as concluding that private parties can only exercise the right of eminent domain in the context of water and mineral resources. The statute expresses no such limitation. And the proposed use of the Easement here as a public road is unquestionably a “public use.”

Finally, there can be no legitimate concern that the Easement will end up permanently in private ownership. The Highlands is required to dedicate the Easement to Wasatch County as a public road, and it would be one of two required public accesses to the development. Utah’s eminent domain code allows the District Court to determine a reasonable time within which the Highlands would be required to complete the use specified, *i.e.* to dedicate the Easement as a public road. If not, the District Court could enter judgment vesting title to the property in BV Jordanelle.

ARGUMENT

POINT I

THE HIGHLANDS HAS THE RIGHT TO ACQUIRE THE EASEMENT VIA EMINENT DOMAIN.

Utah's eminent domain statute is found at Utah Code Ann. § 78B-6-501, *et seq.* Section 78B-6-501 provides in part as follows:

“Subject to the provisions of this part, the right of eminent domain may be exercised on behalf of the following public uses:

(3)(e) roads, streets, and alleys for public vehicular use . . .;

(f) all other public uses for the benefit of any county, city, or town, or its inhabitants;

* * *

(7) Byroads leading from highways to residences and farms.

Utah Code Ann. § 78B-6-501. It is significant to note that the statute defines the right of eminent domain in terms of the *uses* for which the right may be exercised, and not in terms of *who* may exercise it.

A. Utah Eminent Domain Cases.

For more than 100 years Utah cases have allowed private parties to exercise the right of eminent domain where the proposed use was a “public use.” In *Nash v. Clark*, 27 Utah 158, 75 P. 371 (1904), the Utah Supreme Court upheld a condemnation by a private party. Mr. Nash was a farmer who sought to condemn a right of way over

his neighbor's property to extend an irrigation ditch and supply water to his farm. The defendant argued the farmer's use of eminent domain was unconstitutional, contending it was strictly for a private use. The Court's analysis focused on whether the condemnation was for a public use and not whether the condemnor was a public or private person. On the issue of public use, the Court stated:

One class of authorities, in a general way, holds that by public use is meant a use by the public or its agencies – that is, the public must have the right to the actual use in some way of the property appropriated; whereas the other line of decisions holds that it is a public use within the meaning of the law when the taking is for a use that will promote the public interest, and which use tends to develop the great natural resources of the common wealth. After a careful examination of the leading cases on this subject, *we are of the opinion that the class of decisions last mentioned are more in harmony with enlightened public policy, and the liberal interpretation given to the term "public use" which the Legislature has, in effect, declared shall be followed in this state . . .*

Id. (emphasis added). The Court held irrigation was a public use under the Utah eminent domain statute, and therefore it was a proper exercise of eminent domain power. *Id.* at 374.

The Court in *Nash v. Clark* did not explicitly address the question of whether the private farmer, Mr. Nash, could exercise the right of eminent domain, but implicitly approved his right to do so under the statute then in effect, a predecessor to Utah Code Ann. § 78B-6-501. If the right were in question because Nash was a private individual and not a government entity, the Court undoubtedly would have addressed the issue. Since then *Nash* has been cited for the proposition that Utah's statute allows private persons to exercise the right of eminent domain.

The eminent domain statute construed in *Nash* had the same introductory clause as the current statute: “Subject to the provisions of this chapter the right of eminent domain may be exercised on behalf of the following public uses . . .” *Nash*, 75 P. at 371 (*quoting* Rev. St. 1898, § 3588). (A copy of the 1898 statute is attached as Addendum 3.) Thus, the focus of the Court’s analysis then, just as it should be now, was whether the use was a “public use” under the eminent domain statute. Moreover, it is clear the Court understood that a private farmer was exercising the right of eminent domain to get water to his land. There could be no mistake as to his private status and there is no suggestion he was acting on behalf of a government entity or agency. The Court stated: “The only possible way *the farmer* can supply *his land* with water is by conveying it by means of ditches across his neighbor’s lands which intervene between his own and the source from which he obtains his supply.” *Id.* at 374 (emphasis added).

The decision in *Nash v. Clark* was then reviewed by the United States Supreme Court on this very issue. *Clark, et al. v. Nash*, 198 U.S. 361 (1905). The appellant argued the proposed use “is not a public use, and that, therefore, [Nash] has no constitutional or other right to condemn the land, or any portion of it . . . for that purpose.” *Id.* at 367. However, the Court agreed with the Utah Supreme Court and held as follows:

We are, however, as we have said, disposed to agree with the Utah court with regard to the validity of the state statute which provides, under the circumstances stated in the act, for the condemnation of the land of one individual for the purpose of allowing another individual to obtain water from the stream in which he has an interest, to irrigate his land, which otherwise would remain absolutely valueless.

Id. at 369 (emphasis added). Thus, the United States Supreme Court likewise interpreted the Utah statute to allow private persons to exercise the right of eminent domain if it is for a public use.¹

In *Highland Boy Gold Mining Co. v. Strickley*, 28 Utah 215, 78 P. 296, 298 (1904), the Utah Supreme Court upheld a private condemnation of a road for the plaintiff's mining operations. It held that "the construction of roads and tramways for the development of the mining industry is a public use." *Id.* at 298. Here, as in *Nash*, the focus of the Court's analysis was whether the right of eminent domain was being exercised for a public use. The plaintiff who sought to exercise that right was obviously a private mining company and the Court expressed no concern about whether the company had the right to do so, but instead focused on whether the right was being exercised for a public use. As referenced above, the Utah statute channels the analysis precisely in that direction. It does not limit who may exercise the right but simply asks whether it is exercised for a public use. *See* Utah Code Ann. § 78B-6-501. The United

¹ In *Kelo v. City of New London*, 545 U.S. 469 (2005), the United States Supreme Court held that under the United States Constitution a condemnation need not result in actual public ownership or use but must merely serve a "public purpose." *Id.* at 479-80. "Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field." *Id.* at 480 (emphasis added). "The public end may be as well or better served through an agency of private enterprise than through a department of the government." *Id.* at 486 (*quoting Berman, et al v. Parker, et al.*, 348 U.S. 26, 33 (1954)). The Court concluded that because the proposed condemnation of private property "unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment." *Kelo*, 545 U.S. at 484.

States Supreme Court also affirmed this decision, holding the Utah statute constitutional. *Strickley, et al. v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 531-32 (1906) (citing *Clark, et al. v. Nash*, 198 U.S. 361 (1905)).

The Utah Supreme Court approved the private condemnation of a mining tunnel in *Monetaire Mining Co. v. Columbus Rexall Consolidated Mines Co., et al.*, 53 Utah 413, 174 P. 172 (1918). The plaintiff was a private mining company which sought to condemn the right to use a mining tunnel in common with the defendants. The Court held that the eminent domain statute (Comp. Laws 1907, § 3588) was meant “to declare mining generally and the development of mines and mineral deposits a public use, in furtherance of which the right of the exercise of eminent domain was applied with full force and effect.” *Id.* at 175. With that broad statement of public use, the Court then concluded as follows:

If appellant’s application merely involved the exercise of the right of eminent domain to construct a tunnel through, or a road or passageway over, respondent’s mining claims, . . . no one would either question or doubt appellant’s right to condemn the right for such purposes.

Id. (emphasis added). Thus, because the company could clearly condemn its own new mining tunnel, it could certainly condemn an easement to use the defendant’s existing tunnel in common. *Id.* Once again, the Utah Supreme Court concluded a private company could exercise the right of eminent domain if it was for a public purpose under the statute. And the statute was again organized in the same fashion as previous versions with an identical introductory clause. *Id.* at 174-75.

The next significant decision on this issue is *Alcorn v. Reading*, 66 Utah 509, 243 P. 922 (1926). There the Utah Supreme Court reviewed a claim of easement by necessity for an irrigation ditch and the right of eminent domain in that context. The Court cited to its earlier opinion in *Nash v. Clark* and summarized the holding of that case as follows:

The right of condemnation for such purposes is thereby allowed without regard to whether the right is sought by the public or by a private individual.

Id. at 926 (emphasis added) (citing *Nash v. Clark*, 27 Utah 158, 75 P. 371 (1904)). The Court in *Alcorn* went on to hold that an easement by necessity is unenforceable where there is a right to condemn, but that holding was subsequently overruled in *Adamson, et al. v. Brockbank, et al.*, 112 Utah 52, 185 P.2d 264, 274 (1947). Yet both the holding in *Nash v. Clark* and *Alcorn's* recital of it remain undisturbed.

Later that same year, the Utah Supreme Court addressed the issue more directly, and held Utah's statute allows private parties to exercise the right of eminent domain. In *Utah Copper Co. v. Montana-Bingham Consolidated Mining Co.*, 59 Utah 423, 255 P. 672 (1926), the plaintiff filed an action "to condemn a right of way and easements" over the defendant's mining claims. *Id.* at 673. The defendant argued "that the plaintiff, under the statute, was not entitled to exercise the right of eminent domain" *Id.* At a hearing on the plaintiff's motion for order of immediate occupancy, the defendant presented evidence challenging the plaintiff's right to condemn. *Id.* at 675. The trial court nevertheless granted the order of immediate occupancy. *Id.* at 675-76.

On appeal, the Utah Supreme Court was asked to consider whether the order was final or interlocutory. In reaching the conclusion it was interlocutory, the Court held the eminent domain statute allows private parties to condemn. The Court stated as follows:

[U]nder a statute such as we have, giving an individual or mere private corporation not engaged in public service the right to exercise eminent domain under the circumstances enumerated in the statute, we think the landowner whose property is sought to be condemned and taken, has, as against such a condemnor, an undoubted right to controvert and contest the taking and necessity therefor.

Id. at 677 (emphasis added).² The Utah Supreme Court thus interpreted Utah's eminent domain statute to allow the exercise of eminent domain power by private persons if it is for a public purpose enumerated in the statute. It is important to note that the statute cited in *Montana-Bingham* (Comp. Laws Utah 1917, § 7330), *id.* at 673, is very similar to Section 78B-6-501 and begins with a nearly identical introductory clause: "Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses" Compare § 7330 (see Addendum 4) with Utah Code Ann. § 78B-6-501.

In *Utah Copper Co. v. Stephen Hayes Estate, Inc., et al.*, 83 Utah 545, 31 P.2d 624 (1934), a private mining company sought to condemn certain property for use "in aid of mining." *Id.* at 625. In upholding the condemnation by a private company, the Utah Supreme Court held that the eminent domain "statute must be construed . . . and

² Because the Defendant had the right to challenge such a condemnation, whether by a public or a private condemnor, it should have had the opportunity to do so at trial. Thus, the order of immediate occupancy was interlocutory. *Id.*

applied to any particular case *with as much liberality as its language may permit in order to carry out the purpose which the legislative power had in mind, which was to declare mining generally a public use in aid of which the power of eminent domain may be invoked.*” *Id.* at 627 (emphasis added). The Court interpreted the same statute: Comp. Laws Utah 1917, § 7330. *Stephen Hayes*, 31 P.2d at 627; *compare* Addendum 4.

In *Jacobson, et al. v. Memmott, et al.*, 11 Utah 2d 16, 354 P.2d 569 (1960), a private company and a private individual sought to condemn a roadway for mining operations. The eminent domain claim was based upon the statute then codified as Utah Code Ann. § 78-34-1, which read the same as it does today: “Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses” *Id.* at 570 n.1. The Utah Supreme Court upheld the condemnation by the two private plaintiffs and again focused its analysis on roadways to mining deposits as being a public use and proper subjects for condemnation. *Id.* at 570-71.

The cases discussed above are a series of Utah decisions each upholding condemnation of an interest in real property by a private individual or corporation. In each case, the eminent domain statute was materially identical to today’s statute found at Utah Code Ann. § 78B-6-501. Each case supports the position of the Highlands on this appeal.

B. Other Authorities.

A private party’s right to condemn property for enumerated public uses has also been recognized in other jurisdictions and by secondary authorities. In *Glenbrook Homeowners Association, Inc. v. Pettitt, et al.*, 919 P.2d 1061 (Nev. 1996), the Nevada

Supreme Court approved a similar exercise of the right of eminent domain by a private landowner. The Glenbrook Homeowners Association, a private corporation, sought to improve the existing access to its residential development by condemning property of an adjoining landowner. *Id.* at 1061-62. The Nevada eminent domain statute is materially identical to the Utah statute, and states as follows: “Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public purposes: . . . (7) Byroads. Byroads leading from highways to residences and farms.” *Id.* at 1063 (*quoting* N.R.S. § 37.010). The defendant challenged the Association’s right to exercise the power of eminent domain and argued that to do so “an entity must be a specifically delegated condemnation authority.” *Glenbrook*, 919 P.2d at 1063.

The Nevada Supreme Court reviewed its prior decisions interpreting the statute, and ruled that those decisions addressed the “public purpose” for which condemnation powers could be exercised “rather than the identity of the party exercising the power.” *Id.* Once the public purpose was established, “*the power of the private company to condemn the property for that purpose was recognized, even though the statute did not expressly state that a private company was authorized to exercise such power.*” *Id.* (emphasis added). If the Nevada legislature had intended to limit the power of eminent domain “it would have expressly done so.” *Id.* Based thereon, the Nevada Supreme Court ruled that the Association had the right to “condemn the property necessary to correct the defective condition of the byroad.” *Id.*

The Nevada Court also considered other provisions of its eminent domain statute which are also virtually identical to the Utah statute. Specifically, the Court

considered N.R.S. § 37.070(2) which outlines the required contents of a condemnation complaint. It states: “The name of the corporation, association, commission or person in charge of the public use for which the property is sought, who must be styled plaintiffs.” *Glenbrook*, 919 P.2d at 1063 n.1. The Court held the words the “person in charge of the public use for which the property is sought” indicate the statute contemplates that “entities other than government agencies are authorized to condemn property, as long as the planned use constitutes a public use.” *Id.* at 1063. Utah’s statute contains identical language. *See* Utah Code Ann. § 78B-6-507(1)(a).

The recognized treatise NICHOLS ON EMINENT DOMAIN states: “Private corporations may be granted the authority to exercise eminent domain even if they are under no obligation to serve the public.” *Id.* § 3.03[3][b](ii). Also, AMERICAN JURISPRUDENCE states that the power of eminent domain may “be exercised by individuals and private corporations which are under no obligation to serve the public, provided the use is recognized by the law of the jurisdiction as one for which the right of eminent domain may be exercised.” 26 AM. JUR. 2d *Eminent Domain* § 28 (2008). And FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS provides:

In the absence of a constitutional restriction, the legislature may delegate the power [of eminent domain] to a municipality, a private corporation, a transportation company, or an individual, provided the property, when condemned, is to be put to a public use . . .

6A FLETCHER CYC. CORP. § 2905 (2005) (emphasis added).

From these authorities, there can be no doubt that a private party may exercise the right of eminent domain. The only question is whether the proposed condemnation serves a public use enumerated in the Utah eminent domain statute.

POINT II

THE COURT SHOULD CONSTRUE THE PLAIN LANGUAGE OF UTAH'S EMINENT DOMAIN STATUTE.

The District Court's Ruling misreads Section 78B-6-501 and holds that "the Legislature has expressly granted to counties, cities, and towns the authority to condemn private property for public streets and by roads [sic]. Utah Code Ann. § 78B-6-501(3)(e); (7)." (R. 98-99.) To the contrary, Section 78B-6-501 grants no explicit authority to "counties, cities, and towns" or to any particular person or entity, but rather defines the "public uses" for which the right of eminent domain may be exercised. Subsection (3)(e) identifies "roads, streets, and allies" as a public use. Utah Code Ann. § 78B-6-501(3)(e). Subsection (7) also identifies "byroads leading from highways to residences and farms" as a public use. Utah Code Ann. § 78B-6-501(7). It is true that some parts of Section 78B-6-501 make reference to counties, cities, and towns, but they do so only in the definition of public uses and not by way of granting the power of eminent domain to such municipal entities. In fact, Section 78B-6-501 contains no limitation on *who* may exercise the right of eminent domain. *See id.*

Basic principles of statutory construction preclude the interpretation adopted by the District Court. When construing a statute the Court begins from the

premise that if the Legislature intended it to have a particular meaning, it would have expressly stated that meaning. The Utah Supreme Court has held:

[I]t is improper to “infer substantive terms into the text that are not already there. Rather, [statutory] interpretation must be based on the language used, and the Court has no power to rewrite the statute to conform to an intention not expressed.”

In the Matter of the General Determination of Rights to the Use of Water, 2004 UT 106, ¶25, 110 P.3d 666 (quoting *Berrett v. Purser & Edwards*, 876 P.2d 367, 370 (Utah 1994)). The Court has described this as a “cardinal rule of statutory construction . . .” *Berrett*, 876 P.2d at 370.

The District Court’s Ruling runs directly contrary to this cardinal rule. It would read into Section 78B-6-501 a limitation not written in the statute, *i.e.* that the right of eminent domain for roads, streets, and byroads may only be exercised by counties, cities, or towns. This Court may not rewrite the statute to include such a limitation. Since at least 1904 when *Nash v. Clark* was decided, Section 78B-6-501 and prior versions of it have contained nearly identical language with no limitation upon who may exercise the right of eminent domain. (See Addenda 1, 3-4.)

The District Court also noted that Utah Code Ann. § 10-8-2(1)(b) grants cities and towns the power to acquire property by eminent domain, and that Utah Code Ann. § 17-50-302 grants the same power to counties. (R. 98.) It went on to hold that in the face of such express grants of authority, Section 78B-6-501 may not be read to permit private persons to exercise the right of eminent domain. (*Id.* at 91.)

The reason for those statutes most likely derives from a general principle of municipal law declared by the Utah Supreme Court as follows: “It is elementary that municipalities are limited by express grants of power from the legislature or as necessarily implied from such grants.” *Salt Lake City v. Allred, et al.*, 19 Utah 2d 254, 430 P.2d 371, 373 (1967), *decision upon rehearing*, 20 Utah 2d 298, 437 P.2d 434 (1968); MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 10:11 (“A municipal corporation possesses and can exercise all powers granted in express terms . . .”) In *Bertagnoli, et al. v. Baker, et al.*, 117 Utah 348, 215 P.2d 626 (1950), the Court similarly held that boards of education are public municipal corporations and that “their powers are purely statutory . . .” *Id.* at 627. They “have only such powers as are expressly conferred upon them and such implied powers as are necessary to execute and carry into effect their express powers.” *Id.* See also *Hi-Country Estates HOA v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995) (government agency had no powers other than those expressly granted to it by statute).³

Thus, the Legislature likely gave express grants of power to municipal entities to eliminate any question about their authority. However, such a grant “is merely an express recognition of power . . . previously held by the municipalities” and is not a grant of “new power not previously held” under Section 78B-6-501. See *Rupp, et al. v.*

³ By contrast, a private company has rather unlimited authority. A Utah limited liability company may “transact any lawful business that the members or the managers find to be in aid of governmental policy;” and may “have and exercise the same powers as an individual, and all powers necessary or convenient to effect or carry out any or all of the purposes for which the company is organized.” Utah Code Ann. § 48-2c-110(14) and (17). Likewise, a Utah corporation may engage in any lawful business except for express limitations set forth in the articles of incorporation. Utah Code Ann. § 16-10a-301(1).

Grantsville City, et al., 610 P.2d 338, 340 n.4. (Utah 1980). The fact that another statute separate from Utah Code Ann. § 78B-6-501 also authorizes a municipality to exercise the power of eminent domain does not restrict or limit the meaning of Section 78B-6-501.

Under these authorities, a limitation cannot be read into Section 78B-6-501 as the District Court held. The statute expresses no limitation upon who may exercise the right of eminent domain but only upon the purposes for which it may be exercised. *See* Utah Code Ann. § 78B-6-501. If the Legislature meant that only government entities could exercise the right of eminent domain, it could have and should have explicitly stated that intent. It has not done so. Even in the face of multiple Utah Supreme Court decisions approving condemnation by private persons, the Legislature took no steps to correct any supposed error in the Court's interpretations, although it occasionally amended the description of public uses enumerated in the statute. An established canon of statutory construction provides:

where a legislature amends a portion of a statute but leaves other portions unamended, or re-enacts them without change, the legislature is *presumed to have been satisfied with prior judicial constructions of the unchanged portions and to have adopted them as consistent with its own intent.*

Christensen v. Industrial Comm. of Utah, 642 P.2d 755, 756 (Utah 1982) (emphasis added). Section 78B-6-501 and prior versions dating back to 1898 are materially identical in structure even though several re-codifications have occurred. Each one authorizes the right of eminent domain on behalf of specified public uses, and places no limitation upon *who* may exercise the right. Thus, this Court should presume the Utah Legislature has accepted and adopted the interpretations from the cases cited in Point I.

Moreover, the Legislature long ago declared that the term “public use” shall be given a “liberal interpretation” in Utah. *See Nash*, 75 P. at 373. Indeed, it should be read with “as much liberality as its language may permit in order to carry out the purpose which the legislative power had in mind . . .” *Steven Hayes*, 31 P.2d at 627.

POINT III

THE PUBLIC USE SOUGHT BY THE HIGHLANDS IS EXPRESS; THE DISTRICT COURT’S “NECESSARY IMPLICATION” REASONING IS MISPLACED.

The District Court held that the Highlands lacked authority to condemn because a private exercise of eminent domain power was neither express nor necessarily implied in Utah Code Ann. § 78B-6-501. The Ruling misreads the statute and misinterprets the case law discussed in Point I above.

A. Roads, Streets, and Byroads Are a Public Use.

The Utah eminent domain statute plainly declares that roads to private residences are a public use. The statute describes “the following public uses” among others: “(3)(e) roads, streets, and alleys for public vehicular use” and “(7) byroads leading from highways to residences and farms.” *See* Utah Code Ann. § 78B-6-501(3)(e) and (7).

In *Town of Perry v. Thomas et al.*, 82 Utah 159, 22 P.2d 343 (1933), the Town sought to condemn property for a public road to several farms pursuant to section (7) of the eminent domain statute. The Utah Supreme Court held “[t]he phrase ‘public use,’ as used in the eminent domain statute, has been given a liberal interpretation

by this court.” *Id.* at 346. “*It is well settled that the taking of land for public streets, highways, and roads is a public use.*” *Id.* (emphasis added).

The property owner objected on grounds that the use was not public because it would benefit only three or four private farms. The Court rejected that argument and held:

The use is not to be restricted to a few persons but all persons may, if and when they choose, use the street when opened. Whether land will be devoted to a public use is determined by the character of its use rather than the extent of its use. That is, if the way is opened for use by all it is a public use whether advantage be taken of the street by few or many persons.

Id. (emphasis added). Likewise, NICHOLS ON EMINENT DOMAIN provides:

The public use does not depend on the degree of public necessity or convenience that requires the road or the extent to which the public uses it, or the number of persons that it accommodates. It is not a valid objection that the proposed highway will be a cul de sac or that it will lead to the private residence or place of only one individual. The public may desire to visit or do business with that person. If a road is to be open for public travel, the purpose for which the public may wish to travel is immaterial.

NICHOLS ON EMINENT DOMAIN § 7.06[3][b] (emphasis added).

The use for which the Highlands seeks to condemn the Easement is expressly authorized by the statute. Like the road in *Town of Perry*, the Easement will be open to the public and therefore is a public use explicitly enumerated in the Utah eminent domain statute.

B. Water and Mineral Resources Cases.

The District Court held that the Utah Supreme Court has recognized “implied grants of eminent domain authority” only with respect to Utah’s water resources and mineral resources, and that no other “implied grant” of authority exists. (R. at 91-97.) The District Court misconstrued the intent of the statute and the reasoning of those cases.

The District Court incorrectly ruled that Utah courts have used the doctrine of necessary implication to allow the private exercise of eminent domain power only by mining companies and irrigation companies. To the contrary, the right of eminent domain approved in those cases was based on express statements of *public use* in the eminent domain statute. See, e.g., *Highland*, 78 P. at 297; *Monetaire*, 174 P. at 176; *Jacobson*, 354 P.2d at 571. In *Monetaire*, the Court held that “[o]ur statute in clear and explicit terms, grants the right of eminent domain for the purpose of developing the mining industry and for the purpose of developing mineral resources of the state, regardless of ownership.” *Monetaire*, 174 P. at 175-76. The Court has thus authorized the private exercise of eminent domain power for public uses enumerated in the Utah eminent domain statute.

The Court did not by such decisions allow the private exercise of eminent domain power only when it comes to water and mineral resources. Rather, the cases discussed the reasons why the development of water and mineral resources are of benefit to the public, and therefore are “public uses” under the broadly interpreted eminent domain statute. For example, the Court held in *Nash* that extension of an irrigation ditch

to one man's farm was a "public use" because the development of water resources would "ultimately enable citizens, as individuals, to provide themselves with homes, and to furnish additional opportunities for the further development of the great natural resources with which the arid region abounds." *Nash*, 75 P. at 374. The Court further held: "The future growth, prosperity, upbuilding, and industrial expansion of the state not only depend upon the storing and holding back [sic] the high and surplus water so they can be used in times of scarcity, but also in a careful and judicious husbandry of the supply now available" *Id.* at 374.

With respect to mineral resources, the Utah Supreme Court has held that the Legislature intended "to declare mining generally and the development of mines and mineral deposits a public use" *Monetaire*, 174 P. at 175; *see also Strickley*, 78 P. at 298 (mining industry furnishes thousands with steady employment and produces wealth which enables other industries); *Steven Hayes*, 31 P.2d at 627 (Utah Legislature declared "mining generally a public use").

The import of these decisions is that the development of water and mineral resources was essential to Utah's economy, and that is why the Legislature enumerated them as public uses in the eminent domain statute. That most of the cases cited above arose in the context of water and mineral resources is a function of the economic realities of the day. The cases cannot be read, like the District Court did, as limited exceptions to an otherwise general ban on the private exercise of eminent domain power. If that were the intent of the statute, the Legislature would have expressed it or the Utah Supreme

Court would have so declared it in the numerous decisions cited above. Plainly, neither one did so.

POINT IV

THE HIGHLANDS WILL NOT RETAIN OWNERSHIP OF THE CONDEMNED PROPERTY.

In its Ruling, the District Court raised the concern that the “right of way is destined for at least temporary private ownership. ... Conceivably, the proposed road might never be constructed and dedicated, leaving the right of way in private ownership.” (R. at 100-01.) For the following reasons, that concern is unjustified.

First, it is clear in a development such as this that the Highlands must acquire property not only for houses to be constructed, but for roads and streets as well, and to dedicate all roads to the government. The facts found by the District Court acknowledge that the Highlands “is required to dedicate all roads, including the Easement, to Wasatch County as public roads.” (R. at 104.) The District Court also found that the Wasatch County development code requires the Highlands “to have two points of access in and out of the development. . . . The Easement would serve as one of these points of access.” (*Id.*) Based on the District Court’s own findings, therefore, the Easement is necessary for the development of the Highlands Property. And it is clear that all roadways including the Easement must be dedicated as public roads and will become the property of Wasatch County, after being temporarily held in the private ownership of the Highlands.

There is no question this is the standard process for residential development in Utah. While counties, cities, and towns could choose to condemn land for public roadways, nearly all roads and streets become public property when developers such as the Highlands dedicate them to public ownership. The only difference here is the manner in which the Highlands seeks to acquire the Easement for ultimate dedication as a public road. It is significant to note, however, that the properties condemned in *Nash*, *Strickley*, *Monetaire*, *Montana-Bingham*, *Steven Hayes*, and *Jacobson* all remained permanently in private ownership after condemnation.

Second, Utah's eminent domain code has long included a provision which eliminates the District Court's concern. Under Utah Code Ann. § 78B-6-520, the Court in an action to condemn property may make "a finding of what is a reasonable time for commencement of construction and use of all the property sought to be condemned" Utah Code Ann. § 78B-6-520(1). If the condemnor fails to do so within the time specified, the Court may then enter judgment vesting the property in the condemnee. Utah Code Ann. § 78B-6-520(3)-(4).

To address that concern, this Court can and should approve the Highlands' right to exercise the power of eminent domain, and then remand to the District Court for determination of a reasonable time in which to complete the use of the condemned property, *i.e.* to dedicate it to public ownership. Thus, the Easement would either become part of the development of the Highlands Property and dedicated to Wasatch County as planned, or it would revert to the ownership of BV Jordanelle. There is no possibility

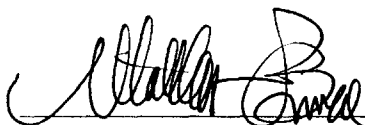
under Utah's eminent domain code for the Easement to remain permanently in private ownership.

CONCLUSION

For the reasons set forth above, this Court should rule that the Highlands has the right of eminent domain under Utah Code Ann. § 78B-6-501 because it is sought for a public use clearly specified in the statute. The Easement is necessary to satisfy Wasatch County's requirement for a second access to the proposed development, and must be dedicated to Wasatch County as a public road. The Court should then remand to the District Court to determine a reasonable time for the Highland to complete the dedication of the Easement as a public roadway.

DATED this 21 day of December, 2009.

RICHARDS BRANDT MILLER NELSON



MATTHEW C. BARNECK

PAUL P. BURGHARDT

Attorneys for Plaintiff/Appellant

ADDENDUM

- Addendum 1 – Utah Code Ann. § 78B-6-501
- Addendum 2 – District Court's Ruling entered December 29, 2008
- Addendum 3 – The Revised Statutes of the State of Utah dated January 1, 1898, Section 3588
- Addendum 4 – Compiled Laws of the State of Utah, 1917, Section 7330

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing instrument were mailed, first-class, postage prepaid, on this 21 day of December, 2009, to the following:

Michael R. Johnson, Esq.
RAY QUINNEY & NEBEKER
36 South State Street, Suite 1400
P.O. Box 45385
Salt Lake City, Utah 84111
Attorneys for BV Jordanelle, LLC



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ADDENDUM “1”

C

West's Utah Code Annotated Currentness

Title 78B. Judicial Code

Chapter 6. Particular Proceedings

Part 5. Eminent Domain (Refs & Annos)

→ § 78B-6-501. Eminent domain—Uses for which right may be exercised

Subject to the provisions of this part, the right of eminent domain may be exercised on behalf of the following public uses:

- (1) all public uses authorized by the Government of the United States;
- (2) public buildings and grounds for the use of the state, and all other public uses authorized by the Legislature;
- (3)(a) public buildings and grounds for the use of any county, city, town, or board of education;
- (b) reservoirs, canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, city, or town, or for the draining of any county, city, or town;
- (c) the raising of the banks of streams, removing obstructions from streams, and widening, deepening, or straightening their channels;
- (d) bicycle paths and sidewalks adjacent to paved roads;
- (e) roads, streets, and alleys for public vehicular use, excluding trails, paths, or other ways for walking, hiking, bicycling, equestrian use, or other recreational uses, or whose primary purpose is as a foot path, equestrian trail, bicycle path, or walkway; and
- (f) all other public uses for the benefit of any county, city, or town, or its inhabitants;
- (4) wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, byroads, plank and turnpike roads, roads for transportation by traction engines or road locomotives, roads for logging or lumbering purposes, and railroads and street railways for public transportation;
- (5) reservoirs, dams, watergates, canals, ditches, flumes, tunnels, aqueducts and pipes for the supplying of persons, mines, mills, smelters or other works for the reduction of ores, with water for domestic or other uses, or for

irrigation purposes, or for the draining and reclaiming of lands, or for the floating of logs and lumber on streams not navigable, or for solar evaporation ponds and other facilities for the recovery of minerals in solution;

(6)(a) roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines, quarries, coal mines, or mineral deposits including minerals in solution;

(b) outlets, natural or otherwise, for the deposit or conduct of tailings, refuse or water from mills, smelters or other works for the reduction of ores, or from mines, quarries, coal mines or mineral deposits including minerals in solution;

(c) mill dams;

(d) gas, oil or coal pipelines, tanks or reservoirs, including any subsurface stratum or formation in any land for the underground storage of natural gas, and in connection with that, any other interests in property which may be required to adequately examine, prepare, maintain, and operate underground natural gas storage facilities;

(e) solar evaporation ponds and other facilities for the recovery of minerals in solution; and

(f) any occupancy in common by the owners or possessors of different mines, quarries, coal mines, mineral deposits, mills, smelters, or other places for the reduction of ores, or any place for the flow, deposit or conduct of tailings or refuse matter;

(7) byroads leading from highways to residences and farms;

(8) telegraph, telephone, electric light and electric power lines, and sites for electric light and power plants;

(9) sewerage of any city or town, or of any settlement of not less than ten families, or of any public building belonging to the state, or of any college or university;

(10) canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light or heat;

(11) cemeteries and public parks, except for a park whose primary use is:

(a) as a trail, path, or other way for walking, hiking, bicycling, or equestrian use; or

(b) to connect other trails, paths, or other ways for walking, hiking, bicycling, or equestrian use;

(12) pipe lines for the purpose of conducting any and all liquids connected with the manufacture of beet sugar; and

(13) sites for mills, smelters or other works for the reduction of ores and necessary to their successful operation, including the right to take lands for the discharge and natural distribution of smoke, fumes, and dust, produced by the operation of works, provided that the powers granted by this subsection may not be exercised in any county where the population exceeds 20,000, or within one mile of the limits of any city or incorporated town nor unless the proposed condemner has the right to operate by purchase, option to purchase or easement, at least 75% in value of land acreage owned by persons or corporations situated within a radius of four miles from the mill, smelter or other works for the reduction of ores; nor beyond the limits of the four-mile radius; nor as to lands covered by contracts, easements, or agreements existing between the condemner and the owner of land within the limit and providing for the operation of such mill, smelter, or other works for the reduction of ores; nor until an action shall have been commenced to restrain the operation of such mill, smelter, or other works for the reduction of ores.

CREDIT(S)

Laws 2008, c. 3, § 942, eff. Feb. 7, 2008; Laws 2008, c. 341, § 1, eff. May 5, 2008.

Current through 2009 General Session and 2009 First Special Session

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ADDENDUM “2”

DEC 30 2008

Monica, Brian
H. Nelson

2008 DEC 30 11:23

**IN THE FOURTH JUDICIAL DISTRICT COURT
WASATCH COUNTY, STATE OF UTAH**

<p>THE HIGHLANDS AT JORDANELLE, LLC,</p> <p>Plaintiff,</p> <p>v.</p> <p>PWJ HOLDINGS, LLC,</p> <p>Defendant.</p>	<p>RULING</p> <p>Case No. 080500461</p> <p>Judge Derek P. Pullan</p>
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This matter comes before the Court on Plaintiff The Highlands at Jordanelle, L.L.C.'s ("The Highlands") Motion for Default Judgment. The legal issue before the Court is whether the Utah Legislature has authorized limited liability companies to exercise the power of eminent domain for the purpose of developing public streets?

For the reasons stated in this Ruling, the answer to this question is no. Because The Highlands lacks the authority of eminent domain, its sole cause of action for condemnation fails as a matter of law. The Highlands' Motion for Entry of Default Judgment is denied. This case is dismissed with prejudice.

FACTS

1. The Highlands owns certain real property located in Wasatch County, State of Utah ("The Highlands Parcel"). (Complaint, ¶ 1).

2. The Highlands Parcel is part of a master planned residential development known as The Highlands at Jordanelle. (Complaint, ¶ 10).
3. Defendant PWJ Holdings, L.L.C. owns real property in Wasatch County, State of Utah ("The PWJ Parcel"). (Complaint, ¶ 7).
4. The Highlands Parcel lies directly to the east of the PWJ Parcel. (Complaint, ¶ 9).
5. The PWJ Parcel is part of a larger master planned residential development known as "Talisman." (Complaint, ¶ 8).
6. Wasatch County approved the master plan for The Highlands at Jordanelle on July 16, 2008. (Complaint, ¶ 11).
7. A public road crosses the eastern portion of the Talisman development. The road is called the Talisman Parkway. The Talisman Parkway has been dedicated to Wasatch County as a public road. (Complaint, ¶ 12).
8. The Talisman Parkway comes within 202.9 feet of The Highlands Parcel. (Complaint, ¶ 12).
9. The Highlands seeks to condemn an easement running from the Talisman Parkway, 202.9 feet across the PWJ Parcel to The Highlands Parcel ("the Easement"). The Easement would be 60 feet wide. (Complaint, ¶ 26).
10. The purpose of the Easement would be for a public street connecting The Highlands Parcel to the Talisman Parkway. (Complaint, ¶¶ 13-14). The Easement will be used "for access to [The Highlands at Jordanelle] and the planned residences" to be constructed in that development. (Complaint, ¶¶ 27-28). The Easement will also be used to install electric and sewer utilities. Id.

11. As part of the master plan for the Highlands at Jordanelle, Wasatch County approved the proposed access point to the Talisman Parkway “at or near the proposed Easement.” (Complaint, ¶ 15).
12. As part of the Wasatch County development process, The Highlands is required to dedicate all roads, including the Easement, to Wasatch County as public roads. (Complaint, ¶ 16).
13. The Wasatch County development code requires The Highlands to have two points of access in and out of the development. (Complaint, ¶ 25). The Easement would serve as one of these points of access.
14. The value of the Easement is \$18,750.00. (The Highlands’ Memo In Supp. Of Motion for Default Judgment, Exhibit A).
15. The Highlands, through its principals and its legal counsel, has made numerous efforts to secure the easement from PWJ and the other partners in the Talisman Development. PWJ has refused to discuss the issue with The Highlands. (Complaint, ¶¶ 17-18).
16. On September 5, 2008, The Highlands hand-delivered a letter to PWJ. The letter generally informed PWJ of its rights under section 78B-6-505 of the Utah Code.¹ (Complaint, ¶ 19, Exhibit 4).
17. The letter did not include the name and current telephone number of the property rights ombudsman, as required by section 78B-6-505(2)(a) of the Utah Code.

¹The complaint references the former statute, section 78-34-4.5. The 2008 amendment, which took effect on February 7, 2008, renumbered this section.

18. On September 23, 2008, The Highlands filed this action. The Complaint states one cause of action entitled "Condemnation." (Complaint, ¶¶ 20-33). The Highlands seeks an "order and judgment determining that [it] has the right of eminent domain to acquire the Easement" and that the "propose[d] use of the Easement is a public use." (Complaint, Prayer for Relief ¶ 1).
19. The clerk of court entered Defendant PWJ Holdings, LLC's ("PWJ") default on October 16, 2008.
20. The Highlands moved for entry of default judgment on October 21, 2008.

RULING

Standard For Entry of Default Judgment

"When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend . . . the clerk shall enter the default of the party." URCP 55(a). Then, the complaining party may seek default judgment against the party in default. P&B Land, Inc. v. Klungervik, 751 P.2d 274, 276-77 (Utah Ct. App. 1988) (entry of default is an essential predicate to any default judgment), quoting, DeTore v. Local 245, Jersey City Pub. Employees Union, 511 F. Supp. 171, 176 (D. N.J. 1981).

A party is not entitled to default judgment, unless (1) "the uncontroverted allegations of the complaint [are] sufficient on their face to establish a valid claim against the defaulting party;" and (2) "the well-pled facts show that [the moving party] is entitled to judgment as a matter of law." Pennington v. Allstate Ins. Co., 973 P.2d 932, 940 (Utah 1998), quoting, Skanchy v. Calcados Ortope, 952 P.2d 1071, 1076 (Utah 1998). This standard ensures that even when parties fail to plead or defend against a cause of action, the resulting judgment will be grounded on sufficient facts and on the rule of law.

The Highlands' Arguments

The Highlands argues that so long as a private entity is pursuing a public use as defined in section 78B-6-501 of the Utah Code, that entity enjoys the authority of eminent domain. There is no requirement that the Legislature expressly or impliedly grant this power to the private entity. The Highlands relies on Utah Copper Co. v. Stephen Hayes Estate, Inc., 31 P.2d 624, 627 (Utah 1934), Jacobson v. Menmott, 354 P.2d 569, 571 (Utah 1960); Highland Boy Gold Mining Co. v. Strickley, 78 P. 296, 298 (Utah 1904); and Ketchum Coal Co. v. Pleasant Valley Coal. Co., 168 P. 86, 88 (Utah 1917).

Citing Town of Perry v. Thomas, 22 P.2d 343 (Utah 1933), The Highlands argues by analogy that municipal corporations “obtain their authority to condemn [roads] from [section] 78B-6-501.” (The Highlands’ Memo, p. 3). This is so even though municipalities are “not specifically mentioned in the eminent domain statute.” *Id.*

Relevant Constitutional Provisions

The Fifth Amendment to the United States Constitution requires that no “private property be taken for public use, without just compensation.” This provision is made applicable to the states by the Fourteenth Amendment. Chicago, B. & Q. R. Co. V. Chicago, 166 U.S. 226 (1897).

Article I; Section 22 of the Utah Constitution reads: “Private property shall not be taken or damaged for public use without just compensation.” The state takings clause is “broader in its language than the similar provision in the Fifth Amendment.” Bagford v. Ephraim City, 904 P.2d 1095, 1097 (Utah 1995).

The Issue Presented

In her dissent in Kelo v. City of New London, 545 U.S. 469 (2005), Justice O'Connor identified "three categories of takings that comply with the public use requirement." *Id.*, 545 U.S. at 497. These categories are:

First, the sovereign may transfer private property to public ownership—such as a road, a hospital or a military base. [citations omitted]. Second, the sovereign may transfer private property to private parties, often common carriers, who make the property available for the public's use—such as with a railroad, public utility, or a stadium. [citations omitted]. But "public ownership" and "use-by-the-public" are sometimes too constricting and impractical ways to define the scope of the Public Use Clause. Thus we have allowed that, in certain circumstances to meet certain exigencies, takings that serve a public purpose also satisfy the Constitution even if the property is destined for subsequent private use.² See, e.g. Berman v. Parker, 348 U.S. 26, 99 L. Ed. 27, 75 S. Ct. 98 (1954); Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984).

Id., 545 U.S. at 497-98.

The condemnation sought by The Highlands does not fit neatly into one of these categories. At first blush, the condemnation resembles a category two public use. The right of way over the PWJ Parcel will be open for use by the public. Yet, because The Highlands is the condemning party, the right of way is destined for at least temporary private ownership. This private ownership will persist until The Highlands dedicates the improved public street to Wasatch County. Conceivably, the proposed road

²The constitutional scope of "public purpose" takings destined for private use sharply divided the Court in Kelo, 545 U.S. 469 (Stephens, J., in which Kennedy, Souter, Ginsberg, and Breyer, JJ, joined; Kennedy, J., concurring opinion; O'Connor, joined by Rehnquist, Ch. J., Scalia, and Thomas, J.J., in dissent; Thomas, J., writing separately).

might never be constructed and dedicated, leaving the right of way in private ownership. In this sense, the condemnation might well be a category three taking.

Whatever the category, the condemnation at issue is unusual because the party seeking to condemn the right of way is not a sovereign at all, but a private limited liability company.³ Thus, the issue presented is whether The Highlands has authority to exercise the power of eminent domain in the first instance.

Delegation of The Power of Eminent Domain To A Private Entity

“The right to authorize the exercise of eminent domain is a legislative power. In the absence of direct authority from the legislature, there can be no taking of private property for a public use, except in cases where the owner consents to the taking.”⁴ 1A-3 Nichols on Eminent Domain § 3.03(1). Without legislative authorization, “the power of eminent domain lies dormant.” *Id.*

³In Kelo, the City of New London approved an economic redevelopment plan which required the condemnation of private property. The condemned property would be transferred to private ownership. The “public purpose” of the redevelopment plan was to revitalize the economically distressed City by creating jobs and increasing tax revenue.

As in this case, the condemning authority in Kelo was a private entity—the New London Development Corporation, a non-profit corporation. The difference is that the City of New London had express statutory authority to condemn property to promote economic development. See, Conn. Gen. Stat. § 8-188. Acting under this authority, the City designated the New London Development Corporation as its “agent in charge of implementation.” See, Conn. Gen. Stat. § 8-193.

⁴“Once the Legislature grants by statute “authority . . . to exercise the power of eminent domain, the matter ceases to be wholly legislative.” 1A-3 Nichols on Eminent Domain § 3.03(1). The entity to whom the power is granted “may then be allowed to decide whether the power will be invoked and to what extent it may be used.” *Id.*

“The right to exercise the power of eminent domain may be delegated to a private corporation.”

Id. at § 3.03(9)(a); (3)(b)(ii). However, the delegation of authority “must be affirmatively shown either by express words or by necessary implication.” Id. at § 9(a).

The necessity from which an implied grant of authority might arise must be compelling:

There can be no implication unless it arises from a necessity so absolute that, without it, the grant itself will be defeated. It must, also, be a necessity which arises from the very nature of things, over which the corporation has no control; it must not be a necessity created by the company itself for its own convenience or for the sake of economy.

Id. at § 3.03(3)(d), quoting, *Pennsylvania R.R.’s Appeal*, 93 Pa. 50 (1886). In the words of the Utah Supreme Court, a grant of eminent domain authority may be implied if “any other construction of the statute or statutes involved would render worthless or seriously impair the grant of power to condemn for the given purposes.” *Bertagnoli v. Baker*, 215 P.2d 626, 628 (Utah 1950)

“The authority to establish or construct does not imply the authority to condemn [A] corporation cannot be vested with the delegated power of eminent domain by implication merely because the object of the corporation cannot be obtained without the use of private property.” 1A-3 Nichols on Eminent Domain § 3.03(3)(d).

Express Grants of Eminent Domain Authority

Contrary to The Highlands’ argument, the Legislature has expressly granted to counties, cities, and towns the authority to condemn private property for public streets and by roads.⁵ Utah Code Ann. §

⁵In other contexts, when the Legislature wanted to grant the power of eminent domain, it has done so expressly. See, Utah Code Ann. §§ 10-7-4(1) (board of commissioners and city counsel may bring condemnation proceedings to acquire water, waterworks system, or water supply); 11-13-205(1) (separate legal or administrative entity created under Interlocal

78B-6-501(3)(e); (7). In section 10-8-2 of the Utah Code, the Legislature grants to cities and towns⁶ authority to “acquire by eminent domain . . . property located inside or outside the corporate limits of the municipality” in order to “furnish all necessary local public services.” Utah Code Ann. § 10-8-2(b)(i)(iii). Local services would include the establishment of new public streets, and the extension of existing ones. Utah Code Ann. § 10-8-8. See, Bountiful v. Swift, 535 P.2d 1236 (Utah 1975) (city properly exercised power of eminent domain to condemn property to construct a public street).

Cooperation Act may acquire by eminent domain property for sewage and wastewater treatment facilities); 11-13-314(1)(a) (commercial project entities existing before January 1, 1980 have power to acquire property by eminent domain for additional project capacity); 17-8-5 (county may acquire by eminent domain necessary easements and rights of way for to establish, clear, protect and ensure continued use of channels, storm sewers and drains); 17-27a-511(1)(e); (county may terminate billboard and associated property rights by eminent domain); 17B-1-103(2)(h) (local districts may as provide in Title 78B, Chapter 6, Part 5, “acquire by eminent domain property necessary to the exercise of the district’s powers”); 17B-2a-820 (state, county, or municipality may acquire by eminent domain a private property interest necessary for the establishment of a public transit district); 17C-2-601(1) (community development and renewal agency may use eminent domain to acquire blighted property within an urban renewal project area); 17D-1-103(2)(a) (special service district may exercise the power of eminent domain possessed by the county or municipality that created the district); 19-9-105(16) (hazardous waste facilities authority may exercise the power of eminent domain); 63-11-17(4)(a) (with approval of executive director and the governor, division of parks and recreation may acquire property by eminent domain); 63B-1-305(2)(k) (State Building Ownership Authority may exercise the power of eminent domain); 63C-7-202(8) (Utah Communications Agency Network may acquire by eminent domain property connected with communications network); 69-3-2 (state, counties, cities, and towns may acquire by eminent domain land for the creation of telecommunication tower sites); 72-7-207 (Department of Transportation may acquire by eminent domain junkyards adjoining the interstate which cannot be adequately screened due to topography); 72-7-510(2)(a) (Department of Transportation may acquire by eminent domain certain nonconforming outdoor advertising); 72-10-205 (county or municipality may acquire by eminent domain property needed for an airport or landing field or expansion of these uses); 73-23-3(3) (Division of Water Resources may acquire land or any other property right by eminent domain).

⁶ A town is “a municipality with a population under 1,000.” Utah Code Ann. 10-2-301(2)(f).

Similarly, in section 17-50-302, the Legislature granted to counties the power to “acquire real property by condemnation, as provided in Title 78B, Chapter 6, Part 5, Eminent Domain.” As stated, Section 78B-6-501 expressly permits the power of eminent domain to be exercised on behalf of “roads, streets, and alleys for public vehicular use” and “byroads leading from highways to residences and farms.” Utah Code Ann. § 78B-50-302(3)(e), (7). See, Utah County v. Ivie, 2006 UT 33, ¶ 16, 137 P.3d 797 (county has authority to acquire property by eminent domain for a public street).

To this Court’s understanding, the Legislature has in only one instance expressly granted the power of eminent domain to the private persons generally. In section 73-1-6, the Utah Code grants to “any person,” upon payment of just compensation:

[A] right of way across and upon public, private, and corporate lands, or other rights of way, for the construction, maintenance, repair, and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels, pipelines, and areas for setting up pumps and pumping machinery, and other means of securing, storing, replacing and conveying water for domestic, culinary, industrial and irrigation purposes or for any necessary public use, or for drainage . . .

Utah Code Ann. § 73-1-6. Some form of this statute has existed since 1919.

Implied Grants of Eminent Domain Authority

Prior to 1919, the Utah Supreme Court had recognized the right of one private land-owner to condemn a right of way for irrigation purposes in a ditch owned by another. Nash v. Clark, 27 Utah 158, 75 P. 371 (1904), affirmed, Clark v. Nash, 198 U.S. 361 (1905). This implied grant⁷ of eminent domain

⁷In Clark v. Nash, the condemning party relied upon subparagraph 5 of the eminent domain statute. The statute read: “The right of eminent domain may be exercised in behalf of . . . Reservoirs, dams, water gates, canals, ditches, flumes, tunnels, aqueducts, and pipes for supplying persons . . . with water for domestic or other uses, or for irrigating purposes.” Because

authority was grounded upon an important reality. Utah is an arid western state. Its residential, agricultural, and industrial prosperity are all tied to the development of scarce water resources. Nash v. Clark, 75 P. at 373-75.

Utah law recognizes another implied grant of eminent domain authority. Section 78B-6-501 identifies several “public uses” directly related to the development of Utah’s mineral resources.

Specifically, the “right of eminent domain may be exercised on behalf of the following public uses:

(5) reservoirs, dams, watergates, canals, ditches, flumes, tunnels, aqueducts and pipes for the supplying of persons, mines, mills, smelters or other works for the reduction of ores, with water for domestic or other uses, or for irrigation purposes, or for the draining and reclaiming of lands, or for the floating of logs and lumber on streams not navigable, or for solar evaporation ponds and other facilities for the recovery of minerals in solution;

(6) (a) roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines, quarries, coal mines, or mineral deposits including minerals in solution;

(b) outlets, natural or otherwise, for the deposit or conduct of tailings, refuse or water from mills, smelters or other works for the reduction of ores, or from mines, quarries, coal mines or mineral deposits including minerals in solution;

(c) mill dams;

(d) gas, oil or coal pipelines, tanks or reservoirs, including any subsurface stratum or formation in any land for the underground storage of natural gas, and in connection with that, any other interests in property which may be required to adequately examine, prepare, maintain, and operate underground natural gas storage facilities;

the statute did not identify *who* could exercise eminent domain authority for this purpose, the Court’s ruling necessarily recognized an implied grant of authority to private persons.

(e) solar evaporation ponds and other facilities for the recovery of minerals in solution; and

(f) any occupancy in common by the owners or possessors of different mines, quarries, coal mines, mineral deposits, mills, smelters, or other places for the reduction of ores, or any place for the flow, deposit or conduct of tailings or refuse matter;

(13) sites for mills, smelters or other works for the reduction of ores and necessary to their successful operation, including the right to take lands for the discharge and natural distribution of smoke, fumes, and dust, produced by the operation of works, provided that the powers granted by this subsection may not be exercised in any county where the population exceeds 20,000, or within one mile of the limits of any city or incorporated town nor unless the proposed condemner has the right to operate by purchase, option to purchase or easement, at least 75% in value of land acreage owned by persons or corporations situated within a radius of four miles from the mill, smelter or other works for the reduction of ores; nor beyond the limits of the four-mile radius; nor as to lands covered by contracts, easements, or agreements existing between the condemner and the owner of land within the limit and providing for the operation of such mill, smelter, or other works for the reduction of ores; nor until an action shall have been commenced to restrain the operation of such mill, smelter, or other works for the reduction of ores.

Utah Code Ann. § 78B-6-501(5)(6)(13), (hereinafter “the Mining Provisions”)

By enacting the Mining Provisions, the Legislature by necessary implication delegated the authority of eminent domain to private entities or persons engaged in mining. Any other construction would have “rendered worthless or seriously impaired the grant of power to condemn” under the Mining Provisions. Bertagnoli, 215 P.2d at 628.

More than ninety years ago, in Monteaire Mining Company v. Columbus Rexall Consol. Mines Co., 53 Utah 407, 174 P. 172 (1918), the Utah Supreme Court held:

In examining all of the subdivisions of [the Eminent Domain Statute], one becomes convinced that it was the intention of the legislative power of this state to *declare mining generally and the development of mines and mineral deposits a public use*, in furtherance of which the right of the exercise of eminent domain was applied with full force and effect. This is apparent from the first enactment of the law of eminent domain as found in Laws Utah 1884 The intention of the Legislature is to extend the right of eminent domain to mines and mining [is] clear and unequivocal. . . . Our statute, in clear and explicit terms, grants the right of eminent domain for the purpose of developing the mining industry and for the purpose of developing the mineral resources of the state, *regardless of ownership*.

Id., 174 P. at 175-76. [Italics added].

The implied delegation of eminent domain authority to private mining interests was grounded upon two critical realities. First, the success of the mining industry was inextricably tied to Utah's economy generally. Second, the natural problems obstructing the development of that industry were significant.

In The Highland Boy Gold Mining Company, 28 Utah 15, 78 P. 296 (1904), affirmed, Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527 (1906), the Utah Supreme Court explained:

The same reasons that hold that manufacturing is necessary to the public welfare in New Hampshire and other New England States can be urged in behalf of mining in Utah [***30] and other Western States. The mining industry in this State, and in others similarly situated, not only produces a home market for the products of the farm, and furnishes thousands of men with steady employment at liberal and remunerative wages, but also produces wealth which has enabled other industries to be created and to flourish, which, without the stimulus thus furnished, would languish. In Dayton Mining Co. v. Seawell, supra, Mr. Chief Justice Hawley, speaking for the court, aptly portrays some of the conditions and disadvantages under which the mining industry is prosecuted in this inter-mountain region, as well as some of the benefits derived therefrom, as follows: "The mining and milling interests give employment to many [*234] men, and the benefits derived from this business are distributed as much and sometimes more among the laboring classes than with the owners of the

mines and mills. The mines are fixed by the laws of nature, and are often found in places almost inaccessible. For the purpose of successfully constructing and carrying on the business of mining, smelting, or other reduction of ores, it is necessary to erect hoisting works, to build mills, to construct [***31] smelting furnaces, to secure ample grounds for dumping waste, rock, and earth; and a road to and from the mine is always indispensable. The sites necessary for these purposes are often confined to certain fixed localities." We have in this State, in addition to the extensive deposits of gold, silver, lead, and copper ores, large areas of lands containing coal in almost limitless quantities, and we depend almost exclusively upon the coal mines for the fuel used in our manufacturing establishments and for domestic purposes. Now, it is of vital importance to the people that the coal, as well as the other hidden resources of the State, be opened up and developed, and that *the mining industry in general*, which has been the source of so much wealth to the people of this and other Western States, be conducted on the same extensive scale in the future that has characterized its operations in the past. Therefore the public policy of the State, as exemplified by the act of the Legislature under consideration, *is to encourage the people to open up and exploit the mines* with which the State abounds, and thereby not only give to the State the wealth which will enable other industries to be created, [***32] but furnish thousands of laborers with remunerative employment.

Id., 78 P. at 298. [Italics added].

The Instant Case

If the Legislature wanted limited liability companies to have the authority to condemn private property for the construction of public roads, the Legislature could grant that power expressly. The Legislature has not done so.

Section 78B-6-501 provides that the right of eminent domain may be exercised on behalf of "roads, streets, and alleys for public vehicular use" and "by-roads leading from highways to residences and farms." Utah Code Ann. § 78B-6-501(3)(e);(7). The question is whether these provisions constitute an implied grant of authority to private persons engaged in residential development. The Court holds

they do not.

The Legislature has authorized the exercise of eminent domain power in behalf of specific public uses, including “roads, streets, and alleys” and “by-roads.” Under Utah law, counties, cities, and towns may use this grant of eminent domain authority to establish and extend public streets. Therefore, denying private parties the right to condemn property for this public use will not “render worthless or seriously impair” the express grant of eminent domain authority in section 78B-6-501.

This case does not involve the development of Utah’s natural resources, scarce or abundant. There is no evidence before the Court that the construction of public streets providing access to residential development is inextricably tied to the strength of Utah’s economy generally. The Highlands has not identified any other state necessity or interest that will be compromised if an implied grant of condemnation authority is not recognized. The Highlands’ objective of connecting to the Talisman Parkway cannot be obtained without use of the PWJ Parcel. However, this fact does not vest The Highlands with the power of eminent domain by implication.

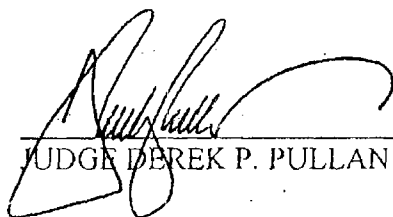
Finally, the fact that Wasatch County has approved the location of the proposed right of way is immaterial. The right to construct a public road is not the right to condemn. Moreover, without express legislative authorization, Wasatch County cannot delegate its condemnation authority to The Highlands. 1A-3 Nichols on Eminent Domain, § 3.03(4)(a) (“Unless the legislature has provided for the re-delegation of the power, the party to whom such power has been delegated cannot assign or delegate it to anyone else.”).

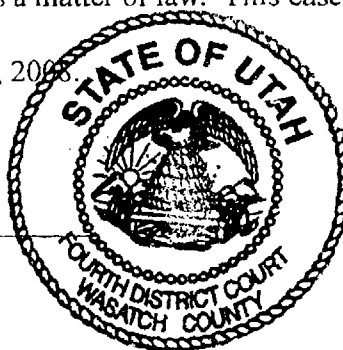
The power to confer condemnation authority rests solely with the Legislature, and that power lies dormant until the Legislature acts.

ORDER

For the reasons set forth in this Ruling, the Court denies The Highlands' Motion for Entry of Default Judgment. Because it lacks the express or implied power of eminent domain, The Highlands' sole cause of action for condemnation fails as a matter of law. This case is dismissed with prejudice.

DATED this 29 day of December, 2008.


JUDGE DEREK P. PULLAN



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 080500461 by the method and on the date specified.

METHOD NAME

Mail	PWJ HOLDINGS LLC Defendant 4844 North 300 West Suite 300 Provo, UT 84604
Mail	PAUL P BURGHARDT Attorney PLA 299 S MAIN 15TH FLR POB 2465 SALT LAKE CITY UT 84110

Dated this 29th day of December, 20 08.


Deputy Court Clerk

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*Denied
see ruling &
order 12/29/08*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR
WASATCH COUNTY, STATE OF UTAH

THE HIGHLANDS AT JORDANELLE, LLC, a Utah limited liability company, Plaintiff, vs. PWJ HOLDINGS, LLC, a Utah limited liability company, Defendant.	JUDGMENT Civil No. 080500461 Judge Derek P. Pullan
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This matter came before the Court on Plaintiff The Highlands at Jordanelle, LLC's Motion for Default Judgment. Based on the foregoing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff has the right of eminent domain to acquire the Easement and that Plaintiff's proposed use of the Easement is a public use.

2. Just compensation for the value of the Easement is Eighteen Thousand Seven Hundred Fifty Dollars and no cents (\$18,750).

3. Upon payment of Eighteen Thousand Seven Hundred Fifty Dollars and no cents (\$18,750) to Defendant as just compensation for the Easement, the Court will issue a final judgment of condemnation pursuant to U.C.A. § 78B-6-516, which will declare that the Easement shall be a permanent Easement in favor of Plaintiff, his successors and assigns

DATED this ____ day of _____, 20__.

BY THE COURT:

HONORABLE JUDGE PULLAN
FOURTH DISTRICT COURT JUDGE

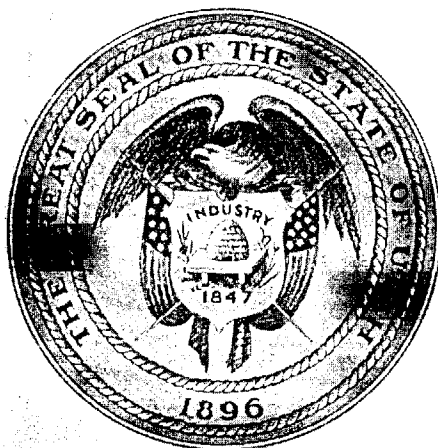
ADDENDUM “3”

Utah. Laws, Statutes, & *cf*
THE
REVISED STATUTES

OF THE
STATE OF UTAH,

IN FORCE

JAN. 1, 1898.



Revised, Annotated, and Published by Authority of the Legislature,

BY

RICHARD W. YOUNG,

GRANT H. SMITH,

WILLIAM A. LEE,

Code Commissioners.

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**TOGETHER WITH THE CONSTITUTION OF THE UNITED STATES, THE
CONSTITUTION OF UTAH, THE ENABLING ACT, AND
THE NATURALIZATION LAWS.**

its full amount, and for the possession of the premises. In all other cases the judgment may be enforced immediately. [C. L. §§ 3801, 3802*.

Cal. C. Civ. P. § 1174*.

Treble damages for forcible entry, etc., § 3510.

Under sections 3787 and 3801, C. L. 1888, a plain-

tiff in a case for damages for forcible entry or unlawful detainer is entitled to recover treble damages. *Eccles v. U. P. Coal Co.*, — U. —; 48 P. 142.

3585. Pleadings verified. The complaint and answer must be verified [C. L. § 3802.

Cal. C. Civ. P. § 1175.

3586. Appeal within ten days. Undertaking. Stay. Either party may, within ten days, appeal from the judgment rendered. But an appeal by the defendant shall not stay the execution of the judgment, unless, within said ten days, he shall execute and file with the court or justice his undertaking to the plaintiff, with two or more sureties, in an amount to be fixed by the court or justice, but which shall not be less than twice the amount of the judgment and costs, to the effect that, if the judgment appealed from be affirmed or the appeal be dismissed, the appellant will pay the judgment and the costs of appeal, the value of the use and occupation of the property, and damages justly accruing to the plaintiff during the pendency of the appeal. Upon taking the appeal and filing the undertaking, all further proceedings in the case shall be stayed. [C. L. § 3660*.

Cal. C. Civ. P. § 978*.

3587. Civil procedure applicable. The provisions of this code relative to civil actions, appeals, and new trials, so far as they are not inconsistent with the provisions of this chapter apply to the proceedings mentioned in this chapter. [C. L. § 3804.

Cal. C. Civ. P. § 1177*.

CHAPTER 65.

EMINENT DOMAIN.

3588. Exercised in behalf of what uses. Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

1. All public uses authorized by the government of the United States.
2. Public buildings and grounds for the use of the state, and all other public uses authorized by the legislature.
3. Public buildings and grounds for the use of any county, incorporated city or town, or school district; reservoirs, canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, or incorporated city or town, or for draining any county, or incorporated city or town; for raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels; for roads, streets, and alleys, and all other public uses for the benefit of any county, incorporated city or town, or the inhabitants thereof.
4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, by-roads, plank and turnpike roads, roads for transportation by traction engines or road locomotives, roads for logging or lumbering purposes, and railroads and street railways for public transportation.
5. Reservoirs, dams, water-gates, canals, ditches, flumes, tunnels, aqueducts, and pipes for supplying persons, mines, mills, smelters, or other works for the reduction of ores, with water for domestic or other uses, or for irrigating purposes, or for draining and reclaiming lands, or for floating logs and lumber on streams not navigable.
6. Roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dump-

ing places to facilitate the milling, smelting, or other reduction of ores, or the working of mines; outlets, natural or otherwise, for the deposit or conduct of tailings, refuse, or water from mills, smelters, or other works for the reduction of ores, or from mines; mill dams; natural gas or oil pipe lines, tanks, or reservoirs; also an occupancy in common by the owners or possessors of different mines, mills, smelters, or other places for the reduction of ores, of any place for the flow, deposit, or conduct of tailings or refuse matter.

7. By-roads leading from highways to residences and farms.

8. Telegraph, telephone, electric light, and electric power lines.

9. Sewerage of any city or town, or of any settlement of not less than ten families, or of any public building belonging to the state, or of any college or university.

10. Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light, or heat.

11. Cemeteries or public parks. [C. L. § 3841*; '90, p. 37; '92, pp. 42, 92; '96, p. 316.

Cal. C. Civ. P. § 1238*. See Sup. '93, p. 965, and Sup. '96, p. 33, § 1233*.

Eminent domain for pipes, tanks, etc., for natural gas, § 1552; for right of way for canals, ditches, etc., § 1277; for railroads, § 436; for drainage district, § 773.

Under section 3841, C. L. 1888, providing that the right of eminent domain may be exercised in behalf of steam and horse railroads; *held*, that by implication this right may be exercised in behalf of electrical railways. *Ogden City Railway Company v. Ogden City*, 7 U. 207; 26 P. 288.

3589. Estates and rights subject to condemnation. The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine, mill, smelter, or other place for the reduction of ores.

2. An easement, when taken for any other use.

3. The right of entry upon, and occupation of, lands, and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use. [C. L. § 3842*.

Cal. C. Civ. P. § 1239*.

3590. Property subject to condemnation. The private property which may be taken under this chapter includes:

1. All real property belonging to any person.

2. Lands belonging to the state, or to any county, or incorporated city or town, not appropriated to some public use.

3. Property appropriated to public use; *provided*, that such property shall not be taken unless for a more necessary public use than that to which it has been already appropriated.

4. Franchises for toll roads, toll bridges, ferries, and all other franchises; *provided*, that such franchises shall not be taken unless for free highways, railroads, or other more necessary public use.

5. All rights of way for any and all purposes mentioned in section thirty-five hundred and eighty-eight, and any and all structures and improvements thereon, and the lands held or used in connection therewith, shall be subject to be connected with, crossed, or intersected by any other right of way or improvement or structure thereon. They shall also be subject to a limited use in common with the owner thereof, when necessary; but such uses of crossings, intersections, and connections shall be made in the manner most compatible with the greatest public benefit and the least private injury.

6. All classes of private property not enumerated may be taken for public use when such taking is authorized by law. [C. L. § 3843.

Cal. C. Civ. P. § 1240*.

Property and franchises of private corporations subject to eminent domain, Con. art. 12, sec. 11.

ADDENDUM “4”

Utah Laws, Statutes, and Regulations

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THE
COMPILED LAWS
OF THE
STATE OF UTAH
1917



VOLUME 2

Compiled, annotated, and published by authority
of an act of the Legislature by
ALLEN T. SANFORD,
RICHARD B. THURMAN,
Compilation Commissioners.

Together with the Constitution of the United States,
the Constitution of the State of Utah, the
Enabling Act, and the Naturalization
Laws and Regulations.

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sistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter.

Cal. C. Civ. P., § 1177* .

CHAPTER 65.

EMINENT DOMAIN.

7330. (3588.) Exercised in behalf of what uses. Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

1. All public uses authorized by the government of the United States;
2. Public buildings and grounds for the use of the state, and all other public uses authorized by the legislature;
3. Public buildings and grounds for the use of any county, incorporated city or town, or school district; reservoirs, canals, aqueducts, flumes, ditches, or pipes for conducting water for the use of the inhabitants of any county, or incorporated city or town, or for draining any county, or incorporated city or town; for raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels; for roads, streets, and alleys, and all other public uses for the benefit of any county, incorporated city or town, or the inhabitants thereof;
4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll roads, by-roads, plank and turnpike roads, roads for transportation by traction engines or road locomotives, roads for logging or lumbering purposes, and railroads and street railways for public transportation;
5. Reservoirs, dams, water-gates, canals, ditches, flumes, tunnels, aqueducts, and pipes for the supplying persons, mines, mills, smelters, or other works for the reduction of ores with water for domestic or other uses, or for irrigation purposes, or for draining and reclaiming lands, or for floating logs and lumber on streams not navigable;
6. Roads, railroads, tramways, tunnels, ditches, flumes, pipes, and dumping places to facilitate the milling, smelting, or other reduction of ores, or the working of mines, quarries, coal mines, or mineral deposits; outlets, natural or otherwise, for the deposit or conduct of tailings, refuse, or water from mills, smelters, or other works for the reduction of ores; or from mines, quarries, coal mines, or mineral deposits; mill dams; natural gas or oil pipe lines, tanks, or reservoirs; also any occupancy in common by the owners or possessors of different mines, quarries, coal mines, mineral deposits, mills, smelters, or other places for the reduction of ores, or any place for the flow, deposit, or conduct of tailings or refuse matter;
7. By-roads leading from highways to residences and farms;
8. Telegraph, telephone, electric light, and electric power lines, and sites for electric light and power plants;
9. Sewerage of any city or town, or of any settlement of not less than ten families, or of any public building belonging to the state, or of any college or university;
10. Canals, reservoirs, dams, ditches, flumes, aqueducts, and pipes for supplying and storing water for the operation of machinery for the purpose of generating and transmitting electricity for power, light, or heat;
11. Cemeteries or public parks;
12. Pipe lines for the purpose of conducting any and all liquids connected with the manufacture of beet sugar;
13. For sites for mills, smelters, or other works for the reduction of ores and necessary to the successful operation thereof, including the right to take lands for the discharge and natural distribution of smoke, fumes, and dust therefrom, produced by the operation of such works; *provided*, that the powers granted by this subdivision shall not be exercised in any county where

the population exceeds twenty thousand, or within one mile of the limits of any incorporated city or town; nor unless the proposed condemnor has the right to operate by purchase, option to purchase, or easement, as to at least seventy-five per cent of the value of land acreage owned by persons or corporations situated within a radius of four miles from the mill, smelter, or other works for the reduction of ores; nor beyond the limits of said four miles radius; nor as to lands covered by contracts, easements, or agreements existing between the condemnor and the owner of land within said limit and providing for the operation of such mill, smelter, or other works for the reduction of ores; nor until an action shall have been commenced to restrain the operation of such mill, smelter, or other works for the reduction of ores.

Am' d '01, p. 19; '07, p. 143; '09, p. 50.

Cal. C. Civ. P., § 1238*. See Sup. (1893) p. 995, and Sup. (1895) p. 33, § 1233*.

Eminent domain for pipes, tanks, etc., for natural gas, § 4024; for right of way for canals, ditches, etc., § 3466; for railroads, for right of way and for water, § 1228, sub. 3; for drainage district, § 2046; for city, for water, § 570x2; irrigation districts, § 3526; county hospital site, § 2781.

Property and franchises of private corporations subject to eminent domain, Con. art. 12, sec. 11.

Private property shall not be taken or damaged for public use without just compensation, Con. art. 1, sec. 22, and note.

No person shall be deprived of property without due process of law, Con. art. 1 sec 7, and note.

Condemnation by foreign corporation, § 946. Condemnation by state armory, § 2884.

Con. art. 1, sec. 22, providing that private property shall not be taken or damaged for public use without just compensation, is a limitation on exercise of power of eminent domain.

Kimball v. Grantsville City, 19 U. 368; 57 P. 1.

If the land on which shade trees adjacent to sidewalk stood was owned by the abutting property owner, the city could only cut the trees by condemning the land and upon paying just compensation.

Glaque v. S. L. City, 42 U. 89; 129 P. 429. Where an owner of land on both sides of the highway acquired title to the highway by failure of the public to use and work it, she could not be compelled thereafter to allow it to be opened as a highway, without compensation being made.

Tuttle v. Sowadzki, 41 U. 501; 126 P. 959.

RAILROADS:

Under § 3841, C. L. 1888, providing that the right of eminent domain may be exercised in behalf of steam and horse railroads; held, that by implication this right may be exercised in behalf of electrical railways.

Ogden City Railway Company v. Ogden City, 7 U. 207; 26 P. 288.

Land which is a part of a railroad's right of way, but not used for any purpose and not essential to the enjoyment of such railroad's franchise and property, may be appropriated to the use of a duly incorporated telegraph company for the purpose of constructing and maintaining its lines, since such appropriation is for a more necessary public use. Measure of damages.

Postal Tel. & C. Co. v. O. S. L. R. R. Co., 23 U. 474; 65 P. 735.

A city council cannot authorize a permanent switch track, for a private business only, along a street and across a sidewalk, from a steam railroad in the street, to the detriment of people residing on the street and to the damage of their abutting property; the streets being dedicated to public use.

Ceraghino v. O. S. L. R. R. Co., 26 U. 467; 73 P. 634.

A party whose property is about to be damaged in a substantial degree for public use is given same remedies as would be accorded him if his property were actually appropriated for public use.

Stockdale v. R. G. W. Ry. Co., 28 U. 201; 77 P. 849.

Railroad cannot subject private property in

a city to burdens to which it will be subjected by running of cars and engines over a switch laid over adjoining property, without proceeding under law of eminent domain.

Id.

CANALS, MINES, ETC.:

The provision of this section and §§ 7332, 7338, render, under ordinary circumstances, property appropriated for a public use liable to condemnation for another public use.

Salt Lake City v. Water & El. P. Co., 24 U. 249; 67 P. 672.

A proceeding by a power company under the eminent domain statute to obtain the right to connect a flume with a city's canal for purpose of discharging water into it, under the provisions of this section and § 7332, is not a suit to condemn land belonging to the city, and it is not necessary to show, as provided in § 7333, that the use to which it is to be applied by power company is a more necessary public use than that to which the city devotes it. (On rehearing, 26 U. 456; 71 P. 1069.)

Salt Lake City v. Water & El. P. Co., 24 U. 249; 67 P. 672.

Property is taken for a public use, within the provision of the constitution declaring that private property shall not be taken for public use without just compensation, when the taking is for use that will promote the public interest, and will tend to develop the resources of the state. In this case a right of way for an irrigation ditch.

Nash v. Clark, 27 U. 158; 75 P. 371; affirmed 198 U. S. 361.

The construction and operation of roads and tramways for the development and working of mines is a public use.

Highland B. G. M. Co. v. Strickley, 28 U. 215; 78 P. 296; affirmed 200 U. S. 525.

Where a street grade was established but not carried into effect, and thereafter buildings were erected, the city was liable for damages resulting from the change of grade. The fact that the improvements were made before the adoption of Con. art. 1, sec. 22, does not relieve liability.

Kimball v. S. L. City, 32 U. 253; 90 P. 395.

Hempstead v. S. L. City, 33 U. 261; 90 P. 397.

Felt v. S. L. City, 32 U. 275; 90 P. 402.

Webber v. Salt Lake City, 40 U. 221; 120 P. 503.

Lannan v. Waltenspiel, 45 U. 564; 147 P. 908.

A proceeding under § 3467 to obtain the right to enlarge an irrigation canal of another is controlled by the principles involved in the exercise of the right of eminent domain.

S. L. City v. East Jordan Irr. Co., 40 U. 126; 121 P. 593.

The right to use a reservoir in common may be condemned.

Gunnison Irr. Co. v. Gunnison High. Canal Co., 51 U. —; 174 P. 852.

The right to run water through defendant's irrigation canal may be condemned, though the defendant has only an easement and the owners of the land were not parties.

Whiterocks Irr. Co. v. Mooseman, 45 U. 79; 141 P. 459.

A purchaser of property on a city street does so with the implied consent that the street must be made reasonably safe and convenient for travel, and cannot complain if it is lowered or filled to make it safe for travel so long as the city has established the grade so as to