This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
City of Austin
v.
Harry M. Whittington, et al.
No. 10-0316.

December 6, 2011.

Appearances:

Renea Hicks of the Law Office of Max Renea Hicks, for Petitioner.

John J. McKetta III of Graves Doughterty Hearon & Moody, P.C, for Respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

CONTENTS
ORAL ARGUMENT OF RENEA HICKS ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF JOHN J. MCKETTA III ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF RENEA HICKS ON BEHALF OF PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the second cause, 10-0316, City of Austin v. Harry M. Whittington.

MARSHAL: May it please the Court, Mr. Hicks will present argument for the Petitioner. The Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF RENEA HICKS ON BEHALF OF THE PETITIONER

ATTORNEY RENEA HICKS: May it please the Court. This, of course, is a condemnation case and the issue before you is the right to condemn by a home rule or municipality. The prime issue in this case is whether when just compensation will be paid and here it will be, that's uncontested. There's a judicially created doctrine and only judicially created doctrine, of bad faith, which can be used to invalidate a home rule condemnation that is for a public purpose and the answer has to be no. The courts under the very structure of the power of eminent domain cannot come in and create a judicial doctrine which overrides the constraints that are on the imminent domain power by in the Texas Constitution.

JUSTICE DEBRA H. LEHRMANN: Are you saying that bad faith is part of the public purpose inquiry and once you find public purpose, then that's the end of it and if so how is that so?

ATTORNEY RENEA HICKS: Well, the only way bad faith can come into play is through an inquiry, which courts are allowed to make, this Court has long held. We get to decide whether there is a public purpose, if the

right circumstances arose. But bad faith comes into play only if sufficient evidence is presented to raise the question of whether, in fact, what is happening in the condemnation really is for a public purpose. It doesn't come into play for the purpose of saying well, it's for a public purpose, but we kind of don't like as courts what the City did in this particular instance or what the pipeline did in this particular instance or whoever the condemner is did in that particular instance. It's not a freestanding doctrine that comes from out of left field, which is what happened here. No Texas court, no Texas Supreme Court anyway has ever held or applied the doctrine to invalidate a taking as has happened here.

JUSTICE DON R. WILLETT: What weight would a court apply to a finding of bad faith assuming there's evidence to support a jury finding of bad faith, how does that enter the formula when the court looks at a public necessity or a public use?

ATTORNEY RENEA HICKS: It wouldn't go into the public necessity issue. It would go to the public use issue and the way it would do it is essentially what's happened in other jurisdictions. Just because of space requirements in the reply brief, I had to list a long list of other jurisdictions where this has been addressed. All of them say it's essentially getting at the issue of when there's a subterfuge at work. When is really not for a public purpose. That's all the bad faith doctrine really can go to and to call it the bad faith doctrine is kind of just falling into the habit of calling something more than it really is. I mean it's if you're hiding, if you're really doing this for something that's not a public purpose, then the courts can say, hey, we've gotten facts sufficient to override this strong presumption that when you say when, the city, say it's for the public purpose, we've gotten facts put in front of us sufficient to raise a question about whether it really is for a public purpose.

JUSTICE EVA M. GUZMAN: Is that a jurisdictional question, excuse me?

ATTORNEY RENEA HICKS: I don't think it's a, I haven't thought of it that way honestly, but I don't think it's a jurisdictional question. I think it's a question of substance. The Court in the past has said, Maher v. Lasater, other cases have said, we, the courts, do get to have a say in whether on the public purpose issue, public use, public purpose issue. We get to have a say, but it doesn't say we get to decide that as a jurisdictional issue.

JUSTICE DON R. WILLETT: But when a court is looking at whether public use has been satisfied. It's a matter which is a legal determination, a court as a matter of law in determining whether public use is satisfied, what weight, how does the jury finding of bad faith factor into that legal analysis?

ATTORNEY RENEA HICKS: Well, at the front end of this, there is a question of whether it ever goes to the issue to the jury. I conceded in a reply footnote 18 or something, I can't remember what footnote number it was, that the City doesn't contest that sometimes this issue of public purpose can go to a jury. On reflection, I may have gone too far. It's not so clear that this issue can go to a jury at all, the public use issue. It's a question for the Court, but it's a legal question for the court so it should never go to the jury, but if it does, which is what your question was, if it's been sent to the jury, first it can only go as an affirmative defense. At a very, there has to be a lot of evidence to get it past the initial hurdle to even get it to the jury by the condemnee. Has to be a lot of evidence that it is not for a public purpose.

JUSTICE DON R. WILLETT: Are you aware of any Texas appellate court that's overturned a jury's finding of bad faith on the part of a condemning authority?

ATTORNEY RENEA HICKS: What I'm not aware of is whether other than here there's ever been such a jury finding so I'm not sure this has come up. The problem that's arisen here, this is kind of like what the, as I mentioned again in the briefing, what the U. S. Supreme Court went through when as there began to be all of these battles about regulatory takings and the law began to, the modern law in the Supreme Court began, the U.S. Supreme Court began to be developed about that, there was an early case. I can't remember. I remember Justice Brennan was the author and there was an early case, I think out of California, and there was some language used that kind of went to the kind of raised the issue of well, it's kind of a substantive due process issue and the

courts get to inquire on a substantive due process basis whether this has happened. Later, the Supreme Court in this opinion in the Lingle opinion by Justice O'Connor said, you know, we need to straighten that out. That's a little bit of language that we should have not allowed to creep into this area. We messed up. We just were a little too broad in our talking. And I frankly think that's what's happened here. I'm not casting aspersions on the Court, it's hard to anticipate every single issue that will come up in the universe, but in the past, even starting with the Higginbotham decision in 1940, there was language thrown in that said, something about absent bad faith and that my guess is that probably was thrown in in the sense of well, we don't know everything that's going to happen in the future. We can't lay down such a broad rule now because we don't understand what that's going to do so we'll throw in the absent bad faith issue.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, but it seems like bad faith is important. Let's assume that there is a public purpose. There is a public purpose, no question about it in a condemnation case. Are you saying that a city could come in in the eminent domain proceeding and lie and say the public purpose is X when all the while the city knows the public purpose is completely different. It's something entirely opposite of the X. It's to do - it's for Y and that the Court has to ignore that as long as there is underlying the proceeding some public purpose imaginable.

ATTORNEY RENEA HICKS: Not imaginable, but I think it can't invalidate the taking because of that. There are other consequences. I mean if the City comes in and lies--

CHIEF JUSTICE WALLACE B. JEFFERSON: What are the consequences?

ATTORNEY RENEA HICKS: There could be perhaps a due process challenge, an equal protection challenge, a First Amendment challenge. There are all sorts of challenges that aren't in the right to take context.

CHIEF JUSTICE WALLACE B. JEFFERSON: But the owner loses his property.

ATTORNEY RENEA HICKS: Right because there was a public purpose.

CHIEF JUSTICE WALLACE B. JEFFERSON: So any time there's a public purpose, the procedural, the substance behind the condemnation proceeding to begin with is irrelevant.

ATTORNEY RENEA HICKS: It's not irrelevant to any inquiry anywhere that may come before the courts, but it's irrelevant to the issue of whether the condemnation takes so to speak, whether the taking takes.

JUSTICE NATHAN L. HECHT: But it seems to me that it folds into the determination of whether there's a public use because the major's sitting there and he decides he would rather look out across the park than a dilapidated building and says, let's condemn it, but there's no other public use than that. The public's not interested in having a park there. He just wants a nice view from his window. Surely, you take that into account in determining whether there's a public use.

ATTORNEY RENEA HICKS: Well, that's a farfetched hypothetical I think. It's not this situation, even remotely this situation and we're exploring the outer boundaries of this, but I think the courts are getting into big trouble with regard to creating their own judicial basis for invalidating otherwise valid legislative action. If you don't like, I mean, I think what that says, is we don't like the way he did this. We don't like the way the City did this. It doesn't feel right. [inaudible]

JUSTICE NATHAN L. HECHT: But there has to be some meaning to public use.

ATTORNEY RENEA HICKS: There is some meaning to public use. We aren't disputing the question of whether there's a meaning to public use. It's not really an issue.

JUSTICE NATHAN L. HECHT: I mean, if the City took the property and just sold it to somebody else and turned a profit on it, and they saud, well, that benefits the city so that's a public use.

ATTORNEY RENEA HICKS: Well, no, I'm not trying to explore the outer boundaries of what a public use is here. I think there may be a question about that especially under the 2009 amendments to the Texas Constitution in Article I, Section 17.

JUSTICE NATHAN L. HECHT: But I'm wondering if bad faith factors into that determination.

ATTORNEY RENEA HICKS: I think bad faith can go to the issue of public purpose. I mean, we say that over and over again. I don't think any, no court, I mean there's no court in another state that I know of that said, bad faith or screwing around with the process so to speak, misusing eminent domain power somehow to sneak through something that's not for a public purpose and call it a public purpose, every court agreed. Everybody agrees. The courts get to look at that. Now, the level of proof to override this is huge. It's essentially the standard for overriding a legislative act because this is a legislative act in this situation and the Court, a lot of times this Court and the legislative acts doesn't even look at motive, a lot. I mean I think that is just because there may be some legislator, the mayor's only one member, for instance, of the city council and only has one vote. If the mayor thought that, but the others had good reasons for wanting a park there that had nothing to do with the fact of that their view was the other direction let's say, then it still would be a valid act. It's just you would have a question. Just because some legislator say over at the Texas State Capitol has a motive, a buddy of his or hers is a lobbyist and he can see this will really help their client get what they want, if the bill is passed, I don't know, 100 to 150 on the vote, that guy is in the 100 vote, it doesn't mean you invalidate the legislation.

JUSTICE EVA M. GUZMAN: But there, if there were a public purpose that you pass the bill on because we're going to condemn it for to build thus and such, but you know that building something else will confer great financial benefit on another surrounding property owner. Wouldn't you be able even though both were for public uses except one confers great benefit on one owner and one doesn't, I mean don't you get to inquire into the bad faith aspect of that type of transaction or do you just ignore that they lied to the public because there was some public use inherent in that?

ATTORNEY RENEA HICKS: The truth is, I think you are stuck with the fact that it's a public use. If they're doing it, I mean, first of all, there are criminal laws that go to this issue. If people are using it to line the pockets of their buddies and they go by and condemn property in one area for no reason other than they know it will line the pocket of the adjacent property owner who happens to be his brother-in-law, there I mean, those are problems, criminal problems with that, but it doesn't invalidate the taking. First of all-

JUSTICE NATHAN L. HECHT: I'm not -- it just seems that takings law is moving in a way to recognize that this is more intrusive on private rights than maybe we appreciated in the past.

ATTORNEY RENEA HICKS: The takings law is moving a lot, but it's legislation that's moving it. It's not making up a new judicial rule to overturn what is otherwise perfectly constitutional and perfectly within the limits of the legislation. Since this, since 2005 when the Whittington I decision, which still kind of sticks a little bit here in the court of appeals, since that decision, the Texas Legislature, there's been a constitutional amendment in 2009. The Texas Legislature has engaged in amendments to the condemnation statutes of Texas in 2005, 2007, 2009, 2011 and they have, at different levels closed in the limits of what can happen. Tried to give, they created a bill of right, landowners bill of rights. They set some limits on what can happen, but they've never said, courts, we're giving you the right to inquire into the issue of bad faith outside the public purpose. I mean all of our--

JUSTICE NATHAN L. HECHT: But they don't get to say. The legislature if it wants to limit the government is free to do that beyond what the Constitution imposes.

ATTORNEY RENEA HICKS: No, I understand that.

JUSTICE NATHAN L. HECHT: But if this Court construes Article I, Section 17 to mean what 206.001 says, that's what we do.

ATTORNEY RENEA HICKS: That's, I agree completely. But first--

JUSTICE NATHAN L. HECHT: We don't their statute to tell us that's what Article I, Section 17 means.

ATTORNEY RENEA HICKS: No, I understand that, but I'm just saying you say that things are coming in to limit this. I agree, but I don't legislatively it's happened. Courts are going back and forth. Kelo certainly didn't limit it. In Kelo, I mean, it comes, people have reacted to it legislatively, but Kelo left the doors open to even the kinds of condemnation that people here locally have decried quite a bit. The legislature hasn't liked it to overturn Kelo frankly, but we're I don't want to get distracted from the core problem here. I agree completely the courts had a role to play in making an inquiry with regard to the public purpose issue and what feels like bad faith can come in to play there, I agree. It didn't come into play here. It has nothing to do with public purpose, the bad faith issue. It's from left field and completely judicially created and overrides statute, constitution, there's no basis for it.

JUSTICE NATHAN L. HECHT: Help me with one minor part of the record. Was after the hotel was relieved of building the parking lot, was the price of construction adjusted or not?

ATTORNEY RENEA HICKS: I honestly don't know, Your Honor. I don't know. The price of construction of the hotel?

JUSTICE NATHAN L. HECHT: I mean the allegation in the brief says, the hotel saved $10 million. Did that money go to the City or it just went to the hotel?

ATTORNEY RENEA HICKS: Well, I think it meant that wasn't that money put into the construction that otherwise was going to have to. Remember, ultimately the city will be the owner of this.

JUSTICE NATHAN L. HECHT: Part of it.

ATTORNEY RENEA HICKS: Yes, a part of, 70% or something like that. I don't remember the number exactly.

JUSTICE EVA M. GUZMAN: And I want to ask you very briefly and I may have missed this. You were speaking a little quickly earlier. When you say it comes in to play, do you mean as an affirmative defense or as rebuttal? I wasn't--

ATTORNEY RENEA HICKS: At best as an affirmative defense, at best.

JUSTICE EVA M. GUZMAN: Okay, so now you've changed a little bit on that.

ATTORNEY RENEA HICKS: Again, I'm backing off of one thing I said, in my brief a little bit just because I'm not sure where it goes and this Court doesn't need to go that far, frankly, and that is can the issue of public purpose ever be submitted subterfuge, ever be submitted to the jury. It's a legal question as Justice Willett said. It is a legal question, the public purpose issue, so it isn't clear to me whether it ever can go to a jury as an affirmative defense. If it does, there has to be proof, but I want to come back to and then secondly, it would be a legal issue ultimately, but very briefly, and I know my time's up, I want to come back. What we've discussed nearly the whole time I've been up here has nothing to do with the issue in this case. It has to do with how this Court might draw limits to help the lower courts figure out how to let condemnations go forward and let people challenge whether there's a public purpose, but that's not what happened here. What happened here is bad faith independent of public purpose stopped a $50 million, didn't stop it, it's left it in limbo for the last decade now.

Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court is ready to hear argument from the Respondent.

MARSHAL: May it please the Court, Mr. McKetta will present argument for the Respondents.

ORAL ARGUMENT OF JOHN J. MCKETTA III ON BEHALF OF THE RESPONDENT

ATTORNEY JOHN J. MCKETTA III: May it please the Court. This is a case that sets important reminders to all governments that there are limits on condemnation. Those limits are found within the constitution and those limits have been set forth by this Court and every other court in the State of Texas. We cited 13 of the 14 districts that addressed it and the many other states in the United States although they are not binding in this Court, limits on what a city can do and those limits are not merely on selecting public purpose. Those limits also are on selecting, determining public necessity and all of the effort here has been to say in the briefing and in the argument, public purpose is the only place, if ever, that a court has a role, but that's not what this Court said, in Properties. It said, public necessity, the determination by a condemning agency we give great deference in the absence of arbitrary capricious, bad faith or fraud. Justice Guzman.

JUSTICE EVA M. GUZMAN: If you have the garage and part of it is parking spaces and part of it is the chiller unit--

ATTORNEY JOHN J. MCKETTA III: It is.

JUSTICE EVA M. GUZMAN: The public purpose is it met if at least some aspect of that garage is undisputably for a public purpose?

ATTORNEY JOHN J. MCKETTA III: The reason I say no to that is this. Let's conjure up an idea of 100 acres being taken, 99 acres for a public project and one acre for the mayor's secretary's home. The fact that any part of that taking and a single taking that's had metes and bounds for 100 acres a commissioner's hearing for 100 acres, the fact that the City has chosen a single parcel, any frailty in that parcel is fatal to the taking. The City has no power to do multiple public purposes.

JUSTICE EVA M. GUZMAN: But chillers do serve a public purpose, you agree with that.

ATTORNEY JOHN J. MCKETTA III: I don't. The Court may. They are not electric utilities.

JUSTICE EVA M. GUZMAN: Do they reduce power consumption at peak times?

ATTORNEY JOHN J. MCKETTA III: They do.

JUSTICE EVA M. GUZMAN: Okay. And we've had power shortages in Texas, that's proper to take judicial notice of that all over the state at different times, especially this summer.

ATTORNEY JOHN J. MCKETTA III: No question about that. A city can engage at its own initiative in many commercial, nonutility, nonregulated endeavors, but not by condemnation. Condemnation power in the statutes allows them condemnation for utilities, but the chiller service is a different form of usage. It competes with electricity.

JUSTICE EVA M. GUZMAN: But don't they function though like power generation units because they help meet demand during peak times?

ATTORNEY JOHN J. MCKETTA III: It's true.

JUSTICE EVA M. GUZMAN: And that's a public purpose. I mean that is a public purpose.

ATTORNEY JOHN J. MCKETTA III: I logged back in the 1940's and 50's the university had chilled water and made it cooler for people. Today, it means people buy less electricity, but that's not furnishing electricity is not the electricity utility, but I don't wish to put all my time, Justice Guzman, on that because I think whether or not this Court decides that a public purpose, whether or not [inaudible].

JUSTICE DON R. WILLETT: Mr. McKetta, the City contends that you have waived your right to attack the trial court finding that there is public use here and you say what in response?

ATTORNEY JOHN J. MCKETTA III: I say that we challenge that at every point. We challenge that from our objections in the first two failed condemnations in 2000, in 2001. We've never at any occasion said that, we spot that this is public purpose, never once so I don't know where, now the parties [inaudible].

JUSTICE DON R. WILLETT: Well, they know you didn't file a notice of appeal on that point.

ATTORNEY JOHN J. MCKETTA III: Oh, of course. What they say is that because we did not separately appeal the notice, we're not allowed to argue contrary to Rule 53, we're not allowed to argue independent bases for affirming the very same judgment. They say that Rule 25 in a first interpretation ever no court has ever said, this. You might, you might not. It says, in Rule 25 says that, if you wish to alter the judgment, they say that means if you want to change a word in the recitation, Rule 25 the last sentence makes clear it's talking about the relief granted in the judgment. We're asking for exactly the relief that's granted in the judgment and Rule 53 says, any basis that may be addressed by issue in this Court which we have done. Thank you, Justice Willett.

JUSTICE DALE WAINWRIGHT: Counsel, are you asking us to take a position in Texas similar to the dissent in Kelo? The dissent in Kelo said, you can question public purpose. It doesn't exist here even though the city council determined that the taking of that property, put into an economic development corporation then for use for private corporations as a public purpose. So are you saying we ought to look be like the dissent in Kelo?

ATTORNEY JOHN J. MCKETTA III: I'm saying there are aspects of that dissent.

JUSTICE DALE WAINWRIGHT: Okay, which are?

ATTORNEY JOHN J. MCKETTA III: There are aspects of that dissent that are parallel with 100 years of jurisprudence from this Court and I'm saying that those aspects are sound. That's different from the question of whether economic redevelopment is or is not a public purpose. That's the holding in Kelo. That's addressed by the 2005 statute, but this Court, going back through the FKM case recently, the City of Davis Lubbock case less recently, the Higginbotham case in 1940, all have said, the proposition that is expressed by courts throughout the country and throughout the state of Texas. And in the 1940, the Higginbotham case didn't make up out of the air a principle. It cited a 1922 decision that's quoted in the briefing. That 1922 decision, though not quoted, cites an 1898 decision. This is a long-established principle that very recently Justice Willett for this Court said that, [inaudible].

JUSTICE DALE WAINWRIGHT: And now state that principle succinctly as it concerns determination to the public use, what's the principle succinctly that you want us to adopt as the law in Texas? Or maybe you would say, clarify?

ATTORNEY JOHN J. MCKETTA III: What I want to say is that a city has no power to state here as a public use and to do it for a private purpose, which is to relieve a private contractor of burdens making a $10 to $12 million greater profit, no benefit to the City according to this record that that no matter what the definition of

public use is and that's why I said, to Justice Guzman regardless what the determination of public use is, one cannot say that I'm doing this public use and that I'm doing it for the purpose of making $10 or $12 million by an individual. Let's take an example of a case that was not before this Court, but cited in our reply to petition and our merits brief, never mentioned by the City. Malcomson Road District v. Newsom, there, there was a square holding, a water detention pond is a public purpose needed to prevent flooding, needed for public purposes and that case squarely held there's a public purpose, but the Court said, no, no, no, let's look at this. The Road District said, to the developer, a pond is required for your development. The developer said, if you put the pond on my property, if I'm required to do it on my property, I won't be able to build as many houses and he said, I have talked with my neighbor outside the district. He doesn't want it to be done, but why don't you condemn and take his land for this public purpose? So we had a square holding of a public purpose, Mr. Hicks would say you can't go any further, but the Court said, no. That states a claim for what we shorthanded bad faith there, they said, arbitrary and capricious, it was using the power of condemnation to achieve a public purpose by relieving one developer of the developer's required burden at the burden of a private landowner that had no role in that [inaudible].

JUSTICE EVA M. GUZMAN: Does that translate to a rule though that every time a third party benefits from some sort of condemnation that that defeats the public purpose aspect of it? Because that's what it sounds like they're saying.

ATTORNEY JOHN J. MCKETTA III: No, I think that would be a terrible rule and I think that's an important inquiry. I think a city has a huge berth. Let's suppose that this record showed, which it does not, suppose this record showed that the developer had gone bankrupt or that it's impossible to do this or that it could save the city $10 million by making a change or suppose the record showed that the construction to do the underground parking that had been promised by the developer contractually, suppose it were shown that that would have a timeline that would delay the project unnecessarily if any of those things. Then a government might exercise discretion. That is it might consider the facts and circumstances and exercise its discretion in determining a public necessity to do something else. And --

JUSTICE EVA M. GUZMAN: What about the water issue, the subsurface water issues? I mean at some point, construction underneath became not feasible for a number of reasons, including economic reasons.
ATTORNEY JOHN J. MCKETTA III: Economic only because these questions were asked of Mr. Hodge, the city representative in Volume 2, pages 32 to 34, 68 to 72, I've misspoken, was it impossible? No, it was not impossible. Would it delay? No, it would not delay. Was it possible to do? Yes, it was. It just cost money and what the result of it, the result was $10 or $12 million benefit to the developer, no benefit to the City.

JUSTICE EVA M. GUZMAN: But it would also if it costs more, it would also ultimately impact that 27% ownership that the city had in this?

ATTORNEY JOHN J. MCKETTA III: The City was not supposed to pay a penny. Under the contract that's shown in Whittington Exhibit 80 and 85 accepted by the City on July 22, 2009, July 22, 1999, Exhibits 80 and 85, the City would not spend a penny. It later paid $15 million for other things and all these parking would be done and the City relieved that within nine days after that July 22 according to these facts, this record undisputed. Mr. Hodge within nine days was talking to Mr. Whittington to propose why don't we take yours. Mr. Whittington said, thank you, that's not what I'm interested in, and then the developer went to Mr. Whittington. What business does the developer have to do with negotiating a ity's acquisition by eminent domain, what right does he have, but he went to Mr. Whittington and the testimony is Mr. Whittington says, he hopes that he was gracious and polite in declining and never dreamed that his City would later do by condemnation exactly what he had told the developer he did not wish to do and the beneficiary of this, the $10 or $12 million beneficiary of this was not the City of Austin. The City of Austin got 76% at a future date of a building without parking. It did not get the bargain it had done. The developer got more than the bargain with no advantage to the City and the point is simply this. If the record showed that the city had considered facts and circumstances and came up with a non-private purpose basis, had considered these facts and circumstances and had any explanation of why it

was relieving for a legitimate public purpose this burden, then under the definition of arbitrary and capricious that was used here without objection and used by the courts informally. It's not a novel definition. It was, in fact, a definition that was in the City of Austin's submission when it asked for this jury instruction, Clerk's Record Volume 1, page 95, if the City had considered other alternatives, had considered relieving the contractor and found a reason to do that, considered it, this would not be under that definition arbitrary and capricious. The record is intact. Every word that the City considered is in Whittington Exhibit 65, the public meetings records make that so and there was zero consideration of any alternative in fact zero alternative of enforcing this contract.

JUSTICE EVA M. GUZMAN: If the record reveals though that there was room for two opinions, then the action would not be arbitrary and capricious as a matter of [inaudible]?

ATTORNEY JOHN J. MCKETTA III: That's correct, Justice Guzman, that is the instruction that was used without objection by both sides and that's the second and third sentence of that instruction and that's an important power for cities. The Whittingtons are not asking this Court to take away the great discretion given to condemning authorities, but those discretions involve at least giving some consideration to the facts and circumstances and here the record shows none was. The purpose was to relieve a private contractor with the effect of making an extra $10 or $12 million and that fits under-

JUSTICE EVA M. GUZMAN: Why wasn't the purpose to create parking spaces for people that would use the convention center?

ATTORNEY JOHN J. MCKETTA III: Well, if we look at Exhibit 65, Whittington 65, we find that the purpose was this. Can we get some money on the retail shops on the ground floor? Can we have three kinds of customers paying money here? Can we have shoppers on Sixth Street, business tenants with contracts as well as other services. There was a commercial discussion going on on how to use this building, but zero consideration, zero consideration of any alternative and zero consideration of why there is any public policy value in relieving this developer of a contractual obligation that will result in a $10 to $12 million greater profit for that developer. No benefit.

JUSTICE NATHAN L. HECHT: That sounds like a question of law.

ATTORNEY JOHN J. MCKETTA III: I think it's important about the jury question. We presented to Judge Hart and the record reflects this that we would like a jury question if that's available, but that he may wish to take those as advisory questions and make his own findings of fact.

JUSTICE NATHAN L. HECHT: As to, if there was a dispute about did something happen or not, maybe that's a jury question, but once the real facts are set out, what you make of them seems to me to be indistinguishable from whether it's public use in the first place.

ATTORNEY JOHN J. MCKETTA III: People could say was Mr. Hodge telling the truth with this conversation? Was Mr. Whittington's recollection about January 31 accurate? Those are facts that are given constraints for a jury as to what they may consider or not consider, but here, as to the question, a very interesting question should these ever go to the jury, in this case if you look at the record, you'll find that the City of Austin refused briefed and opposed to Judge Hart making any independent findings on these issues. That's at 2 Clerk's Record 276 and 10 or 15 pages later in the Clerk's Record, you'll find where we say well that waives any right by you to say this should have been non-jury and in the court of appeals, they did not raise any jury question. In this Court, they did not raise any jury question, a very interesting question that could be raised on some record, but here Tab 3 of our brief sets forth the charge and in that charge, the city did not object to the submission to the jury; even said that, any finding of actual necessity was subject to these three defenses in their briefing said, these defenses apply as to actual necessity and any potential claim that this lawsuit should resolve the jury question, by their own conduct, they prevented you having available any contrary finding, but we know this. We

know that Judge Hart, who was urged not to make independent findings, entered a judgment on that verdict, which it was not required to do if he thought there was no evidence to support those and he dismissed because this City acted in what we've shorthanded bad faith and there's evidence to support each of the three different types, arbitrary and capricious I think is the starkest one where you are doing no damage to future cities by saying if there's anything you've considered, we will give deference to it, but if you've considered nothing--

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, but it sounded earlier like you had an all-or-nothing proposition, 100 acres with one acre that goes for the secretarial uses or whatever. Are you saying that if there is any private purpose, a nonpublic purpose for a condemnation, then that destroys the underlying basis for the condemnation totally?

ATTORNEY JOHN J. MCKETTA III: For that condemnation. That is, how would this Court or any other court say, which part of that acreage should be valued at how much.

CHIEF JUSTICE WALLACE B. JEFFERSON: And so--

ATTORNEY JOHN J. MCKETTA III: So it could be re--

CHIEF JUSTICE WALLACE B. JEFFERSON: So a future, so future condemnation proceedings will be about discovering a small part that goes to a private purpose or at least arguably does and if it does, if the landowner can prove that, he doesn't want his land taken away, then the condemnation fails.

ATTORNEY JOHN J. MCKETTA III: Well, let's suppose as happened in the FKM case itself that somebody says, you're taking an acre when you only need 1200 feet and the condemnation authority can then respond and say I see your challenge to the public purpose. That has to be asserted before anything else. It's an objection. I'm going to reduce and if I can show no prejudice to you to reducing, I can keep the same valuation. Otherwise, I need to dismiss and start over with proper acreage. How would we ever want to sanction a city being able to do some private taking if we simply do enough of public taking? The government must respect the private rights of property and only use that power when there's a proper public use and public necessity for that power, not just 90%, not just, Your Honor.

JUSTICE DALE WAINWRIGHT: If the development of that 1200 feet in FKM, take this hypothetical because of drainage that's built because of impervious coverage, a lot of reasons, there is a benefit to the corporation on the adjacent property that reduces flooding that had happened in the past. That is a maybe unintended, but a benefit to a private person.

ATTORNEY JOHN J. MCKETTA III: I think that's proper. I think benefits happen when people build, condemn for reservoirs, they make rich property owners that now have waterfront property. When people condemn for an inner tramway, a railway, that makes benefit for local commercial people. But where, according to this record, the taking was for the purpose of with the involvement of the developer for the purpose of relieving that developer making that developer an extra $10 or $12 million, that's not an incidental or collateral benefit.

JUSTICE DALE WAINWRIGHT: I understand.

ATTORNEY JOHN J. MCKETTA III: That's the purpose.

JUSTICE DALE WAINWRIGHT: You believe you should win, your client should win this case. I'm interested.

ATTORNEY JOHN J. MCKETTA III: And I'm not asking-

JUSTICE DALE WAINWRIGHT: I'm interested in the Chief's question. On the continuum, where do you draw the line? What's the principle? This case is important, but we have to lay out principles that guide the rest of the

state for generations.

ATTORNEY JOHN J. MCKETTA III: And importantly so those principles should always indicate that the collateral or incidental benefits that happen to nearby landowners from takings is not something that stops a taking. There's nothing in this case where we suggest that's so. What we do is we look at the principles that limit when a government has gotten sloppy or intentional in using the power without consideration of facts, any facts and circumstances, without considering which is the better of two alternatives, not considering any. What we're addressing here is when is there a time, is there a time? The City says, there is not. Is there a time that the judiciary has some role in saying no, that's a misuse instead of a [inaudible].

JUSTICE DON R. WILLETT: Do you see any difference between the private gain attempted in Kelo and this case at all?

ATTORNEY JOHN J. MCKETTA III: I do. I do. The Kelo was and you will see it as you study the decisions of many states. Different states have different views about public use. This Court in the past has said, we take the less liberal view. We don't take the view that any general good is a public use. But that's not what this case is about, but in Kelo, that was a finding that economic development is consistent with public use and there's very fair and Justice Stevens said, worst vote he ever made in a tight four justices and apparently now Justice Stevens thought, nope, should have been the other way, but that's not this case. The Kelo difference on economic development is on the alternative basis of that 2005 statute, but not on the.

JUSTICE DON R. WILLETT: But you said that, the taking here was to benefit a private developer.

ATTORNEY JOHN J. MCKETTA III: Not just benefit, relieve a private [inaudible].

JUSTICE DON R. WILLETT: Right, of an obligation.

ATTORNEY JOHN J. MCKETTA III: That was to for the purpose of that private developer's benefit just like the water ponds in the Malcomson case. You shouldn't. You've got an important public use of a water pond, but you shouldn't relieve this developer so he can make more profit on more homes and pick somebody else's. That's his burden. Don't use condemnation to discharge a private person's burden. Thank you.

JUSTICE PHIL JOHNSON: Chief, may I ask one question?

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Johnson.

JUSTICE PHIL JOHNSON: The court of appeals said that, we, they upheld the jury finding of bad faith on the basis that the chilling plant was represented as being necessary in a letter to Mr. Whittington while at the same time, the project manager said that, this new plant is not absolutely necessary and they said that, is legally and factually significant evidence to uphold the finding of bad faith. Is it your position that any divergence of opinion such as that is going to be legally and factually sufficient to uphold a finding of bad faith in a matter such as this?

ATTORNEY JOHN J. MCKETTA III: Thank you, Justice Johnson, I was disappointed. As you know, the court of appeals said, at a there's abundant evidence at the very--

JUSTICE PHIL JOHNSON: At a minimum.

ATTORNEY JOHN J. MCKETTA III: --minimum.

JUSTICE PHIL JOHNSON: It said as, in a minimum, it cites that.

ATTORNEY JOHN J. MCKETTA III: I think that the real scoundrel here is the contractor being relieved of this.

JUSTICE PHIL JOHNSON: Okay. But let me ask--

ATTORNEY JOHN J. MCKETTA III: But so but the answer to your question is, I think that is a fact-intensive matter of whether that was an intentional effort to mislead or whether it was not. I think that's the weakest evidence that the court of appeals could have used to prove legal sufficiency in its judgment that was sufficient without these abundant other matters.

JUSTICE PHIL JOHNSON: Well, there are two questions that seem like might be posed by the statement it's not absolutely necessary. Number one, planning ahead. It seems like it might constrict the government entities' ability to plan ahead if it's absolutely necessary as opposed to necessary and we can foresee that, number one and number two, it seems like it's going to be difficult to ever have unanimity on whether something like that is absolutely necessary is the reason why I ask the question. This opinion looks like it says, to the State of Texas without unanimity, you can support a finding of bad faith to negate the condemnation.

ATTORNEY JOHN J. MCKETTA III: Let me answer both of those questions, if I may, I apologize for straining on my time limits, Justice Johnson. First, as to the planning, I think it's an important matter the cities be able to plan for the future so I would hate to have this Court give guidance that that's improper. As to the message that decision gives about unanimity of decision, a feature that's very unusual, and this unpublished opinion is a fact of the record here, which is very unusual, is that after a first trial, after an appeal on the eve of the second trial, the city ratified all of the acts by resolution, unanimous resolution all of the acts its people had done so we had the unusual situation that there actually is unanimity on all those acts by whatever the City's reason for doing that it did, it ratified, but that is not the way that I would ask this Court to analyze this record for legal sufficiency. I think that the overwhelming evidence concerning the parking structure is an important part and sadly was not at all part of the limitation that's expressed in that unpublished opinion for guidance to cities in the future. Thank you and thank you for the additional time.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. McKetta, Counsel.

JUSTICE EVA M. GUZMAN: Mr. Hicks, I wanted to ask you about the options. The Convention Center was built in 1992. When did the City first consider or look to Block 38 as an alternative to parking? Was it before the contracted with H&L? Had--

REBUTTAL ARGUMENT OF RENEA HICKS ON BEHALF OF PETITIONER

ATTORNEY RENEA HICKS: Well, it was only after the Convention Center expanded for one thing. That's when that became important so it wasn't at the original building time. It was when it expanded and added a lot of value to Block 38, frankly, as is testified to.

JUSTICE EVA M. GUZMAN: Yeah, I saw them in your briefs, but looking at options.

ATTORNEY RENEA HICKS: But, as I recall the record, the city looked, at the beginning had looked briefly at Block 38, then turned to the parking garage hotel combination theme. Then when that fell through and I'm going to come back to that issue, when that fell through is when they turned back to saying we got to have a parking place somewhere, let's look at Block 38. Now did you, I'm sorry, were you going to ask me?

JUSTICE EVA M. GUZMAN: Go ahead and finish that thought. I have one more question.

ATTORNEY RENEA HICKS: What I was going to say is this thing about the parking garage is frankly it's a phony issue. The City as I think it was said, by Mr. McKetta, benefits happen. It was in response to a question

somewhere, benefits happen. It sounds like a bumper sticker, I guess, but benefits do happen in condemnation and here there clearly was a benefit to the developer of the hotel when the City said, we got to go somewhere else because you've got a leaky parking garage, but there was a benefit to the city too. If the City had said, you know, we don't want to let you off the hook for $10 million in investment. We're going to stick with the leaky parking garage. Can you imagine what on earth would happen now with the City having said, you know, to keep from saving them $10 million, we're going to make sure we've invested in a parking garage that leaks and we would have that.

JUSTICE NATHAN L. HECHT: Well, but it seems to me if the hotel had said, well, we don't want to build it 20 stories. We want 15, you've knock something off the price.

ATTORNEY RENEA HICKS: Could be, but again, that is really irrelevant to the issue of whether the taking of Block 38 was a valid taking or not. It doesn't detract in the slightest from Block 38 being used as a parking garage for the convention center, which is perfectly within the law, completely within the law. I think it's indisputabley the public purpose. In Pate 1958 Supreme Court decision here, this Court said, just because somebody profits from your condemnation doesn't invalidate the public purpose part of the condemnation. This goes to the Chief Justice's question. In Pate, the court specifically said, at page 833 and I'll just read it. The lessee may make a profit out of the venture, but this in itself does not make the use private rather than public. I mean that happens all the time. This is an incoherent doctrine being argued for for the landowner here. There is no telling what mischief would be worked. If this were thrown into the law that you begin to inquire to the degree of profit, the degree of interaction, even for something that is for a public purpose. Cities have to talk to [inaudible] by landowners. It would be a disaster if they didn't. They're supposed to do this.

JUSTICE EVA M. GUZMAN: But you can't manufacture a public purpose to accomplish this sort of benefit as alleged here.

ATTORNEY RENEA HICKS: I agree. It cannot be manufactured and if the City manufactures it and it's not a public purpose, then the court should say as a matter of law that wasn't a public purpose, but that is not what happened here. The chiller unit, I left out of the brief, first of all, it's, this Court has said that, it's the City Council that decides necessity not a staffer two months later writing an email memo.

JUSTICE EVA M. GUZMAN: Well, that was my second question. What of the 2006 resolution that was passed ratifying past active city employees, how does that impact the email, if you will?

ATTORNEY RENEA HICKS: Well, they didn't say they ratified everything the staff said. They said, they ratified the actions that had been taken with regard. They didn't say every memo that's ever been written however you might parse it in the way against the City is hereby ratified and it adopted as the position of the City Council. First of all, this-

JUSTICE EVA M. GUZMAN: They said, all acts done or initiated is what they said.

ATTORNEY RENEA HICKS: Yeah, it's the actions. It's the actions.

JUSTICE EVA M. GUZMAN: So writing an email is not an action.

ATTORNEY RENEA HICKS: It's not an action that they ratified here, I don't think, under any fair reading of what that is, but that's not the very, that's a side issue.

JUSTICE EVA M. GUZMAN: But it goes to the sufficiency, it goes to the, you know, if we're going to consider what that means.

ATTORNEY RENEA HICKS: Even if this, this talked about absolute necessity, the memo, and if you look at

it, it says, as to those buildings mentioned below, the buildings mentioned below are the Hilton Hotel and the Convention Center and the chiller unit works for all of downtown essentially so that's not an issue. The public necessity issue, this Court in FKM Properties at page 630 said, this. We have noted when the use is public, the necessity or expedience of appropriating any particular property is not a subject of judicial cognizance is what you said, there. The statute, 251.001(a) says, when the governing body, when the governing body of a municipality considers it necessary. It doesn't say anything after that provision about and the courts have a right to inquire into whether that determination was correct or not. It says, nothing about that and this Court has said, since Higginbotham that it's not a matter of judicial cognizance to look at that. On the altered judgment in the public purpose issue that Justice Willett raised, we had a public purpose. I raise that in a minor way, frankly, because the rule specifically, says, if you seek to alter the judgment, you have to do a cross appeal and there is no question, they aren't just trying to alter a word. They're trying to alter the public purpose part of the judgment. There may be a question as to whether that changes the relief requested. I understand that and that's a matter of some debate I suspect and it wouldn't hurt for this Court to clarify what that rule means in that regard when there is a judgment like this, but the important part is not the waiver issue. There is no realistic challenge to whether this was for, both pieces, the chiller unit for 30% of the property, the parking garage for 70% were for public purposes. It is inconceivable that you could conclude otherwise, frankly.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Hicks, any further questions? The cause is submitted and the Court will take a brief recess.

MARSHAL: All rise.

END OF DOCUMENT