

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. MICHAEL MILLER

CASE NO. C20075114

COURT REPORTER: NONE

DATE: October 24, 2007

CATALINA FOOTHILLS UNIFIED SCHOOL DISTRICT NO. 16, of Pima County, a political subdivision of the State of Arizona,
Plaintiff,

v.

PIMA COUNTY, a body politic; et al.,
Defendants.

RULING

UNDER ADVISEMENT RULING

Defendant La Paloma Property Owners Association ("La Paloma") moves to dismiss this eminent domain action by Plaintiff Catalina Foothills Unified School District ("CFSD") on the ground that a school district has no authority to obtain a permanent easement to be used as a third access route to the school property. CFSD responds that A.R.S. §§ 12-1111(2), 12-1113(2), and 12-1114(5), when read together, authorize a school district to condemn a permanent easement for use as a non-exclusive private roadway onto CFSD property.

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Facts¹

In 1994 CFSD condemned a triangular section of property known as "Block 24." See Exhibit 1 to October 18, 2007 oral argument (2006 aerial photograph). It is bounded on the top-north line by Skyline Drive and on the southwest line by Sunrise Drive. Skyline and Sunrise are public roadways. It is bounded on the third side (southeast line) by La Paloma. The property in question is an approximately 220 foot private drive, which is also known as Campo Abierto. See Exhibit C to Verified Complaint. Just beyond the disputed section of Campo Abierto is a guardhouse that restricts vehicular access to La Paloma.

CFSD is in the final stages of completing an early childhood learning center on Block 24. Although the District has access to the school grounds from Skyline and Sunrise, it also alleges that safe and efficient access to the Center requires use of the private driveway onto and as part of Campo Abierto. CFSD is very specific that it does not seek the disputed property in fee simple; rather, it is seeking to condemn an easement across a private street for the use of its students, staff, and invitees. Essentially, CFSD wishes to use Campo Abierto as access to the Learning Center in basically the same manner that residents and invitees of La Paloma use it to access the residential and office lots.

¹ La Paloma moves to dismiss pursuant to Ariz.R.Civ.Proc., Rules 12(d)(1) and (6). Generally, a motion to dismiss is limited to the material allegations of the complaint, which are taken as true and considered most favorable to the plaintiff. *Logan v. Forever Living Products International, Inc.*, 203 Ariz. 91, 52 P.3d 760 (2002). At oral argument, both parties provided additional information in response to the Court's questions. Although a motion to dismiss may be treated as one for summary judgment, the additional information provided by the attorneys is only considered for the purpose of providing a full description of the property in question. The dispositive issue remains a question of law.

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Analysis

The dispositive issue² on La Paloma's motion is whether a school district has eminent domain authority to condemn a perpetual easement for non-exclusive use as a private roadway. For the reasons that follow, this Court concludes that the Arizona Legislature has not delegated to school districts the power to condemn an easement over a private roadway.

Political subdivisions "do not have inherent power of eminent domain and may only exercise those powers that are statutorily delegated to them." *City of Phoenix v. Harnish*, 214 Ariz. 158, 161, 150 P.3d 245 (App. 2006) (reversing trial court condemnation order to establish extra-territorial nature preserve). Additionally, powers of eminent domain must be construed "narrowly . . . and [the courts] will not expand them beyond what is expressly granted by the legislature or otherwise clearly and necessarily implied from the powers expressly granted." *Id.* at 161-162; *see also Orsett/Columbia Ltd. Partnership v. Superior Court ex rel. Maricopa County*, 207 Ariz. 130, 133, 83 P.2d 608 (App. 2004) (reversing trial court order to condemn 23-month leasehold interest). Narrow construction of condemnation statutes is the general rule rather than the exception. *See* 1A-3, JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 3.03 [6][b] (Rev. Ed. 2003).

² La Paloma makes additional arguments based on the Arizona Constitution and the absence of necessity. The Court does not reach those arguments in view of its interpretation of A.R.S. § 12-1111.

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The pertinent provisions of A.R.S. § 12-1111 state as follows:

Subject to the provisions of this title, the right of eminent domain may be exercised by the state, a county, city, town, village, or political subdivision, or by a person, for the following uses:

1. All public uses authorized by the government of the United States.
2. Buildings and grounds for any public use of the state and all other public uses authorized by the legislature.
3. Buildings and grounds for the use of a county, city, town or school district.
...
6. Roads, streets and alleys, and all other public uses for the benefit of a county, city, town or village, or the inhabitants thereof, which is authorized by the legislature. The method of apportioning and collecting the costs of the improvements authorized by paragraphs 3, 4, 5 and 6 shall be as provided in the law by which they are authorized.

CFSD does not rely exclusively on A.R.S. § 12-1111(3) for its authority. Rather, it argues that it is a political subdivision that is entitled to condemn for "all other public uses" pursuant to paragraph (2).

Based on its interpretation of A.R.S. § 12-1111(2), CFSD further relies on § 12-1113(2) to authorize an easement and § 12-1114(5) to convert the easement into a right-of-way.

CFSD stretches the interpretation of A.R.S. § 12-1111 well beyond necessary implication or a reasonable, narrow construction for several reasons.

First, the condemnation authority delegated by the Arizona Legislature to school districts is specific and limited: "Buildings and grounds for the use of a . . . school district." If the Arizona Legislature had intended to authorize school districts to condemn for "all other public uses" under

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paragraph 2, it would have been a simple matter to add the term to that paragraph. CFSD cannot explain why the term "school district" was not included in paragraph 2, and this Court finds no reason for its exclusion in the legislative history or case law. Additionally, A.R.S. § 12-1114(5) limits the scope of condemnation for rights-of-way to purposes described in paragraph 2 of § 12-1111. The Arizona Legislature could have included paragraph 3 of § 12-1111 if it had intended school districts to have the right to condemn for a right-of-way. Where a condemnation statute is specific and limiting, this Court cannot expand the entity's authority. *City of Phoenix v. Harnish*, *supra*, ¶¶ 12-13.

Narrowly construing A.R.S. §§ 12-1111, 12-1113 and 12-1114, the Court concludes that a school district does not have authority to condemn an easement for a private roadway over private land.

At oral argument, counsel for CFSD asserted the right to condemn the disputed property in fee simple.³ Counsel acknowledged, however, that she had not considered the implications of this legal position and was not prepared to say whether an action to condemn the entire property was an alternative to the action to condemn an easement. Nonetheless, a motion to dismiss should not be granted without allowing a plaintiff leave to amend if the deficiency in the complaint could be cured by further pleadings. *Republic Nat. Bank of New York v. Pima County*, 200 Ariz. 199, 205, ¶ 23, 25 P.3d 1 (App.

³ This argument, or a derivation from it, may be the subject of a companion action filed in Pima County Superior Court. In Case No. C2007-0499, CFSD seeks to quiet title to the same property on the basis of the 1994 final order of condemnation that it contends gives it the same access rights sought to be condemned in this case.

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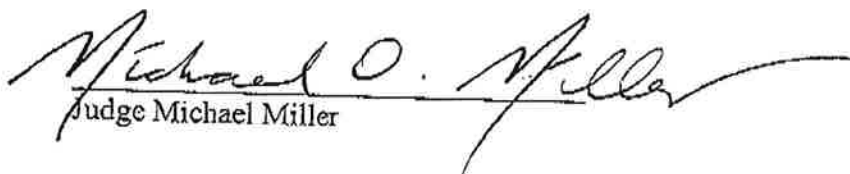
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2001). Arguably, such an amendment might cure the deficiency.⁴ CFSD must be given a limited time to decide whether it will move to amend the Complaint.

IT IS HEREBY ORDERED *granting* the Motion To Dismiss. Plaintiff Catalina Foothills School District may move to amend the Complaint to condemn the property in fee simple. The deadline for filing a motion to amend is **November 7, 2007**. If no motion to amend is filed, the action is dismissed effective **November 8, 2007**.

Dated this 24 day of October 2007


Judge Michael Miller

cc: Hon. Michael Miller
Lisa Anne Smith, Esq./Heather K. Gaines, Esq. – DeConcini McDonald Yetwin & Lacy, P.C.
G. Lawrence Schubart, Esq. – Stubbs & Schubart, P.C.
Under Advisement Clerk

⁴The Court recognizes that La Paloma vigorously disputes CFSD's authority to condemn the disputed property in fee simple. In granting leave for CFSD to request that the Complaint be amended, the Court does not find or suggest that such an amendment would be successful as a matter of law or on the specific facts of this case.

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