

SUBJECT: Allowing condemnation damages for certain diminishment of market value

COMMITTEE: Land and Resource Management — committee substitute recommended

VOTE: 7 ayes — Bosse, B. Turner, Hamric, Howard, Jackson, Krusee, Mowery

0 nays

2 absent — Crabb, Staples

WITNESSES: For — Bernard Weinstein; Michael Barron; Walker Beavers; Raymond Betz; Jimmy Gaines, Texas Landowners Council; Ed Small, Texas Cattle Raisers Association; Karl Willman

Against — R. Ivan Bland, Texas Municipal League; Ed Snyder, City of Plano

On — Robert Cuellar, Texas Department of Transportation

BACKGROUND : Art. 1, sec. 17 of the Texas Constitution guarantees that no person's property may be "taken, damaged or destroyed for public use without adequate compensation." According to the courts, in order for a landowner to receive compensation, the landowner's property or a portion of the property must be taken. If only a portion of the property is taken, the compensation given must take into account the loss of value to the remaining portion of the property caused by the condemnation.

In 1993, the Texas Supreme Court, in *State v. Schmidt*, 867 S.W.2d 769, determined that the loss of market value to the remaining property did not include any loss in market value due to traffic patterns, convenience of access, visibility or disruption due to construction activities. The *Schmidt* case was brought by property owners along U.S. Highway 183 in Austin who claimed that changing the highway from a general thoroughfare to an elevated, limited access highway significantly diminished the market value of their property. Both the trial court and the Court of Appeals had determined that the property owners could receive damages for diminishment of the market value of their property for the construction.

DIGEST:

CSHB 2740 would require that if a portion of a piece of property is condemned for public use, the total amount of the award for the portion condemned and the portion that remained would be the difference in the market value of the entire property immediately before the condemnation and the market value immediately after the condemnation. The valuation could take into consideration any benefit or injury that the construction or operation of the public project would have on the market value of the property.

If the market value of a piece of property were increased or decreased by a project before condemnation occurred, that change in value could not be considered when determining the change in market value of the property. However, increases or decreases in the market value of the remaining property caused by the proposed project after condemnation occurred would have to be considered in determining the market value.

CSHB 2740 would require that if the condemnation was done by or for the Texas Department of Transportation (TxDOT) for a highway, the special commissioners who normally determine the amount of compensation due for loss of market would have to consider:

- vehicle and pedestrian access to and from and on and off the property;
- traffic circulation and amount in and around the property;
- visibility and appearance of and from the property;
- productivity and convenience of use of the property, and
- the access to utilities and drainage.

The effect that a condemnation had on any of the factors would have to be estimated for the property in question regardless of whether other property in the same area was similarly affected by the condemnation.

Under CSHB 2740, if the property in question were owned by a public entity or an entity organized and operated on a non-profit basis and was devoted to a public function or non-profit service, the damage award could be no less than the cost of replacing the property.

CSHB 2740 would take immediate effect if finally passed by a two-thirds record vote of the membership of each house and apply to any condemnation proceeding for which a special commissioners' hearing for the assessment of damages began on or after that date.

SUPPORTERS  
SAY:

Texas eminent domain law after the ruling of the *Schmidt* case fails to provide property owners with their constitutional guarantee of being adequately compensated for any public takings. The court in *Schmidt* significantly limited the rights of property owners to receive full compensation for takings by removing several factors from the market value determination. CSHB 2740 would return the law back to protecting the rights of property owners by specifically overruling the *Schmidt* decision.

Takings law in Texas has always used a diminishment of market value test to determine how a partial taking affects the value of the remainder of the property. Prior to the *Schmidt* case, market value considered all factors in determining the actual damage to the property. However, with the *Schmidt* case, property owners were prohibited from considering several very important factors in determining market value. These factors are especially important to businesses whose decision of where to locate can be based entirely on factors of access, visibility and traffic.

CSHB 2740 would not allow property owners to obtain compensation for anything other than diminishment of market value, a standard that has been applied in Texas as far back as 1863. It would simply recognize that when property is condemned for a highway, the factors of access, visibility, traffic and the inconvenience of construction should play a part in determining the market value of the property.

When a portion of property is taken for a highway use, the remainder of the property can decrease in value significantly. A recent study of condemnations in Austin and Houston found market values dropping from 27 to 75 percent of the value before the condemnation. Much of this loss in value was due to the unattractiveness of the property as a suitable location for business precisely because of the factors ruled against in the *Schmidt* case.

Just because other neighbors who do not have a portion of their property condemned would not receive compensation is no reason to refuse to adequately compensate those property owners who do have a portion of their property condemned. Takings law has always allowed only those persons whose actual property has been condemned to recover damages. While it would be better if all property owners were compensated for loss in value of their property for public projects, such a change would be a significant shift in Texas takings law and not within the scope of this legislation, which simply seeks to return the law back to what it was before the *Schmidt* ruling.

The cost increase to TxDOT projects would be minimal in relation to the overall budget for highway construction. While it would cost some money to compensate these property owners, such compensation would be fair and reasonable under the constitutional guarantee that requires the state to compensate property owners for taking their property.

OPPONENTS  
SAY:

CSHB 2740 would significantly increase the cost of construction projects and have a substantial impact on the ability of TxDOT and cities to make improvements to streets and highways. The factors excluded from market value in the *Schmidt* case had never been allowed in any condemnation proceeding that the court had ruled on precisely because of the cost to local governments and the state in making transportation planning decisions. The court in *Schmidt* applied more than 100 years of consistent case law to determine the result of the case.

The *Schmidt* factors are items that do not create a property interest. When buying a piece of property a landowner has no expectation of the traffic flow or visibility of the property remaining exactly the same as it is when the property was purchased. The changes to traffic flow and visibility are all costs of living in a city. The owners of the property enjoy the benefits of improvements to these items, but in order to enjoy those benefits, they must bear the risk that such changes could cause a diminishment in their property value.

OTHER  
OPPONENTS  
SAY:

CSHB 2740 would base the award of market value loss for the *Schmidt* factors on a partial condemnation of the property. In some situations this would create an anomaly if the neighbor of the property owner were

similarly affected by the project but no portion of their property was taken. The neighbor would receive nothing for the same loss of visibility, traffic flow and access only because no portion of their property was condemned for the project. If a property owner would not be able to receive compensation for these damages if their property were not condemned, why should a property owner who has a one foot wide right of way of their property condemned benefit from these factors.

NOTES:

The committee substitute would make no substantive changes but would conform to standard bill drafting form; rather than rewriting section 21.042, the committee substitute would amend current law.

Three other condemnation related bills have been set for floor debate:

- HB 3338 by Hilbert, which would allow for alternative pleadings in condemnation cases, was set on the House General State Calendar for May 8;
- HB 3339 by Hilbert, which would modify when a dismissal of a condemnation proceeding would be allowed, was set on the House General State Calendar for May 8; and
- HB 1794 by Krusee, which would allow a property owner to make an election of the time at which prior market value of the property is determined, is set on the House General State Calendar for May 9.