

SUBJECT: Revised standards for authority to use eminent domain power

COMMITTEE: Land and Resource Management — committee substitute recommended

VOTE: 5 ayes — Mowery, Orr, Callegari, R. Cook, Pickett
0 nays
4 absent — Y. Davis, Geren, Ritter, Zerwas

WITNESSES: For — Bill Peacock, Texas Public Policy Foundation; Regan Beck, Texas Farm Bureau; Stephen Adler; (*Registered, but did not testify:* Stuart Blaugrund, Land Grab Opponents of El Paso, Brent Connett, Texas Conservative Coalition; Kitty-Sue Quinn, Texas Land and Mineral Owners Association; Ed Small, Texas and Southern Cattle Raisers Association; Mark Vane and David T. Weber, Gardere Wynne Sewell, LLP; Joe Bill Watkins, Vinson and Elkins, LLP)

Against — Matthew C. Deal, Houston Metropolitan Transit Authority; Donald Lee, Texas Conference of Urban Counties; Christopher Mosley, City of Fort Worth; William E Wood, City of San Antonio; (*Registered, but did not testify:* John Burke, Texas Rural Water Association; David Davenport, Canyon Regional Water Authority; Shanna Igo, Texas Municipal League; Terry Kelley, Johnson County Special Utility District; CJ Tredway, Central Harris County Regional Water Authority; Frank Turner, City of Plano)

On — Steve Carroll, Texas Energy Coalition; James Mann, Texas Pipeline Association; Mark J. Breeding; Ray Hal; (*Registered, but did not testify:* Robert Cornelison, Texas Ports Association)

BACKGROUND: The Fifth Amendment to the U.S. Constitution prohibits the taking of private property for public use without just compensation, commonly referred to as the “takings clause.” Texas Constitution, Art. 1, sec. 17 prohibits a person’s property from being taken, damaged, or destroyed without consent for public use without adequate compensation.

In June 2005, the U.S. Supreme Court ruled in *Kelo v. City of New London*, 545 U.S. 469, that the proposed use of property by the city of

New London, Conn. for a development project qualified as a “public use” within the meaning of the U.S. Constitution’s takings clause. The Supreme Court said that the city’s plan unquestionably served a public purpose and therefore ruled that it did not violate the takings clause. The court ruled that promoting economic development is a traditional and long accepted government function and embraced the broader interpretation of public use as “public purpose” in upholding the city’s actions.

The court also emphasized that nothing in its opinion precluded a state from placing further restrictions on the exercise of the takings power. It said that many states already impose “public use” requirements that are stricter than the basic federal standards.

Following the *Kelo* decision, the 79th Legislature, in its second called session in 2005, enacted SB 7 by Janek, which prohibits governmental or private entities from using eminent domain to take private property if the taking:

- confers a private benefit on a particular private party through the use of the property;
- is for a public use that merely is a pretext to confer a private benefit on a particular private party; or
- is for economic development purposes, unless economic development is a secondary purpose that results from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas.

A determination by a governmental or private entity that a proposed taking of property does not involve one of these prohibited reasons is not sufficient to create a presumption to that effect.

Property Code, sec. 21.041 establishes the legitimate bases for assessing damages to a property owner resulting from a condemnation. For this determination, special commissioners are instructed to admit evidence on the value of the property being condemned, the injury to the property owner, the impact on the property owner’s remaining property, and the use for which the property was condemned.

Property Code, ch. 21, subch. E provides an opportunity for property owners to repurchase land taken through eminent domain for a public use

that was canceled before the 10th anniversary of the date of acquisition. The possessing governmental entity is required to offer to sell the property to the previous owner or the owner's heirs for the fair market value of the property at the time the public use was canceled. The repurchase provision does not apply to right of way held by municipalities, counties, or the Texas Department of Transportation.

Sec. 21.0111 requires a governmental entity exercising eminent domain authority to disclose to the subject property owner at the time an offer to purchase is made any and all existing appraisal reports produced or acquired by the governmental entity relating specifically to the owner's property and used in determining the final valuation offer in a specified timeframe.

DIGEST:

CSHB 2006 would modify the processes governing eminent domain proceedings, standards of evidence that could be considered by a court in the course of making decisions regarding damages, obligations placed upon condemning entities, and the rights of previous owners to repurchase taken property.

As a basis for assessing actual damages to a property owner from a condemnation, CSHB 2006 would allow special commissioners to take into account any evidence that a property owner would consider in a negotiated transaction outside the standards set forth in the chapter. The bill would define "public use" as a use of property that allowed the state, a political subdivision of the state, or the general public of the state to possess, occupy and enjoy the property.

The bill would modify the price at which previous owners could repurchase condemned property on which a public use was cancelled within 10 years of the acquisition. The repurchase price would be the price paid to the owner by the governmental entity at the time the property originally was acquired, rather than the fair market value of the property at the time the public use was canceled.

CSHB 2006 would add sec. 2206.101 — the "Truth in Condemnation Procedures Act" — to require a governmental entity, for each property or group of jointly-owned contiguous properties to be condemned, to formally authorize by motion the initiation of condemnation proceedings at a public hearing by a record vote. The bill would require entities that intended to acquire property for a public use to make a good faith effort to

acquire the property by voluntary purpose or lease. A court, upon finding that a condemning entity did not make a good faith effort as such, would be empowered to order the condemning entity to pay all costs and any reasonable attorney's fees incurred by the subject owner.

In response to a request by the property owner under the Public Information Act, condemning entities would have to furnish only documents relating to the condemnation of the specific property. Any pipeline interests intending to exercise the power of eminent domain would have to serve property owners with notice prior to initiating proceedings.

The bill would take effect September 1, 2007, and would apply to requests for disclosure and condemnation proceedings on which a petition was filed on or after that date.

**SUPPORTERS
SAY:**

CSHB 2006 would make critical amendments to existing statutes regulating eminent domain to ensure that individual property rights were appropriately balanced against legitimate public needs for acquisition. The bill would make the use of eminent domain a public process by subjecting it to authorization by a governing body and would ensure accountability by requiring disclosure of documents related to a condemnation beyond the appraisal records required in current statutes.

CSHB 2006 would provide a definition of public use that both would hold condemning authorities accountable and would have sufficient flexibility to avoid discounting legitimate public interests. Public use would be defined generally to include specific uses added by SB 7 or uses that allow public interests to access and otherwise enjoy the property. This definition would preclude conspicuous examples of condemnations that result in private commercial uses but that are justified as being publicly accessible, incidental to the primary use, and having economic benefits.

The bill would leave sufficient room for fair consideration of any evidence that a property owner would consider in market transactions. Expanding evidence standards would provide recognition of the special status of condemnation proceedings caused by the fact that the property owner would not have sold under normal circumstances. Current standards of evidence do not provide for unique conditions associated with each property. Property owner rights would be protected by the good faith negotiation requirement expressly placed on condemning authorities.

Recourse would be available, along with compensable court fees, for an owner who was unable to partake in fair negotiations with the condemning authority. Entities using the power of eminent domain would have a strong incentive to negotiate in good faith and try to secure a settlement upfront.

CSHB 2006 would provide for the repurchase of condemned property at the price the entity paid at the time of acquisition. Permitting the repurchase price to be set at the original sale value, and not the current fair market value as currently required in the Property Code, would enable subject property owners to reclaim equity for appreciating property to which they were entitled. Property owners subject to takings that wrongfully result in cancelled, absent, or unnecessary public uses would be eligible only for restitution. The bill would not confer any special advantage upon an individual because it would permit only the redress of a taking that was not justly executed. There also is a distinct possibility that a property could depreciate over time following a condemnation. In that case, the property owner would be subject to losing value in the land by repurchasing. The bill under no conditions would guarantee the transfer of positive value to an individual.

The bill would create a strong disincentive against the speculative exercise of eminent domain authority by condemning authorities, including schools, municipal and county governments, state agencies, pipelines, and utilities. Condemning authorities would be strongly discouraged from acquiring land through eminent domain for which there were no immediate plans. Takings completed on a speculative basis can deprive current owners of the future value of their property. CSHB 2006 would curtail speculative condemnations and establish an important safeguard against the excessive and reckless use of eminent domain.

OPPONENTS
SAY:

CSHB 2006 would introduce more liabilities into eminent domain proceedings than it would resolve. The bill would change certain statutory provisions that were established by SB 7 and that have not given rise to any substantial issues since the enactment of that bill. CSHB 2006 would add a broad and ill-defined standard to the criteria of admitting evidence for the determination of damages in a condemnation hearing. Including a standard of admission for any evidence that a property owner might consider in a market transaction would open up a dangerous and indefinite realm. This standard could include evidence of items having sentimental or aesthetic value that did not necessarily have any bearing on value of the property, the purpose for which the land was being taken, or the material

damage to the owner. Allowing an undefined variety of evidence could create greater inconsistencies in the hearing process and reduce the overall equitability of damage claims across the state.

The bill also would introduce vague provisions regarding the definition of public use and good faith negotiations. While the bill appropriately would count the permitted uses specifically listed in statute as public, it would not clearly define the relationship between primary and incidental uses. CSHB 2006 would require future clarification about the permissibility of public uses that had an incidental private benefit. In addition, the determination of a good faith effort would be left to a court. This could place many condemning authorities in the difficult position of being unaware of what steps to take to ensure a finding of good faith. The provision could encourage litigation to clarify what would constitute a good faith effort in the context of eminent domain.

CSHB 2006 would allow “double-recovery” for property owners who had undergone eminent domain proceedings and were eligible to repurchase their property. The bill would confer a windfall upon property owners who were compensated justly for the original taking. An owner who was eligible to repurchase at the price originally paid could to accrue all the equity from appreciation without having to pay property taxes, maintenance expenses, and other costs normally incurred as part of property ownership. The bill would allow any appreciation that accrued in the property while it was in the custody of a government organization to be transferred to an individual in the form of equity.

The U.S. Constitution’s “takings clause” requires property owners to be justly compensated for any property transferred through eminent domain. Once this compensation is granted, the owner relinquishes any right to equity and other investments associated with the property. Allowing an individual to repurchase at the original price effectively could result in putting the state in a position of being used as an instrument of financial gain for that individual. There is a good reason for the longstanding and rarely amended constitutional prohibition against transferring things of public value to individuals.

**OTHER
OPPONENTS
SAY:**

CSHB 2006 would be a decided improvement over current statutory provisions regarding eminent domain. However, the bill has certain shortcomings. While it would add a much needed definition of public use, it would not apply this definition to takings initiated as part of the slum

and blight provisions. The bill should include a definition of public use and should permit takings for economic development purposes so long as these adhered to a strict definition of public use. CSHB 2006 would not place additional restrictions on the use of a property taken for a presumptive public purpose. The repurchase provision of the bill should be enhanced by requiring that a condemned property be put to a public use within 10 years or fewer or be relinquished with a preference right to purchase offered to the original owner.

NOTES:

Three other measures related to the use of eminent domain authority have been set today for second reading in the House. HB 3057 by Callegari would require a municipality to determine that each property in an area possessed characteristics of blight prior to clearing improvements in the area by means of condemnation. HB 1495 by Callegari would require condemning authorities to provide a bill of rights statement written by the attorney general for the person listed as the most recent owner prior to negotiations for the acquisition of that person's property. HJR 30 by Jackson would amend the Constitution to allow governmental entities to sell property acquired through eminent domain back to the previous owners at the price the entities paid to acquire the property.

HB 2006 originally was set on the May 2 Major State Calendar and was recommitted on a point of order.