

SUBJECT: Revising constitutional purposes for which property may be taken

COMMITTEE: Land and Resource Management — committee substitute recommended

VOTE: 5 ayes — Bonnen, Hamilton, Homer, Paxton, Thibaut

0 nays

4 absent — Farrar, Alvarado, Bolton, Orr

WITNESSES: For — Wright Gore, Western Seafood Co.; Carlos Higgins, Texas Silver-Haired Legislature; Wesley Hottot, Matt Miller, Institute For Justice, Texas Chapter; Bill Peacock, Texas Public Policy Foundation; Deborah Summers; (*Registered, but did not testify*: Kirby Brown, Texas Wildlife Association; Lauren Flake, Texas Landowners Council, Inc; Daniel Gonzalez, Texas Association of Realtors)

Against — Steve Bresnen, North Harris County Regional Water Authority; Jay Doegey, City of Arlington; Ted Gorski, City of Fort Worth; W. A. Meyers, Conference of Urban Counties; Robert Soard, Harris County; (*Registered, but did not testify*: Chester Beaver, City of Austin; Rudy Garza, City of Corpus Christi; John Gilliam, City of Plano; Shanna Igo, Texas Municipal League; David Miller, City of Forest Hill; Patricia Shipton, City of El Paso)

On — John Barton, Texas Department of Transportation; Stephen Carroll, Texas Energy Coalition; Richard Cortese, Texas Farm Bureau; James Mann, Texas Pipeline Association; (*Registered, but did not testify*: Gregory Brazaitis, Energy Transfer Company)

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.

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.

DIGEST:

CSHJR 14 would amend Texas Constitution, Art. 1, sec. 17 to restrict the taking of property to instances in which the taking, damage, or destruction was necessary for the possession, occupation, and enjoyment of the property by a common carrier, by an entity providing utility services, by the public at large, or by the state or one of its subdivisions. It also would add the term “just” in regard to compensation that must be offered as part of a taking.

The proposal would be presented to the voters at an election on Tuesday, November 3, 2009. The ballot proposal would read: “The constitutional amendment to prohibit the taking, damaging, or destroying of private property for public use unless the action is necessary for the possession, occupation, and enjoyment of the property by a common carrier, an entity providing utility service, the public, the state, or a political subdivision.”

**SUPPORTERS
SAY:**

CSHJR 14 would add key protections against abuses of the power of eminent domain by stating in the Constitution the legitimate purposes for which property may be taken and specifying that compensation offered to a condemned property owner must be adequate and “just.” Current law contained in SB 7 was an important step in reforming eminent domain law and practices in the state. However, SB 7 left open a number of issues. Primary among these was a revised constitutional framework to restrict the use of eminent domain in the state.

A constitutional amendment would have both practical and symbolic value in protecting private property — practical value in placing clear restrictions on the use of eminent domain, and symbolic value in sending a strong message from the Legislature and voters that eminent domain must be used for very limited purposes, when absolutely necessary. The “possession, occupation, and enjoyment” language in the resolution would

provide strong direction to courts subsequently ruling on eminent domain cases.

The “possession, occupation, and enjoyment” language would convey a common concept found in federal law and other laws. The language would require a condemning authority to keep the property in its possession, to occupy the property, and to use the property for some productive purpose. The language would prohibit a public entity from taking property and then in effect transferring the rights to that property to a private entity by allowing it to manage, occupy, and profit from the property. Further, it would prohibit a legitimate body from acquiring property through eminent domain with no clear plans to put the property to a pressing use. No private property should be taken without a compelling reason and plan for use, and the proposed amendment would take the decisive step of placing this intent in the Constitution in general terms that would prevent many abuses but would not affect legitimate takings. The fiscal note assumes that this constitutional change would not have a significant fiscal impact on the state.

The “possession, occupation, and enjoyment” language would not lead to the exaggerated scenarios that many have suggested. It would not cause problems for leasing or other arrangements, and would not be problematic for courts, which would be able to decipher which agreements met with spirit of the amendment. The joint resolution also explicitly would add pipelines and utilities to authorized parties and subject them to the same requirements in order to eliminate any unintended consequences regarding private authorities that carry out public uses, such as a natural gas company.

CSHJR 14 also would take the important step of clarifying that compensation paid for taken property must be “just” as well as adequate. The concepts of “just” and “adequate” compensation are distinct, with the former being stronger than the latter. This distinction would be of import to juries instructed to consider the value of a property. In those cases, “just and adequate” likely would give rise to a more generous interpretation than would “adequate” alone.

**OPPONENTS
SAY:**

CSHJR 14 would leave at the behest of courts the fundamental legitimate scope of eminent domain in the state. Introducing vague language of “possession, occupation, and enjoyment” into the Constitution could give rise to a wide range of possible court interpretations. It would undermine

decades of judicial precedent in the area of the law and introduce uncertainty that could cost taxpayer dollars in the future.

The proposed constitutional amendment would create a large gray area around the legitimate uses of eminent domain. This could have serious repercussions on local governments, who often have complicated agreements for acquired property that would not be covered clearly under the proposed language. Cities often enter into a variety of leases and other arrangements that may be on property acquired through eminent domain. Some examples include hangars, counter space, and concessions in airports; hospital leases; a coffee shop in a library — all ancillary uses with uncertain status under the “possess, occupy, and enjoy” language.

The large gray area cast by this unclear language would be a magnet for future litigation that would be costly for the state and local governments at all levels. If a court found that the new language did preclude a variety of clearly legitimate uses, it would be very difficult to change. The Constitution is not the proper forum for testing experimental terms or other provisions that have substantially uncertain implications. If necessary, unclear terms should be given the chance to settle in statutory form, where they can be readjusted more easily by the Legislature if necessary.

Ultimately, CSHJR 14 attempts to resolve problems that largely have been resolved by the enactment of SB 7, and in so doing may result in unintended consequences of a greater magnitude than the shortcomings it attempts to rectify. Courts have not had sufficient opportunity to review and further define current eminent domain law, enacted only a few years ago, so allowing more time for this to occur could resolve many lingering concerns about the extent of protections for property owners under existing laws.

OTHER
OPPONENTS
SAY:

CSHJR 14 contains language that may be too restrictive to have in a constitutional amendment. The “possession, occupation, *and* enjoyment” language in the joint resolution may prohibit certain legitimate uses. The language should be amended to read “possession, occupation, *or* enjoyment.” This greater flexibility would be more appropriate for a constitutional provision that would be very difficult to change.

NOTES:

Two related joint resolutions that would amend the constitutional takings clause have been left pending in the House Land and Resource

Management Committee. HJR 65 by Y. Davis would amend the Constitution to include certain costs of relocation for condemned parties. HJR 31 by Anderson would prohibit the state from taking property if the primary purpose of the taking was for economic development or to benefit a particular private party.