

SUBJECT: Revising standards for use of eminent domain power

COMMITTEE: Land and Resource Management — committee substitute recommended

VOTE: 9 ayes — Oliveira, Kleinschmidt, Anchia, R. Anderson, Brown, Garza, Kolkhorst, Lavender, Margo

0 nays

SENATE VOTE: On final passage, February 9 — 31–0

WITNESSES: For — Kirby Brown, Texas Wildlife Association; Lee Christie, Tarrant Regional Water District; Richard Cortese, Texas Farm Bureau; Ron Kerr, Gas Processors Association; James Mann, Texas Pipeline Association; George Nachtigall, Harris County (*Registered, but did not testify*: Kathy Barber, National Federal of Independent Businesses; Steve Bresnen, North Harris County Regional Water Authority; Robert Doggett, Texas Housing Justice League; Tommy Engelke, Texas Agricultural Cooperative Council; John W. Fainter, Jr, Association of Electric Companies of Texas, Inc.; Marida Favia del Core Borromeo, Exotic Wildlife Association; Jimmy Gaines, Texas Landowners Council; Luis Gonzalez, Texas Self Storage Association; Carlos Higgins, Texas Silver Haired Legislature; Robert Howard, South Texans' Property Rights Association; Mark Lehman, Texas Association of Realtors; David Mintz, Texas Apartment Association; Scott Norman, Texas Association of Builders; Patrick Nugent, Texas Pipeline Association; David Oefinger, Texas Pest Management Association, Inc.; Jim Reaves, Texas Nursery and Landscape Association; Steve Salmon, Texas Riverside and Land Owners Coalition; Steve Salmon, Texas Sheep and Goat Raisers Association; Jason Skagos, Texas and Southwestern Cattle Raisers Association; Ed Small, Texas Forestry Association, City of Lufkin; Robert Strauser, Port of Houston Authority, Texas Ports Association; Bob Turner, Texas Poultry Federation and Texas Sheep and Goat Raisers Association; Josh Winegarner, Texas Cattle Feeders Association; Eric Wright, Northeast Texas Water Coalition)

Against — Frank Turner, City of Plano; Ryan Rittenhouse, Public Citizen, Inc.; Debra Medina, We Texans; Steve Hodges, Norbert Hart, and Eric Friedland, City of San Antonio; Terri Hall, Texans Uniting for Reform

and Freedom; Paul Barkhurst; Don Dixon (*Registered, but did not testify*: Barry Henson, Margaret Henson, Darrel Mulloy, Marilyn Mulloy)

On — Ted Gorski, Jr., City of Fort Worth; Scott Houston, Texas Municipal League; Bill Peacock, Texas Public Policy Foundation; Amadeo Saenz, Texas Department of Transportation

BACKGROUND: The Fifth Amendment to the U.S. Constitution prohibits the taking of private property for public use without just compensation and is commonly referred to as the “takings clause.” In June 2005, the U.S. Supreme Court ruled in *Kelo v. City of New London*, 545 U.S. 469 (2005), that the proposed use of property by the city of New London, Conn. for a private economic development project qualified as a “public use” within the meaning of the U.S. Constitution’s takings clause.

Following the *Kelo* decision, the 79th Texas Legislature, in its second called session in 2005, enacted SB 7 by Janek, which prohibits governmental or private entities from using the power of 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.

The 80th Legislature in 2007 enacted HB 2006 by Woolley, which would have modified eminent domain processes. The bill was vetoed by the governor, who cited potentially higher costs to governmental entities from requiring compensation to landowners for diminished access to roadways and for factors such as changes in traffic patterns and road visibility.

In November 2009, voters approved Proposition 11 (HJR 14 by Corte), which amended Texas Constitution, Art. 1, sec. 17 to restrict taking property to the purpose of ownership, use, and enjoyment by the state, a local government, or the public at large or by an entity given the authority of eminent domain under the law or for the elimination of urban blight on

a particular parcel. The amendment did not include as a public use the taking of property for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues.

Property Code, ch. 21, subch. C 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 (TxDOT).

DIGEST:

CSSB 18 would modify processes and requirements governing eminent domain, including evidence to be considered by special commissioners in making decisions on damages awards, the rights of property owners to repurchase taken property, the requirement of a bona fide offer to purchase property, and landowners' right to access information from an entity taking their property.

CSSB 18 would add a statutory prohibition against a government or private entity taking land that was not for a public use. The bill would require governmental entities to pay relocation expenses for displaced property owners and provide a relocation advisory service.

Assessments and damages. Special commissioners, in assessing actual damages to a property owner from a condemnation, would have to take into account a material impairment of direct access on or off the remaining property that affected the market value of the remaining property, but they could not consider circuity of travel and diversion of traffic that were common to many properties.

If special commissioners awarded damages to a property owner for a taking that were greater than 110 percent of the original damages the

condemning entity offered to pay before the proceedings, the property owner would be entitled to attorney's fees and other fees in addition to costs in current law.

A condemning entity and a property owner in a trial to assess damages caused by the taking could each strike one of three special commissioners appointed by a judge. A judge would replace any stricken commissioners. The special commissioners would have to wait at least 20 days after being appointed to schedule a hearing.

Determinations of fair value of the state's interest in access rights to a highway right-of-way would be the same as standards used by the Texas Transportation Commission in acquiring access rights under provisions governing acquisition of property and payment of damages related to access.

Right of repurchase. An owner of property taken through eminent domain could repurchase the property from any entity at the original price paid to the owner if the public use for which the property was taken was canceled before the property was used for that purpose or if, within 10 years after the taking, the property became unnecessary for the public use for which it was acquired or no "actual progress" was made toward the public use. "Actual progress" would be defined as completing two or more of the following actions on the property or another property taken for the same public use:

- performing significant labor to develop the property;
- acquiring significant materials to develop the property;
- contracting significant work from an architect or similar professional;
- applying for state or federal funds to develop the property;
- applying for a state or federal permit to develop the property;
- acquiring an adjacent property for the same public use that prompted the taking of the original property; and
- for a governmental entity, the adoption of a development plan indicating the entity would not complete more than one action before the 10th anniversary of taking the property.

Suits over the right of repurchase could be settled in a district court. The bill would establish procedures for providing notice to property owners informing them of their right to repurchase and allowing former owners to

request a determination of whether they were entitled to repurchase the property if sufficient progress were not made at least 10 years after a taking.

The right of repurchase would expire after one year if an entity made a good faith effort to locate a property owner and did not receive a response.

Bona fide offer. The bill would require an entity with eminent domain authority to make a bona fide offer to acquire property from an owner voluntarily. Under the bill, an entity with eminent domain authority would have made a bona fide offer if:

- an initial and final offer were made in writing to a property owner;
- a final offer was made in writing at least 30 days after the initial offer;
- the entity, before making a final offer, obtained an appraisal from a certified appraiser of the value of the property being taken and any damages to any remaining property;
- the final offer was equal to or greater than the amount of the written appraisal obtained by the entity;
- the entity provided a copy of the written appraisal, a copy of the deed or other instrument conveying the sought-after property, and the Texas landowner's bill of rights document; and
- the entity provided the property owner with at least 14 days to respond to the final offer and the property owner did not agree to the terms of the final offer within that time.

The entity would have to include a statement affirming that it made a bona fide offer in a petition to take a property. If a court hearing a suit determined that a condemning authority did not make a bona fide offer, the court would abate the suit, require the entity to make a bona fide offer, and order the condemning entity to pay costs currently authorized in law and reasonable attorney's fees incurred by the property owner directly related to the failure to make a bona fide offer.

Eminent domain process. CSSB 18 would require a governmental entity to approve the use of eminent domain at a public meeting by a record vote. It also would establish procedures for voting on specific properties and groups of properties.

The bill would expand disclosure requirements to include all entities with the power of eminent domain instead of only governments. An entity could not include a confidentiality provision in an offer or agreement to take property. The entity would have to inform a property owner of his or her right to discuss the offer with others or to keep the offer confidential. An offer to purchase or lease a property would have to be sent by certified mail and would have to include any appraisal reports acquired in the preceding 10 years.

An entity wishing to condemn a property for a pipeline would have to provide notice to the relevant county commissioners court before beginning negotiations with the property owner.

The bill would require that an entity authorized to take property, but not subject to open records laws, produce information related to the taking at the property owner's request. It would repeal Government Code, sec. 552.0037, which subjects non-governmental entities with eminent domain authority to open records laws, and Property Code, sec. 21.024, which requires critical infrastructure entities with eminent domain authority to produce certain information relating to a condemnation to the owner of the property.

General provisions. Entities that were created or that acquired the power of eminent domain before December 31, 2012, would have to submit a letter to the comptroller acknowledging that the entity was authorized by the state to exercise the power of eminent domain and identifying the legal source for that authority. An entity that did not submit a letter by September 1, 2013, would have its authority to exercise eminent domain suspended until it submitted the letter. The comptroller would submit to state leaders a report with the name of each entity that submitted a letter and a corresponding list of provisions granting the identified authority.

A property owner whose property was taken for an easement for a gas or oil pipeline could construct a road at any location above the easement. The road would have to be perpendicular to the easement, and it could not be more than 40 feet wide or interfere with the operation and maintenance of a pipeline.

The bill would prohibit certain medical centers established in Vernon's Texas Civil Statutes, Art. 3183b-1, from exercising the power of eminent domain to take single-family residential properties and multi-family

residential properties with fewer than nine units. It would also prohibit a municipal utility district from taking property for a site or easement for a road outside of its boundaries.

The changes made to hospital districts, municipal utility districts, and standards for determining fair value of highway right-of-way would apply only to condemnation proceedings filed on or after the bill's effective date.

The bill would take effect September 1, 2011.

**SUPPORTERS
SAY:**

CSSB 18 would provide a balance between protections for private property owners and the needs of taxpayers generally. Texas was among the fastest-growing states in the union in the last decade, according to the 2010 U.S. Census. Such strong growth creates many new public needs, such as schools, roads, and utilities, that often can be built only by taking property through eminent domain authority. While the vast majority of land is acquired without the need for eminent domain, it is important to protect those owners that refuse an initial offer to purchase their land. CSSB 18 would establish these protections without imposing unacceptable costs on Texas taxpayers.

The bill would add fairness to state statutes governing the right of repurchase, expand the range of damages that could be considered in eminent domain proceedings to ensure just compensation to property owners subject to condemnation, and protect property owners in a variety of other respects where they have proven vulnerable.

Uses of eminent domain. CSSB 18 is the culmination of years of hard work on behalf of a wide range of parties to forge a consensus on eminent domain reform. The bill would be a clear improvement over current law and would address most of the lingering concerns about the use of eminent domain authority.

The bill would retain language authorizing the use of eminent domain for "public purposes" that could have unintended consequences if changed. It would add to the statutes a requirement similar to one added to the Texas Constitution in 2009 that land be taken only for a public use. The public use language in the bill would help protect property owners against abuse without going too far and requiring that land be taken only for a "necessary" use. Adding a requirement that all takings be necessary could create substantial legal confusion and put condemning authorities in the

position of having to defend the necessity of each use of eminent domain authority in a court. This would be a major cost to taxpayers, encouraging excessive litigation and potentially tying up critical public projects, neither of which Texans can afford. Adding the term “necessary” to the public use requirement would not resolve any clear and current example of eminent domain abuse in the state.

Damages and assessments. Expanding to a reasonable extent the range of plausible damages that could be awarded to property owners is necessary to ensuring just compensation for those subject to condemnation. CSSB 18 would do this by allowing special commissioners, who are appointed to determine adequate awards for property owners, to consider a “material impairment of direct access” to a property. This would expand the current practice of allowing special commissioners to consider only “material and substantial” impairments to access to a property. Eliminating the term “substantial” would require special commissioners to award damages for impaired access to a property, such as eliminating one entrance and exit to and from a parking lot that has other entrances and exits. Current legal practice does not allow special commissioners to consider these types of damages, although they often have a clear market value. The bill would provide a good balance because it is careful not to open the floodgates to the litigation that could follow a further expansion of permissible damages.

One issue often raised is that providing property owners with a broader range of damages could lead to higher costs for condemning authorities. Current statutes and the nature of the relationship between property owners and the powerful entities with eminent domain authority, however, have created an imbalance against the property owner, who often has little recourse and must go to great lengths just to receive a tolerable, let alone just, offer.

Expanding the range of damages would help restore balance by leading to more reasonable judgments in court and sending a message to condemning entities to consider the expanded range of damages in crafting their initial offers. Expanding legitimate damages would encourage condemning authorities to make fair offers up front to avoid the possibility of paying a higher sum on appeal of the initial offer. This could save money for a condemning authority in the long-run.

The bill also would require an entity to provide relocation costs — a benefit current law makes optional — in an amount sufficient to cover expenses related to relocation. This would offset some of the difficulty and grief people endure when being displaced from their homes or businesses without introducing the problematic and costly concept of ensuring a property owner a comparable standard of living.

Right of repurchase. CSSB 18 would provide for the repurchase of condemned property at the price the entity paid at the time of acquisition. This change would implement authority granted by Art. 3, sec. 52j of the Texas Constitution, which was added in 2007 when Texas voters approved Proposition 7 (HJR 30 by Jackson). Allowing 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 property owners to reclaim equity for appreciating property to which they were entitled. Only property owners subject to takings that wrongfully result in cancelled, absent, or unnecessary public uses would be eligible for restitution.

CSSB 18 would curtail speculative condemnations and establish an important safeguard against the excessive and reckless use of eminent domain authority. The bill would not confer any special advantage on an individual because it would allow the redress only of a taking that was not justly executed. It would create a strong disincentive against the speculative use of eminent domain by condemning authorities, including schools, municipal and county governments, state agencies, pipelines, and utilities. Condemning authorities would be discouraged from acquiring land through eminent domain for which there were no immediate plans. Takings completed on a speculative basis deprive current owners of the future value of their property.

Bona fide offers. CSSB 18 would install clear requirements for initial offers to purchase property before an entity initiated eminent domain proceedings. The bill would require specific processes, including adhering to timelines and providing relevant appraisals and other information, and it would prohibit confidentiality agreements. If a condemning entity did not meet the requirements in the bill, the entity would have to pay court costs and other costs the property owner assumed in contesting the action.

The strongest encouragement for a fair offer in the bill would be the potential that a condemning entity would have to pay attorney's fees and other court costs if its initial offer were 10 percent less than a property

owner's final award as granted by special commissioners or a court. This would be a deterrent against making a low initial offer. A property owner would be more likely to contest an unfair offer in court if he or she could possibly recover court costs.

OPPONENTS
SAY:

CSSB 18 would impose additional costs on Texas taxpayers for the legitimate exercise of eminent domain authority. Two areas in the bill would directly and substantially increase the costs of condemnation for a legitimate public use, translating in many cases to a greater cost to taxpayers. These additional costs are unnecessary because the Legislature and the voters have in recent sessions approved measures to thwart the main sources of eminent domain abuse.

The bill would expand damages that special commissioners consider when deciding on an award to include a "material" but not "substantial" impairment of direct access to a property. This would add costs to takings for transportation projects for TxDOT, mobility authorities, and local governments. TxDOT estimates this provision could have an impact of \$10 million in fiscal 2012. The total impact statewide would certainly be greater. The provision also could have unintended consequences if courts were more permissive than expected in allowing for damages that were "material impairments."

CSSB 18 would allow a court to award attorney's fees to a property owner if an ultimate award were 110 percent of the initial offer made by a condemning authority. TxDOT estimates this could cost about \$7 million in fiscal 2012. This requirement also would affect other entities that use eminent domain, including universities, due to additional court costs and the incentive to inflate initial offers to avoid paying court costs at the end.

Other provisions in the bill also would increase the costs to Texas taxpayers. Some institutions that do not currently pay relocation costs would have to begin doing so. An entity that had to resell a property to an original owner would lose any increased value that accrued in the property. While the costs of these provisions cannot be estimated, they are likely to add up over time and could be significant in the long term.

OTHER
OPPONENTS
SAY:

CSSB 18 would fall short of the eminent domain reform Texans need and deserve. The bill would not require a taking to be a "necessary" public use. It would not address enduring abuses of slum and blight powers to take property. Provisions for expanding the right of repurchase and requiring a

bona fide offer should be stronger. The bill should expand further the evidence commissioners must consider when awarding damages to a property owner to include financial damages associated with relocating to another property and maintaining a comparable standard of living or business.

Uses of eminent domain. Not restricting property takings to a “necessary” public use would be a major shortcoming of the bill. The Texas Constitution already requires that property takings be made for a public use, but it does not require that each taking be necessary to accomplish that public use. Requiring that a taking be necessary would force condemning entities to defend the taking as essential to a particular project. This would help rebalance the power relationship between condemning entities and property owners. Current law provides no firm legal ground to challenge the legitimacy of a property taking. Adding the “necessary” provision could provide a basis for a property owner to challenge a property taking in conspicuous cases of abuse.

The bill also would retain the authorization to use eminent domain for a “public purpose” instead of a public use. The confusion between “use”— which is specific to carrying out an actual government function on a property — and “purpose” — which invokes a broader role of government in promoting common goods — has allowed many abuses of eminent domain in the past. The bill should be amended to strike references to public purpose and replace them with public use.

Slum and blight. CSSB 18 would not address a nagging vulnerability with regard to eminent domain power left unaddressed by SB 7 in 2005 — exceptions for areas designated as blighted or as slums. Under current statutory provisions, municipalities may take property for economic development purposes if the taking is a secondary purpose resulting from community development or urban renewal activities to eliminate existing harm on society from slums or blighted areas.

Existing statutory definitions of slum and blight are vague at best, leaving it to the judgment of municipal officials to decipher what constitutes hazardous conditions, greater welfare, and social and economic liabilities. The current statutory definition of blight would allow a taking in cases where a property’s defect was minor, such as deteriorating improvements, or was not caused by the property owner, such as inadequate infrastructure. A lack of safeguards for property owners in potentially

blighted areas has given rise to a number of abusive and reckless eminent domain practices.

Municipalities can use the blight exception to condemn properties on questionable premises. CSSB 18 should be amended to reform the definition of blight and the use of eminent domain on blighted properties and should remove all references to “slums” in statute.

Right of repurchase. The bill would actually weaken the right of repurchase in current law. Current law triggers the right of repurchase if a governmental entity cancels a public use on a parcel. The proposed bill would leave a loophole for local governments, which could enact resolutions to meet only one of the seven conditions necessary to satisfy “actual progress” in the bill. Many of the conditions necessary to achieve “actual progress” are so loosely worded that most entities could satisfy the requirements with minimal effort. The bill should be amended to tighten the “actual progress” conditions to ensure that an entity had taken real steps toward a public use.

Another related weakness of the right of repurchase provision in the bill is that it would do nothing to prevent an entity from taking a property and using it for a purpose unrelated to the original taking. This would allow speculative practices among condemning entities who may have a provisional, malleable plan in place for development. To curb this possibility, the bill should be amended to add a “fourth trigger” that would activate the repurchase provision if the eventual use of the property was not the original use for which it was taken.

Bona fide offers. The bill’s provisions for bona fide offers would not adequately protect property owners. Language in HB 2006, enacted by the 80th Legislature and vetoed by the governor, would have broadly required a condemning authority to make a good faith offer. Language from that bill was permissive to allow the matter to be defined through court proceedings. CSSB 18 would provide specific conditions that, if met, would constitute a bona fide offer. The conditions in the bill are focused on small procedural matters and in large measure reflect current practices, which have proven decidedly to favor condemning entities over property owners. Bona fide offer provisions in the bill likely would compel condemning entities to minimally satisfy the provisions on paper but would not guarantee a more fair process for property owners.

The sanctions for an entity that a court determined did not operate in good faith by making a bona fide offer should be strengthened. The bill should be amended to require that a court dismiss an action for an entity that did not make a bona fide offer and prohibit that entity from filing another petition to condemn that specific property for a specified period.

NOTES:

The Legislative Budget Board (LBB) estimates the bill would have an uncertain fiscal impact to the state due to the case-by-case nature of the requirements of future condemnation proceedings. The LBB anticipates the bill would result in increased costs to acquire property through condemnation proceedings, specifically those related to highway right-of-way projects and actions by institutions of higher education.

The House committee substitute added provisions to the engrossed Senate bill that would :

- entitle property owners to attorney's fees and other fees if a final award was 110 percent of the original offer from a condemning entity;
- require pipelines with the power of eminent domain to notify a county commissioners court before beginning negotiations with a property owner;
- set an expiration on the right of repurchase after one year if an entity made a good faith effort to locate a property owner and did not receive a response; and
- limit the condemnation authority of certain hospital districts.

SB 18 by Estes, which passed the Senate, but died in the House during the 2009 regular session of the 81st Legislature, would have modified processes and requirements governing eminent domain, standards of evidence considered by special commissioners in making decisions on damages, obligations of condemning entities, and the rights of previous owners to repurchase taken property.