Policy Brief

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Recent Examples of Eminent Domain Abuse in Texas

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Harry Whittington v. the City of Austin

Harry Whittington and his family own a city block near the Austin Convention Center. On August 9, 2001, the Austin City Council passed a resolution that the Whittingtons' property, "should be acquired for a public use." The city's resolution was silent regarding what public use the city council intended to effectuate by condemning the Whittingtons' property.

However, the city later said that it wanted to use the land for the purpose of building a parking garage for the Austin Convention Center and chilling plant. It appears that the parking garage use came to light only after discussion on proposed convention center parking facility in conjunction with the adjacent Hilton hotel project fell through. The chilling plant use came even later. Additionally, testimony in the trial showed that "the City could have met all of its projected convention center parking needs for a fraction of the cost merely by non-renewing contract parking leases in the City's existing parking garage at Second and Brazos." The condemnation, it seems, was actually for the purpose of allowing the city to acquire parking for the convention center without having to forego revenue from private citizens using their other parking facility.

The City was initially successful in its condemnation of the land, and built a parking garage on the property. However, the Whittingtons' have successfully appealed the case, and the ultimate ownership of the property and parking garage is still up in the air.

Nature Conservancy v. Willacy County

Five years ago the Conservancy purchased 2,500 acres from a developer on the northern portion of South Padre Island located in Willacy County. Since its purchase, the Conservancy transferred 1,000 areas to the U.S. Fish and Wildlife Service. In November 2005, the Nature Conservancy learned through a local newspaper reporter that Willacy County officials had directed their attorneys to initiate proceedings to condemn the Conservancy's property on Padre Island.

While the County has not been particularly forthcoming in explaining its purpose for the condemnation, it seems that one purpose for the taking is to create a ferry landing for better access to the northern portion of South Padre Island. However, the 300 acres that the county has indicated it wants to condemn is far more than needed for such a project, leading to speculation that the County's officials would also like to foster commercial and residential development of the northern portion of the island.

The County has yet to formally proceed with the condemnation proceedings against the Nature Conservancy.

Lane Hardwicke v. the City of Lubbock

Lane Hardwicke owned an historic home on 9th Street in Lubbock. It was located in the North Overton area of Lubbock designated by the City in March 2002 as the North Overton District Tax Increment Finance Reinvestment Zone, under the Tax Increment Financing Act (Texas Tax Code, Chap. 311). McCanton Woods, Ltd., the lead developer in the North Overton zone, negotiated with Hardwicke to acquire his property. When the negotiations were unsuccessful, McCanton Woods requested the City of Lubbock to condemn Hardwicke's property, as it is authorized to do in Sec. 311.018 of the Act. McCanton Woods agreed to reimburse the City for the cost of condemnation, including attorneys fees, while the City agreed to transfer the property to McCanton Woods at fair market value. In January of 2006, the City let Hardwicke know that if it failed to accept its offer, the City would begin condemnation proceedings. Hardwicke filed suit to stop the condemnation.

CONTINUED ON BACK

The trial court held, and the appellate court affirmed, that the taking of a property from one private owner and transferring it to another private owner for the purpose of clearing slums and blighted areas is a public use. This is the case, the court held, even when the property in question is not blighted or substandard.

Frank Newsom v. Malcomson Road Utility District
Frank Newsom owned a northern and a southern tract of undeveloped land outside the Malcomson Road Utility District's (District) boundaries. A drainage ditch lay along the eastern boundary of Newsom's northern tract. A corporate landowner that wished to develop its nearby tract into a residential subdivision tried to purchase 2.6178 acres along the eastern edge of Newsom's northern tract to expand the drainage ditch, which the Harris County Flood Control District (HCFCD) required for development of the subdivision. Similarly, a different owner of nearby property tried to purchase 2.58 acres of Newsom's property to build a retention pond that HCFCD required for development of the second subdivision. The second owner wanted to use Newsom's property in order to be able to build more houses on the property that he already owned. The District supported the purchase because it would increase the District's tax base.

Newsom rejected both of the offers. The developers asked the District to condemn the portions of Newsom's land that they had tried to purchase. The District proceeded to file separate condemnation proceedings in county court for each piece of property.

The appeals court ruled that the takings were for a public use, despite the fact that the drainage projects were required for the permitting of specific developments, and were designed to be of a size to accommodate the runoff only from those projects. In making its determination, the court relied on the fact that the ditch and the pond could both receive runoff from other uphill properties. And even though the retention pond in the second place could have been built on property already owned by the developer, the appeals court left open the possibility that the takings constituted a public necessity. The court said that the "condemnor's discretion to determine what and how much land to condemn for its purposes—that is, to determine public necessity—is nearly absolute. Courts do not review the exercise of that discretion without a showing that the condemnor acted fraudulently, in bad faith, or arbitrarily and capriciously, i.e., that the condemnor clearly abused its discretion." Because of this standard, courts very rarely review the facts underlying a determination of public necessity. Newsom has appealed to the Supreme Court.

FKM Partnership, Ltd. v. Board of Regents of the University of Houston System
FKM owned a 1.0792 acre tract of land located along the east side of the University's campus with frontage on Calhoun Road and the frontage road of State Highway 35. In 1996, FKM made plans to develop the property as a retail shopping center, and entered into discussions with the University about the possibility of a partnership with FKM to develop the property. Though the University declined to enter into an arrangement, FKM continued to work on the project.

In early 1998, FKM sent a site plan for the project to the president of the University. At approximately the same time, the University informed FKM it was considering acquiring the property. After negotiations failed, in February 1998 the University filed a petition for condemnation in order to complete its obligations for creating the Texas Highway 35 right-of-way. However, the University did not actually need this property to satisfy its obligations in this regard. Several years later, the University filed an amended petition to acquire a significantly smaller piece of the property. This time, it stated that the acquisition of the property was necessary to complete the acquisition of its east campus areas.

Though the district court found that the University had engaged in wrongful condemnation proceedings and awarded damages to FKM, the 14th Court of Appeals held in April 2005 that there is nothing in the University's actions that warranted such a finding, and ordered the court to stay the case to give the University time to correct any defects so that it could proceed with the condemnation. The case is now on appeal to the Supreme Court.

Balous Miller v. the City of San Antonio
During the late 1980's the City of San Antonio condemned a portion of Balous Miller's family farm for the construction of the Applewhite Reservoir. Although Mr. Miller was compensated for the taking of his family's property, he was not compensated for the damages that would accrue to that portion of property he retained. He was told that his property would not be damaged because it would soon have a lakeside view. Of course, the Applewhite Reservoir was never completed. Though the City contemplated selling the condemned property back to the original land owners, it decided not to do this. Years after work on the Applewhite Reservoir project ended, the City of San Antonio sold the property to Toyota, probably for much more than it paid for it originally. Mr. Miller lost not only the amount that he could have received from Toyota, but he also remains uncompensated for damages to his property, which at one time was to overlook a scenic reservoir, but now is adjacent to a truck factory.