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Property Rights in Texas: Heading in the Right Direction

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Key Points

- Texas' strength in property rights is in its relatively limited land use controls.
- Recent Texas Supreme Court decisions are substantial improvements in property rights law.
- Recent statutory changes have also improved property rights.
- More improvements are needed from the courts and the Texas Legislature.

Introduction

Texas has traditionally been a strong property rights state. Most Texas cities and counties have far less restrictive land-use controls than are found on the West Coast and the Pacific Northwest. And it has had few of the infamous urban redevelopment projects that have been typical of the Northeast and Midwest. Yet in the past Texas courts have traditionally followed the lead of the federal courts, granting broad latitude to the legislative and executive branches when they promulgate regulations, exercise eminent domain authority, and engage in other activities that negatively affect property rights. And the Texas Legislature and local governments often took advantage of this leeway. However, several recent Texas Supreme Court decisions along with legislative action over the last few years are reigning in these excesses and helping to ensure that constitutionally-granted property rights are being restored to their historic place in Texas law.

Texas' Strength: Limited Land Use Regulation

The Great Recession came late to Texas and left early.

There are many areas of the Texas economy where this proved to be the case, but perhaps none more relevant than the Texas housing market. Unlike most other major urban centers, real estate process held up remarkably well in Texas. One of the main reasons for this is the relative dearth of land use controls in the state.

Indeed, the Federal Reserve Bank of Dallas put out a study showing that Houston fared better than most of the rest of the country because of its lack of zoning:

> Houston does not just have a larger supply of available land on its outskirts. Unlike all other large U.S. cities, Houston lacks zoning laws restricting industrial, commercial and residential construction to specific neighborhoods. …
>
> So much land is available in Houston that the cost of each incremental unit rises slowly and keeps the average cost below that of more restrictive metros. Even in the face of significant population growth, this large supply keeps land prices in Houston stable, which over time contributes to lower home prices. …
>
> Indeed, Houston and other metros such as Dallas and Atlanta that have relatively more permissive development policies have lower housing prices than more restrictive places do.
>
> At $155,800, Houston's median house price is the third lowest among the 12 largest U.S. metropolitan areas and is less than half the average for these cities (Table 4). Houston's median price is lower than even the national average, which includes inexpensive rural areas.[1]

Joel Kotkin credits Houston's approach with having an impact on a decline in poverty rates:

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In Houston, minimal land use restrictions have helped create new housing opportunities that keep prices down.

> In Houston, for example, minimal land use restrictions have helped create new housing opportunities that keep prices down. This may be one reason why Houston's population in hard-core poverty areas fell by 107,272 (about 48 percent) during the 1990s, one of the largest urban declines according to The Brookings Institution.[2]

Of course, as noted below, Texas has its problems when it comes to property rights. But they pale in comparison to many other cities and states, such as Portland, Oregon:

> Though many people consider Portland, Oregon, a model of 21st century urban planning, the region's integrated land–use and transportation plans have greatly reduced the area's livability. To halt urban sprawl and reduce people's dependence on the automobile, Portland's plans use an urban–growth boundary to greatly increase the area's population density, spend most of the region's transportation funds on various rail transit projects, and promote construction of scores of high-density, mixed-use developments.
>
> When judged by the results rather than the intentions, the costs of Portland's planning far outweigh the benefits. Planners made housing unaffordable to force more people to live in multifamily housing or in homes on tiny lots. They allowed congestion to increase to near-gridlock levels to force more people to ride the region's expensive rail transit lines. They diverted billions of dollars of taxes from schools, fire, public health, and other essential services to subsidize the construction of transit and high–density housing projects.
>
> Those high costs have not produced the utopia planners promised. Far from curbing sprawl, high housing prices led tens of thousands of families to move to Vancouver, Washington, and other cities outside the region's authority.[3]

It is interesting to note that people who want to escape the land use controls of Portland often have to move out of state to do so. This is because some of the most stringent restrictions are urban-growth boundaries which often make development outside of the city impossible.

Like what happened in many counties in California during the 1970s, Oregon's urban-growth boundaries were established over time from 1979-85.[4] Randall O'Toole explains what happened from there:

> Growth boundaries limit the supply of land available for new home construction. In 1990, builders could buy an acre suitable for residential use in the Portland area for $25,000.62. By 1997, the cost of the same acre was between $150,000 and $200,000. Because median incomes had not increased significantly, the National Association of Home Builders ranked Portland the second-least affordable housing market in the country.

In contrast, there are very few land use controls on land in Texas counties. The Foundation's Ryan Brannan explained the situation in a recent paper:

> Texas has always operated under the "Dillon Rule" for counties. The Dillon Rule is a rule of law stating that counties may exercise no power unless it is expressly granted by the state Legislature, or can be fairly implied by an express grant of power from the Legislature. It represents a tradition of legislative oversight and restraint in balancing state and local interests, and has established a consistency in law and governance that has resulted in business growth and economic development.
>
> This limited local authority does not preclude counties from having specific land use controls. For instance, there is some zoning specifically allowed by Texas law in unincorporated areas. Chapter 231 of the Local Government Code entitled "County Zoning Authority" grants such power, narrowly construed and generally extend roughly 5,000 feet beyond the feature in question, or otherwise cover an area in which potential impacts of development around the feature was sufficient to convince the Legislature that enhanced land use control was necessary to protect the feature.
>
> In addition, Chapter 232 of the Local Government Code gives counties additional land use controls. Chapter 232,

> sets forth the provisions relating to county regulation of subdivisions located outside incorporated areas. Counties are given the authority to review, approve and regulate the subdivision of land. However, as with the Texas Constitution and the other chapters relating to county land use controls, these regulatory powers are for certain, specific circumstances and for limited purposes—such as water supply and drainage, transportation, and other purposes related to health and safety.
>
> Chapters 231 and 232 of the Government Code are examples of the Legislature's historical preference to only grant specific counties specific authority to address a specific problem—unlike the broader and general land use authority typically provided to cities.[5]

Instead of people moving out of Texas to find affordable housing, Texans' strong bias towards property rights as reflected in our relative lack of land use controls means the opposite happens: people move to Texas. And we all benefit.

Weaknesses in Texas Property Rights Laws

Eminent Domain

The weaknesses in Texas property rights law from both the legislative and judicial perspectives wasn't well known to most Texans before the U.S. Supreme Court's 2005 *Kelo* decision that allowed the city of New London, Connecticut to take the property of Susette Kelo and her neighbors for a redevelopment project.

Before *Kelo*, the property rights of Texans were somewhat shielded from the consequences of Texas law because whatever it might have said, there was no general understanding that the U.S. Constitution's Public Use Clause allowed the government to take any property from any person for just about any reason and give it to someone else. There were limits in place.

However, post-*Kelo*, the flaws of Texas law regarding property rights were fully exposed. *Kelo* was the culmination of a series of federal and state court decisions that have rewritten the Takings Clauses of the U.S. Constitution essentially saying that private property is not a fundamental civil right, but a privilege granted by the state at its sole discretion. Texas property owners had nowhere to go for protection after *Kelo*.

Instead of people moving out of Texas to find affordable housing, Texans' strong bias towards property rights as reflected in our relative lack of land use controls means the opposite happens: people move to Texas. And we all benefit.

For example, the city of Freeport sought earlier last decade to seize a portion of Western Seafood's property in Freeport. The city's plan was to then turn the property over to a private entity, Freeport Waterfront Properties, for the purpose of building a private marina to enhance the city's economic welfare. Texas law gave little protection to Western Seafood, so the company turned to the federal courts for help. However, in a 2006 ruling, the Fifth Circuit Court of Appeals said:

> *Kelo*, which was issued after the district court's summary judgment order, is directly on point and supports this conclusion. The facts in Kelo bear a strong resemblance to the circumstances of the instant case. …
>
> As in *Kelo*, the city of Freeport seeks to develop its waterfront to revitalize a flagging local economy. … The record does not suggest that the City is seeking an end other than economic development. Therefore, we hold that the City's exercise of eminent domain does not violate the Takings Clause of the United States Constitution. (citations removed)

Western Seafood eventually got to keep its property, but not because the law was on its side. It engaged in public relations and political efforts that eventually turned the tide. But these efforts cost a lot of time and money they wouldn't have had to spend if Texas statutes and jurisprudence accurately reflected the Texas Constitution.

One of the chief debates over eminent domain law in the last few years has been around the issue of what constitutes a public use. Both the *Kelo* and *Western Seafood* cases highlight the

fact that courts and legislatures have largely abandoned the meaning and often the actual language of the constitutional term "public use" and have replaced it with the term "public purpose." So whereby schools and roads or similar public uses were required for a taking, now public purposes such as economic development and increasing tax revenues are sufficient cause.

Regulatory Takings

When it comes to the laws relating to the government's ability to issue regulations that restrict the right of using property, the question is generally not on whether the government has the right to restrict the use. Instead, it has been on whether the owner should be compensated for the loss of the property's use. The shorthand for referring to this issue is regulatory takings.

The standard for compensable regulatory takings in Texas was set out by the Texas Supreme Court in *Mayhew*, where the Court ruled that financial compensation for a taking is proper if 1) a regulation does not substantially advance a legitimate governmental purpose, 2) the regulation denies the owner all economically viable use of the property, or 3) the regulation unreasonably interferes with the owner's use and enjoyment of the property.[6]

Some of the problems with this standard were highlighted when the Court followed up its *Mayhew* decision with *Sheffield*, in which it held that the city's desire to curb growth was a sufficient reason for government regulation of private property.[7] The Court has also held as valid the imposition of a government regulation without compensation even though it reduced a property's value by as much as 90 percent.[8]

These rulings make obvious that the courts take very literally the constitutional term "property." Here is how the term is used in the U.S. and Texas constitutions:

> U.S.: "nor shall private property be taken for public use, without just compensation."
>
> Texas: "No person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made…"

In order for the Texas Supreme Court's ruling to make sense, it must be restricting the term property to only its physical aspects, i.e., dirt, water, minerals, etc. Because if the term property included the actual use of the property, and those uses were restricted, i.e., taken, then compensation would necessarily be due.

That this is the direction the Court has taken is clearly seen in *City of University Park v. Benners*. In this case, the Court said, "Property owners do not acquire a constitutionally protected vested right in property uses."[9] In other words, Texans have title to the dirt or water or minerals that make up the land they own, but do not have the right to use them without permission from the state.

A common practice by local governments that takes advantage of the Court's jurisprudence is cities restricting development on lands because of aesthetic, economic, or environmental concerns. Local zoning ordinances are often the way these restrictions get put into place—except in Houston, which is the only major city in Texas and the U.S. that doesn't have zoning. In other cities, zoning and rezoning of property can be done with little concern for the impact on property owners. Rezoning and other city ordinances that restrict use and diminish the value of a property are generally considered a legitimate "exercise of police power" as long as they "accomplish a legitimate goal" and are "reasonable."

In other words, cities can prohibit an activity or even force a business to close through zoning without it being considered a taking, in most cases.

While the Texas Supreme Court placed some limits on this ability when it said "[A] regulation may, under some circumstances, constitute a taking requiring compensation," in the same sentence it reiterated that "all property is held subject to the valid exercise of the police power."

One expert who can testify to this is Allen Woodard.

All but two of the 31 auto-related shops that used to operate along Dallas' Ross Avenue have shuttered as a result of a Dallas City Council vote to re-zone the area—auto shops not being the kind of business the Council has in mind for its new arts district. One of those remaining is Woodard Paint and Body. Allen Woodard was not willing to simply close the doors to his family's shop, which has been in business at that location since 1946. However, much like in the case of Western Seafood, the law—more specifically, the case law—is not on his side.

Woodard was eventually able to negotiate a deal with Dallas to remain on his property for another 12 years. The city granted him a specific use permit through 2020, with an automatic two year renewal. But it wasn't cheap. Woodard's legal fees ran about $60,000, and upgrades required by the city like sidewalks and landscaping will cost another $50,000. As Woodard put it, "I have to pay $110,000 to stay on my own property."[10]

This happened to Woodard and the other business owners on Ross Avenue because they have no right to use their own property without permission. So the city can legally shut down their businesses as long as they are given a chance to "recoup" their investment through amortization in what are deemed to be "nonconforming uses," i.e., uses that no longer comply with a new city ordinance. And since Woodard Paint and Body has been in business for over 60 years, Woodard would have long ago received an adequate return on investment, according to case law. There is no consideration of the income, jobs, and property value that vanishes when the nonconforming use is finally terminated.

As the Houston Court of Appeals explains, "Amortization is a valid technique to allow owners of property to recoup their investment in property that becomes nonconforming as a result of the regulations. … In the Benners case, the owner had 25 years notice that the nonconforming use would have to terminate. The court determined that this was sufficient time to recoup any loss in property value caused by the zoning ordinance." (*Eller Media Co. v. City of Houston*, 101 S.W.3d 668, Houston 2003)

The Private Real Property Rights Preservation Act was passed by the Texas Legislature in 1995 to address these types of regulatory takings. The Act requires compensation when governmental regulations are the producing cause of a reduction of 25 percent or more in real property value. Through legislation like this, the Legislature has the ability and authority to reverse many of the faults found in regulatory takings jurisprudence. However, the Act as passed did not apply to cities, so a private property owner who is facing many of these problems has found little recourse in this law.[11]

Judicial Deference

In addition to the Texas courts' interpretations of terms like "public use" and "property," they have also adopted certain precedents that impact both eminent domain and regulatory takings law. One of these precedents is the great deference that the courts give to the legislative and executive branches.

In order for a government to condemn private property in Texas, the taking must be for a public use and there must be a public necessity for taking the particular piece of property.

Of course, many people generally support judicial deference as opposed to judicial activism in that it allows the decisions made by elected governmental bodies that represent citizens. The problem is that in too many cases, the courts have tended to practice this form of judicial conservatism, or deference, in the very areas where citizens need the most protection. That certainly has been the case in the arena of property rights, where the courts have generally shifted the burden of proof to property owners—when they are allowed to present proof at all.

For instance, in order for a government to condemn private property in Texas, the taking must be for a public use and there must be a public necessity for taking the particular piece of property:

> There are two aspects to the 'public use' requirement. First, the condemnor must intend a use for the property that constitutes a 'public use' under Texas law. Second, the condemnation must actually be necessary to advance or achieve the ostensible public use.[12]

What happens when a question arises about whether a particular taking is for a public use and/or necessary for that use?

The Texas Supreme Court has been resolute that the determination of public use ultimately remains a judicial question. As stated by the Court, "the ultimate question of whether a particular use is a public use is a judicial question to be decided by the courts."[13]

However, although the determination of public use is a judicial question, "Texas courts traditionally afford great weight

to legislative declarations that a given use of property is a public use.[14] This deference is extended to both laws passed by the Texas Legislature and to decisions of the governing bodies of local governments. As the court says in *Whittington v. City of Austin*, it applies "whether in the form of statutes generally authorizing condemnation for that purpose or in a governmental body's condemnation resolution regarding the particular property" (internal references omitted).[15]

In practice, this means that it is up to a property owner to prove that the city is doing something wrong in a condemnation proceeding, i.e., taking a property for something other than a public use.

The presumption or deference granted to entities that exercise eminent domain does not end at determining public use. Once a taking is determined to be for a public use, it is almost automatically assumed that the taking is also necessary for that public use. The Texas Third Court of Appeals explains: "[N]ecessity is presumed from 'a determination by the condemnor of the necessity for acquiring certain property."[16] The court continues, "Once the presumption of necessity arises, the defendant can contest the fact of necessity only by establishing affirmative defenses such as fraud, bad faith, or arbitrariness."[17]

In other words, a determination by the condemnor that the taking is necessary is the final word in the absence of fraud, bad faith, or abuse. As a Texas appeals court said in one case where a property owner attempted to make a challenge on necessity, 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."[18]

As such, challenging a taking for public use is extremely difficult and very expensive for property owners. Not only do the courts' interpretations allow wide latitude for a taking entity to operate with respect to determinations of public use and necessity, but it is up to the property owner to make this difficult case. Each step of the way, the original owner fights the presumption and bears the heavy costs of litigation.

A perfect example of this is the case of Harry Whittington. Mr. Whittington and his family owned 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 a 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. It acquired the land and built a parking garage and chiller on the property. However, the Whittingtons' have successfully appealed the case, and the ultimate ownership of the property and its facilities is still up in the air.

The Texas Third Court of Appeals explains why the Whittingtons have thus far been successful:

> In fact, the chilling plant was not necessary to provide that water; evidence introduced at trial showed that another plant had previously provided the water and actually continued to do so after the Block 38 plant was built. The evidence also showed that the author of the Final Offer letter knew as much, having previously received an email from the City's project manager stating that "this new plant is not absolutely necessary," but nevertheless decided to represent that the plant was necessary in the Final Offer letter. Such a knowing misrepresentation is more than a scintilla of evidence of bad faith.

The main issue in this case came down to whether the taking was necessary for a public use. As previously noted, the Whittingtons normally would have no chance to make this argument to the courts. However, the city attorney who drafted the Final Offer letter that stated the city needed the property actually knew that was not the case. As the court put it, this was "more than a scintilla of evidence of bad faith."

Yet even though the courts have established the presence of fraud, bad faith, or arbitrariness in this case, the Whittingtons have been fighting the condemnation for a decade. Few property owners have the resources necessary for such a battle, and most would have given up years ago and taken what money they could get. This is largely the result of the extreme deference granted government entities in property rights cases.

Exclusion of Evidence in Compensation Cases

When a state or municipality takes title to private property, the private property owner must be compensated for the property condemned by the government. The United States Constitution calls for "just compensation" to be paid to the landowner, while the Texas Constitution calls for "adequate compensation" to be paid. At issue is what constitutes "adequate compensation" when private property in Texas is condemned by the State of Texas, a local government, or a private entity under the constitutional takings authority known as "eminent domain."

The guiding case law is the 1936 Texas Supreme Court ruling in *State v. Carpenter*, which held that "all circumstances which tend to increase or diminish the present market value" of the condemned property should be considered. This is known as fair market value. However, because of government's constitutional condemnation authority, landowners do not have the luxury of choosing to keep their property if they are unhappy with the amount of the government's offer. At some point, the landowner must accept what is offered by the government or awarded by the judiciary. Therefore, true fair market value does not exist in condemnations, as market value can be determined only in voluntary exchanges between willing buyers and willing sellers. The best we can manage is the "adequate" compensation standard.

To best approximate the fair market value, property owners ought to be able to introduce into evidence anything they consider to be important to the valuation of their property. However, despite the language of the Carpenter case, courts have tended to significantly restrict the evidence that a landowner can introduce.

For instance, the Texas Supreme Court held that one landowner could not admit evidence that the best and highest use of a tract was "subdivision into residential homesites, with some commercial sites" because "at the time of the taking … there had been no subdivision or development of the 104-acre tract in question."[19]

When a state or municipality takes title to private property, the private property owner must be compensated for the property condemned by the government.

Additionally, the courts have ruled that certain damages to remainder property are noncompensable: community damages (diversion damages and loss-of-access damages) and lost business profits/goodwill.

The courts have established these limits in an effort to protect taxpayers from excessive rewards. However, as we've noted it is the landowners whose property is being taken and need protection—not the government or taxpayers who are the beneficiaries of the takings. As landowners are free to consider anything in the determination of the value of their property in a market transaction, so should they at least have the opportunity to have a judge or jury consider all evidence in their attempts to obtain fair market value for the property which is being taken from them.

Property Rights are Making a Comeback in Texas

Despite the many weaknesses noted above, Texas is making great strides in improving its property rights protections.

For instance, the Texas Legislature has made some significant changes since the *Kelo* decision that have improved eminent domain law. They include:

- Prohibiting the use of eminent domain for "economic development" purposes, unless the economic development is a secondary purpose resulting from urban renewal activities to eliminate slum or blighted areas.

- Allowed (not required) a government entity to re-sell an acquired property to the previous owner at the price the entity paid at the time of the acquisition if the public use for which the property was acquired is canceled, no actual progress is made toward the public use, or the property is no longer necessary for the public use.

- Requiring that takings be for "the ownership, use, and enjoyment of the property.
- Requiring that taking property for the elimination of urban blight be based on the characteristics of a particular parcel of property, rather than on the general characteristics of the surrounding area.
- Banning takings that are not for a public use.
- Changing "public purpose" to "public use" when authorizing eminent domain authority for schools, cities, and counties.

These changes have addressed some of the weaknesses in eminent domain law mentioned above.

Equally as important, however, the Texas Supreme Court has begun making significant inroads into dealing with the weaknesses listed in all of the areas noted above. Four recent Court decisions are in the vanguard of restoring the property rights of Texans. Here are the four decisions with excerpts from the court's opinion in each.

IN RE STATE OF TEXAS, RELATOR, NO. 10-0235
The State of Texas filed a petition to condemn a tract of land and a drainage easement in Travis County from its owners, the Laws family. The property was to be used in the construction of State Highway 130. However, before the Special Commissioner's hearing was held to determine compensation, the Lawses subdivided their original property into eight separate tracts, each of which contained some of the land being condemned. Though the Lawses called the subdivision and legal maneuvers in this case a waste of time and money, they pursued it due to their fear that previous Supreme Court opinions would prevent them from seeking a valuation based on subdivision of the properties:

> "The State believes that the ideal economic unit is the entire condemned tract, the highest and best use of which is to hold as investment for future development. The State is permitted under Windham to offer this testimony. The Lawses, like Windham, believe that the condemned tract is an inferior economic unit. Where Windham thought the proper unit was larger than the condemned tract, however, the Lawses believe that the tract to be condemned contains several self-sufficient economic units. If they have non-speculative evidence to support this contention, they should be permitted to offer it at trial. Though the State has a right to define the property being taken, it does not have the power to constrain the owners' evidence of competing conceptions of the best economic unit by which the taken property should be valued."[20]

Texas courts have over time harmed the ability of property owners to receive "fair market value" for their property by limiting the types of evidence that property owners can introduce when challenging the compensation offered in a takings case. Thus the Laws' concerns were well grounded. Whether the case represents a change in course for the courts or merely a clarification of existing case law, it is a significant gain for property owners which the Court should consider in future compensation cases.

CITY OF DALLAS v. HEATHER STEWART
After Heather Stewart left her Dallas home in 1991, it was vacant, boarded up, and without utilities for about a decade. Only the occasional vagrant used it for lodging. The house was repeatedly found in violation of the city code by enforcement officials before the Dallas Urban Rehabilitation Standards Board declared the building an "urban nuisance" and the city demolished it in 2002. Since the house was declared a nuisance, the city offered Stewart no compensation. After her house was demolished, Stewart filed suit claiming that Dallas unconstitutionally took her house because it was not a public nuisance. While a district court sided with the city in part of the case, a jury sided with her in another and awarded her $75,707.67 for the destruction of her house. The Supreme Court affirmed the jury's decision:

> "That the URSB's [Dallas Urban Rehabilitation Standards Board] nuisance determination cannot be accorded preclusive effect in a takings suit is compelled by the constitution and Steele, by Lurie and its antecedents, by the nature of the question and the nature of the right. The protection of property rights, central to the functioning of our society, should not—indeed, cannot—be charged to the same people who seek to take those rights away. Because we believe that unelected municipal agencies cannot be effective bulwarks against constitutional violations, we hold that the URSB's nuisance determination, and the trial court's affirmance of that determination under a substantial evidence

standard, were not entitled to preclusive effect in Stewart's takings case, and the trial court correctly considered the issue *de novo*."[21]

The importance of the Court's decision is that it reaffirmed that a property owner should have the ability to have the facts of her case heard by the courts—not just by the local government who wants to take her property in the first place.

TEXAS RICE LAND PARTNERS AND MIKE LATTA, V. DENBURY GREEN PIPELINE-TEXAS, LLC,

In March 2008, Denbury applied to the Texas Railroad commission for a permit to operate a CO_2 pipeline as a common carrier with eminent domain authority to deliver the company's own CO_2 from its facilities in Mississippi to its Texas oil wells near Houston in order facilitate tertiary operations. The Railroad Commission granted the permit without examining whether the pipeline operation qualified Denbury to operate as a common carrier and without a hearing or notice to landowners along the proposed pipeline route. Texas Riceland Partners and Mr. Latta, whose property Denbury wished to acquire for the pipeline via eminent domain, filed suit asking the courts to look at the facts of the case, which they believed would show that Denbury was not entitled to common carrier status. The court of appeals said the property owners did not have the right to review by the courts. The Supreme Court disagreed, and opined:

"This property-rights dispute asks whether a landowner can challenge in court the eminent domain power of a CO_2 pipeline owner that has been granted a common-carrier permit from the Railroad Commission. The court of appeals answered no, holding that (1) a pipeline owner can conclusively acquire the right to condemn private property by checking the right boxes on a one page form filed with the Railroad Commission, and (2) a landowner cannot challenge in court whether the proposed pipeline will in fact be public rather than private. We disagree. Unadorned assertions of public use are constitutionally insufficient. Merely registering as a common carrier does not conclusively convey the extraordinary power of eminent domain or bar landowners from contesting in court whether a planned pipeline meets statutory common-carrier requirements. Nothing in Texas law leaves landowners so vulnerable to unconstitutional private takings."[22]

The importance of the Court's decision is that it reaffirmed that a property owner should have the ability to have the facts of her case heard by the courts—not just by the local government who wants to take her property in the first place.

This decision follows the Court's reasoning in the case of Heather Stewart by allowing the property owners to have their day in court.

BARBARA ROBINSON, V. CROWN CORK & SEAL COMPANY, INC.

Barbara Robinson and her late husband, John, sued Crown Cork & Seal alleging he had contracted mesothelioma from workplace exposure to asbestos products. They sued Crown because the Robinsons claimed that during John's service in the United States Navy he worked with asbestos insulation manufactured by the Mundet Cork Corporation that Crown subsequently merged with. However, a recently passed law by the Texas Legislature would have limited Crown's successor liability for asbestos claims and thus would have made it difficult for her to press her claims. In fact, Crown claimed that the law barred the Robinsons from recovering on their claims and the trial court agreed. The Texas Supreme Court ultimately reviewed the case and subsequently invalidated the law:

"Judges are properly deferential to legislative judgments in most matters, but at some epochal point, when police power becomes a convenient talisman waved to short-circuit our constitutional design, deference devolves into dereliction. The Legislature's policymaking power may be vast, but absent a convincing public-welfare showing, its police power cannot be allowed to uproot liberties enshrined in our Constitution."[23]

While this is not a property rights case, it has important applications in property rights law because it shows the Court's willingness to check the actions of the Legislature and presumably executive agencies and local governments—in this case actions taken under the authority of police power—when significant rights are at stake.

Recommendations

Texas property rights protections have been significantly improved in the six years since the *Kelo* decision. The Texas Supreme Court should continue its recent trend towards robust private property rights jurisprudence. Additionally, the Texas Legislature should take the following steps to further ensure that constitutionally-granted property rights will continue to maintain their historic place in Texas law.

Regulatory Takings: The Texas Private Real Property Rights Preservation Act

- The Private Real Property Rights Preservation Act should apply to municipalities as well as counties. Urban Texans should have the same property rights protections as rural Texans, and every Texan should have the same remedies against property rights transgressions via regulation, as guaranteed in the Texas Constitution.

- The numerical threshold of what qualifies as a taking—25 percent of the market value of the affected private real property—is an arbitrary number that should be completely eliminated or significantly reduced.

- Government entities should have the ability to issue waivers for property owners to regulations as an alternative to financial compensation when a taking is identified. Those waivers should specifically mention which property rights are being reinstated per the waiver. Doing so will allow the waiver to "run with the land" for future owners, as well as prevent municipalities from spending more money for compensation.

- The Texas Legislature should affirm in statute the Texas Supreme Court's recent jurisprudence limiting judicial deference in the case of property rights protections.

Eminent Domain

- A major flaw with Texas eminent domain law is that once a property has been condemned, it can be used for just about any purpose—the condemnor is not required to use it for the purpose it was taken. SB 18 attempted to fix this problem—but failed. In most cases, the provision in SB 18 allows a condemnor to get around the buyback provision even if it does not use the property for the use specified in the condemnation proceedings. The buyback provision should be changed by adding a new trigger that would grant property owners the right to repurchase their property if the initial use of the taken property is not the public use for which the property was taken. It applies in all situations and is not tied to the 10 year time frame in current law.

- All provisions in law that where condemnors are allowed to exercise eminent domain authority for a "public purpose" should be changed to read "public use."

- Property owners should be able to introduce more evidence into the record in compensation cases

- Courts should allow property owners greater ability to challenge the necessity of a taking

Conclusion

The Texas Legislature and the Texas Supreme Court have made significant improvements in property rights protections in recent years. In both cases the changes in law represent a reversal of years of erosion of the property rights of Texans. Property owners, legislators, and judges should continue to press forward to take advantage of and extend these recent gains. ✯

Endnotes

[1] Bill Gilmer, *Houston Business—A Perspective on the Houston Economy*, The Federal Reserve Bank of Dallas (Jan. 2008).
[2] Joel Kotkin, *Opportunity Urbanism An Emerging Paradigm for the 21st Century*, Greater Houston Partnership (2007) 75.
[3] Randall O'Toole, *Debunking Portland: The City That Doesn't Work*, Cato Institute (9 July 2007)1.
[4] Ibid., 12.
[5] Ryan Brannan, *Limited County Land Use Authority: An Avenue to Protecting Private Property Rights*, Texas Public Policy Foundation (Dec. 2010) 1.
[6] *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 934 (Tex. 1998).
[7] *Sheffield Development Company, Inc. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004).
[8] *Quick v. City of Austin*, 7 S.W.3d 109 (Tex. 1998).
[9] *City of University Park v. Benners*, 485 S.W.2d 773 (1972). At 773.
[10] Interview with the author, Sept. 2011.
[11] V.T.C.A., Government Code § 2007.001.
[12] *Whittington v. City of Austin*, 174 S.W.3d 889 (Tex. App.-Austin 2005, pet. Denied).
[13] *Maher*, 354 S.W.2d at 925; *Davis v. City of Lubbock*, 160 Tex. 38, 326 S.W.2d 699, 704 (1959); *Higginbotham*, 143 S.W.2d at 83; also see *City of Arlington v. Golddust*, 41 F.3d 960, 963 (Tex. 1994).
[14] *Whittington* (2005) 8.
[15] Ibid.
[16] *Whittington*, 174 S.W.3d at 897; citing: *Higginbotham*, 143 S.W.2d at 88.
[17] Ibid.
[18] *Malcomsom Road Utility District v. Newsom*, 171 S.W.3d 257 (Tex. App-Houtson [1st Dist.] 2005, pet. granted).
[19] *State v. Willey*, 351 S.W.2d 904, 905 (Tex. Civ. App.—Waco 1961), rev'd, 360 S.W.2d 524 (Tex. 1962).
[20] http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=31364.
[21] http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=30306.
[22] http://www.supreme.courts.state.tx.us/opinions/Case.asp?FilingID=30945.
[23] Justice Willett, joined by Justice Lehrmann, concurring.

About the Author

Bill Peacock is the vice president of research & planning and director of the Texas Public Policy Foundation's Center for Economic Freedom. He has been with the Foundation since February 2005.

Bill has extensive experience in Texas government and policy on a variety of issues including, economic and regulatory policy, natural resources, public finance, and public education. His work has focused on identifying and reducing the harmful effects of regulations on the economy, businesses, and consumers.

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