



Condemnation Compensation

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THE ISSUE

When a state or municipality takes title to private property, the former owner must receive what the U.S. Constitution calls “just compensation,” or in the Texas Constitution’s language, “adequate compensation.”

At issue is what constitutes “adequate compensation” when private property in Texas is condemned by the state or a municipality under the constitutional takings authority known as “eminent domain.”

The very nature of eminent domain puts government and property owners on unequal footing. Condemnations are not voluntary sales but, rather, forced takings of private property. The legal term “eminent domain” means “supreme lordship,” clearly an indication that one party—the government—has superior power and leverage over the other.

Because of government’s constitutional condemnation authority, owners have no right to keep their property if they are unhappy with the government’s offer. At some point, the owner 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 Independent Institute’s Anthony Gregory writes that “victims of seized assets have never consented, otherwise a pure exchange could take place that requires no police power. No such coerced transaction

can be said to entail ‘just compensation,’ since compensation is only just when the party being compensated agrees to the deal.”

Even owners who successfully appeal a condemnation award must pay a portion of the increased award in attorneys’ fees. Thus, even owners who prevail in the legal system do not receive full compensation.

Landowners should, as nearly as possible, be made whole. Careful, in-depth analysis regarding potential increased compensation costs show that future cost increases are overstated. While the state should always be mindful of spending taxpayer dollars, in this case, fairly compensating landowners for condemned property is a proper government expense and is the right thing to do.

THE FACTS

- ★ Article I, Section 17, of the Texas Constitution states, “No person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person.”
- ★ For entire takings, 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 (FMV).

- ★ Determining adequate compensation for partial takings, as opposed to entire takings, is a two-part process:
 - First, FMV is always paid for the condemned tract, regardless of the taking's effect on the non-condemned portion of the taking (i.e., the portion left to the original owner).
 - Second, once FMV is paid for the condemned tract, compensation for the remaining tract must be calculated. This step is a more complicated process, as certain damages to remainder property are non-compensable: community damages (diversion damages and loss-of-access damages) and lost business profits and goodwill.
- ★ The Legislature should reform the eminent domain process. Increased transparency—including full disclosure of all documentation related to a property—in the takings process will lead to a fairer and more transparent compensation process.

RESOURCES

Article 1, Section 17, Texas Constitution, <http://tlo2.tlc.state.tx.us/txconst/sections/cn000100-001700.html>.

The Trouble with 'Just Compensation,' Mises.org (Dec. 5, 2006) <http://mises.org/story/2379>.

State v. Carpenter, 89 S.W. 2d 194 (1936).

State v. Schmidt, 867 S.W. 2d 769 (Tex. 1993). ★

RECOMMENDATIONS

- ★ Landowners should as far as possible be made whole, i.e., receiving compensation in the amount of FMV loss, factoring in “all circumstances which tend to increase or diminish the present market value” of the condemned property. Whatever factors would be considered in voluntary, private-market exchanges should be considered when determining the amount of compensation for condemned property.

