TEXAS PUBLIC POLICY FOUNDATION
PolicyPerspective

March 2015
Center for Economic Freedom

The Landowners Strike Back

How the Reimbursement of Attorney Fees Reinforces Eminent Domain Reform

by Kathleen Hunker
Policy Analyst

Key Points

- Texas property owners cannot rely on legislative oversight or the political process to protect them from negligent and abusive condemnation practices.
- High litigation costs prevent Texas property owners from vindicating their right to adequate compensation in court.
- Reimbursing attorney fees would enable Texans to pursue their rights and blow the whistle on the misuse of eminent domain.
- The Legislature should require courts to award legal fees to property owners if the final compensation for a condemned property is 10 percent or more greater than the initial offer.

Excutive Summary

When the U.S. Supreme Court handed down its opinion in *Kelo v. City of New London*, it cast a spotlight on the state of property rights here in Texas and, more significantly, on how far state law had traveled from the Texas Constitution's plain affirmation that the government could only take private property for a "public use" and with "adequate compensation." Texas has made great progress since then. Recent legislation has mended the former by excluding economic development and has expanded the latter to take into account costs that theretofore had been ignored by the courts. In addition, the Texas Legislature has reformed many features of the Texas Property Code to ensure that the procedures governing the condemnation process engender results that are in conformity with the boundaries engraved in the state constitution.

Yet, in spite of these improvements, the state's charge to shield its citizens from the moral hazard that is incumbent to the takings power stands unfinished. This is particularly true as applied to the compensation requirement, where lingering judicial precedents distort Texas landowners' already low bargaining position. The "expert" opinions of appraisers cannot replace the accuracy of interested investors when it comes to assessing the market value of a property.

What's more, condemning entities have such an institutional advantage in defending their actions in court that many Texans simply accept what they know are a below market rates. Attorney and expert fees can easily total in the thousands of dollars, and the Property Code does not currently give Texans a way of redeeming those expenses even in the event a clear legal victory. As a consequence, many Texans lack the resources necessary to fund their legal representation. Others merely recognize that the litigation expenses will be subtracted from their damages award and reason that the diminished amount is not worth the time and heartache of a protracted fight. In either case, Texas property owners are denied their right to adequate compensation. When combined with the fact that the state government does not have the infrastructure to supervise every use of eminent domain, it becomes clear that there is little in the way of enforcing on condemning entities the Constitution's boundaries or the Legislature's aforementioned reforms.

On that front, the Texas Property Code may have already identified a practical solution: fee shifting. Crudely described as awarding attorney fees to certain legal victors, both federal and state law utilize fee-shifting arrangements as a means of enforcing limits on government power in the civil rights context, especially when the that power is diffused and the would-be abuser hard to identify. Past experience has shown that fee shifting breaks down the financial barriers to legal representation and turns those most familiar with the alleged wrongdoing into private attorney generals capable of taking an active part in their property's defense. If adopted in Texas, a fee-shifting arrangement could help Texans secure adequate compensation when their private property is taken and put to a public use. To make this change, the Legislature should:

continued

Amend Section 21.047, Texas Property Code, to direct the condemning entity to pay any and all reasonable attorney fees, appraisal costs, and other expenses incurred by the property owner when either 1) the commissioners award damages greater than 10 percent what the condemnor offered to pay in its initial offer letter or 2) the court awards damages greater than 10 percent what the condemnor offered to pay in its initial offer letter.

The "Despotic Power"

Eminent domain refers to the prerogative that federal and state governments have to take, without consent, the private property of another and apply it to some public use whenever expediency demands. An apparent oddity in an otherwise rights-based legal system, it trumps all other claims on the property if correctly invoked, regardless of the land's sentimental significance or place in the owner's long-term livelihood. For this reason, it is often called "the despotic power."[1]

The practice has a long pedigree in Anglo-American law, which has historically viewed eminent domain as a pre-existing power of the sovereign or, as it was described by the Texas Supreme Court, "a right inherent in organized society itself."[2] In view of that, it is seen by the courts as existing independent of any constitutional grant of authority, state or federal.[3] Instead, our written constitutions acknowledge this forerunning power and then embed strict limits as to its application, demanding that it only be exercised for a public use and that property owners be adequately compensated for any land taken.

Notably, both the state and federal constitutions simply instruct where the boundaries of eminent domain lie. They do not provide a blueprint on how to enforce that confinement. The state therefore relies on the policies outlined in the Texas Property Code, along with supplementary judicial doctrines, to build the actual legal structure that keeps the power of eminent domain in check—at least that's the theory. Experience teaches that the temptation secure convenient public benefits can gradually overwhelm the law's respect for private property, even in Texas.

Texas Retreats from Adequate Compensation

Despite a culture that venerates property rights, Texas' condemnation process has not always lived up to the promises enshrined within the state and federal constitutions. Indeed, in the years leading up to *Kelo v. City of New London*, a combination of judicial abdication and ill-advised doctrines had so diluted the procedural safeguards in the Property Code that condemning entities could skimp on what amounted to adequae compensation with little fear of judicial censure.

For example, in *Hubenak v. San Jacinto Sag Transmission Company*, the Texas Supreme Court defused a condemnor's obligation to negotiate in good faith before it petitioned for the property, holding that "the dollar amount of the offer generally should not be scrutinized."[4] Stated differently, the mere gesture of making an offer satisfied the procedural prerequisite unless the landowner could affirmatively prove arbitrary, capricious, or fraudulent behavior.[5] Little to no attention was given to the appraisal's accuracy or the condemnor's willingness to genuinely consider a counteroffer.

In addition, Texas courts shrunk the meaning of adequate compensation to exclude certain damages from the condemnor's final calculations even though these factors would have played a significant role in negotiations on the competitive market. Albeit, some items like an owner's personal connection to the property are hard to measure, but others have very specific dollar values attached to them, such as diminished access to a roadway.[6]

Significantly, pretrial negotiations represent the only occasion that Texas landowners have to haggle over the rights contained with the easement and, in light of litigation expenses, perhaps the only chance landowners have to challenge the assessed damages. By expressly excusing the condemnor from diligently ascertaining the property's true value, and in some case authorizing the condemnor to ignore parts of that value, the Court denied Texas property owners their best opportunity to preempt the adverse impact a condemnation would have on their financial security. The Court certainly ensured that condemning entities would make initials bid that were much lower than what the landowner could secure through a voluntary sale.

The Legislature Revives the Constitution

Texas lawmakers did not hit the stop button on the courts' disarmament of adequate compensation until the *Kelo v. City of New London*. The Texas Legislature traditionally had been content to let the courts set much of the state's policy regarding compensation. However, once Kelo helped the Legislature realize how far judicial doctrine had turned from the Constitution's plain language, it took aggressive

> **"Most Texans acquiesce to condemnors' pre-trial demands, not because they believe the offered money correctly reflects the property's fair market value, but because they're intimidated by the time and expense that could be spent appealing the amount."**

steps to revisit and then reform the state's condemnation process, including the issue of compensation.

In 2007, House Bill 2006 contained numerous provisions designed to reform the compensation process. In fact, it was a dispute over the compensation reforms that led to the veto of HB 2006. The veto didn't stop the Legislature from continuing its efforts to effect reforms in this area. In both 2009 and again in 2011, the Legislature addressed this issue. After a failure to make changes in 2009, the Legislature passed Senate Bill 18, which contained several compensation reforms.

SB 18 sought to lower the knowledge gap that often prevents landowners from contesting a condemnor's initial offer by ordering the condemnor to disclose all appraisal reports prepared in the last ten years and prohibiting it from attaching a confidentiality provision with the offer. Lawmakers also targeted some of the most troubling judicial precedents, Hubenak in particular. Condemnations could not proceed unless the entity made a bona fide offer attempting to purchase the property voluntarily as defined in the statute, and courts were directed to abate the proceeding if the condemnor failed to comply with the requirement. As extra incentive, the court was to order the condemnor to pay all reasonable attorney and professional fees incurred by the property owner as a result of that violation.

The aggregate of SB 18's reforms encouraged condemning entities to tender more accurate purchase offers from the get-go, thereby procuring the landowner's full compensation without the need for a lengthy and costly trial. As will be discussed throughout this paper, most Texans acquiesce to the condemnor's pre-trial demands, not because they believe that the offered money correctly reflects the property's fair market value, but because they are intimidated by the time and expense that would be spent appealing the amount. Thus, if the initial offer does not contain a fair appraisal, odds are that Texans will never receive adequate compensation for their seized property. Strengthening the procedural safeguards in the Property Code, as Senate Bill 18 did, was one way to urge condemnors to exercise better diligence. Shifting litigation costs onto the condemnor represents another.

Texas Still Has a Long Way to Travel

Even with the improvements steered in by Senate Bill 18, Texas landowners can still run aground when trying to secure adequate compensation for their taken property.

In part, the trouble is a byproduct of lingering shortcomings in the Property Code, particularly those provisions that have been weakened or misinterpreted by judicial opinions. As an example, Texas courts permit condemning entities to include in their bona fide offer rights that are not subject to condemnation, such as surplus land not needed for the public project or an unrestricted right to assign the easement to another party.[7] The offer can even impose positive obligations on the landowner for years after the taking.[8] More seriously, the courts equate an objection to these so-called requests as a rejection of the condemnor's good faith negotiation, which means that when Texans sit down at the table they are not simply settling upon an agreed price, they are also navigating around a potential minefield of demands, where any impasse could push the landowner into a condemnation action with all the expenses it entails. In short, the courts' doctrine skews the landowner's pretrial bargaining position all while the enabling the condemnor to exploit eminent domain as a means of pressuring Texans to surrender property rights not otherwise available. Pointedly, Texas casebooks are filled with similar sounding precedents.

On top of gaps in the Property Code, the very nature of the condemnation process ensures that Texans will have to routinely confront lowball overtures for their seized land. Valuation tends be a matter of opinion, which cannot be anchored to an objective standard in a condemnation setting. The Texas Supreme Court has tried. It conclusively ruled that adequate compensation means that a property owner is entitled to the land's fair market value, which it defined as, "the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no

necessity of buying."[9] However, despite the fact that few would challenge the Court's starting benchmark, the consensus crumbles once the parties attempt to arrive at this so-called market price, seeing as there is no genuine market with respect to a condemned property.

Here is where the crux of compensation disputes reside. Eminent domain ousts a piece of property from the competitive market. It also nullifies whatever leverage a property owner would have had in a private sale by removing the owner's right to withdraw from the transaction. As a consequence, any attempt to accurately gauge the property's true value through a pre-trial discussion is tainted by the fact that property owners walk into negotiations with a sword dangling above them. Moreover, eminent domain cuts off the market's greatest asset in determining a property's value: the presence of competitors. In a typical sale, the owner can rely troops of investors with a real stake in the land's worth to assess its characteristics, investigate the viability of future development, and overall show respect for attributes that may not have a specific monetary cost but hold a strong significance for the owner—a good business reputation, for instance, or family ties to the land. A condemnation action, conversely, depends on a handful of half-interested appraisers to artificially recreate what the market does instinctually, using a methodology that is more art than science.[10] Hence, even assuming every party in a condemnation attentively works toward an honest estimation of the land's value, the fact-sensitive inquiry leaves plenty of room for disagreement.

Recent court verdicts illustrate this point. In *CrossTex v. Button*, the condemnor refused to consider damages regarding the property's potential for future development. The jury disagreed and awarded an additional $665,968 to the owner.[11] In *Peregrine v. Eagle Ford*, the condemnor doubted that the easement would have any negative impact on the landowner's remaining property, but the jury ultimately ruled in the landowner's favor, assigning $1,350,410 in remainder damages.[12]

While the size of these awards are unusual, the fact that property owners often lose out because of flawed and unfair offers is not. Valuation disputes often turn on incredibly fact-specific judgments, whose answer can lead to sharp fluctuations in the amount of reparations the landowners is entitled. Additionally, both the landowner and the condemnor have an inherent but opposing bias toward

those details that support their interpretation of the land's worth, so it is unlikely that their initial assessment of appropriate compensation will align. In other words, undercompensation is a staple of the condemnation process and that although the regulation of the condemnor's pre-trial conduct has improved the prospects of Texas landowners, it has not and indeed cannot guarantee that the condemnor will tender adequate compensation in their first offer. Accordingly, lawmakers should turn their efforts toward the litigation stage and, in particular, ensuring that Texans have the wherewithal to pursue their categorical rights and are not bullied into silence by the greater resources and expertise of the condemning entity.

Lax Enforcement of Existing Reform

The prospect of securing Texans adequate compensation is reduced even further by the lax enforcement of existing procedural safeguards. Although the power of eminent domain is anchored to sovereign governments, state law-

makers can and have delegated it to other parties said to be acting in the public interest. That delegation, however, has since ballooned into a swell of faceless agencies, governments, and private companies, many with only threadbare tie to an elected office. As a result, the proliferation of eminent domain authority now exceeds the legislative branch's supervisory capabilities and those so entrusted face only modest pressure to conform their conduct to the letter of legislative reforms, much less their spirit.

A recent report from the Texas comptroller captures a snapshot of this. As part of SB 18, condemning entities were ordered to submit a letter to the comptroller's office, identifying themselves as an institution with the power of eminent domain and tagging where they obtained that legal authority. Any organization that failed to comply would see its license expire on September 1, 2013. By publishing the results, the Legislature intended to shine a ray of transparency on the condemnation process as well as compile for the first time a one-stop catalogue from which it could measure and direct future reforms.

There are two chief lessons that lawmakers can pull from the subsequent report, both of which suggest that the legislative branch cannot enforce the adequate compensation requirement on its own. First and foremost, many entities with eminent domain operate outside of normal lines of public accountability. According the comptroller's findings, only 82 percent of the letters received were submitted by government institutions. The remaining 18 percent were private organizations.[13] Also, a sizeable number of the report's governmental respondents were unelected public bodies [albeit this is inferred by the types of entities that participated and not a precise breakdown of all respondents].[14] Delegation only works because voters lean on elected officials to keep their proxies in line, and the officials respond by first supervising and then, if necessary, pulling back any strays. However, with every additional step, between an elected body and the designated agent, the thinner that chain becomes and the less likely the elected body would be willing or able to intercede on their constituent's behalf. In fact, there is a line of argument that suggests that state officials may have an incentive to intentionally use the frayed accountability as an excuse to sidestep constitutional walls when the taking is convenient and the legal prerequisites troublesome.

Second, the state government does not have the resources to scrutinize the conduct of its designated agents. The comptroller documented over 9,000 entities with the alleged power of eminent domain. Even recognizing that some entities misread the authorization statute or had multiple submissions sent on their behalf, the Texas government still has the onus of monitoring thousands of condemning entities, each performing a yet to be determined number of condemnations across the state, with each petition seeking a unique property subject to an almost infinite number of characteristics that affect its fair market value. The intensity of legislative oversight waxes and wanes with the amount of knowledge lawmakers have over a condemning entity's conduct and for obvious reasons that familiarity is at its lowest ebb when their attention is diverted by so many delegated agents. Without the services of some sort of whistleblower, lawmakers would be hard pressed to identify abusive or negligent practices unless the state government pledged substantial amount of resources, perhaps not even then.

Litigation Expenses Deny Texans Access to the Courts

Ordinarily, the alternative to legislative scrutiny would be the courts, which lack the conflict of interest present in the political branches, and which specialize in individualized, fact-sensitive inquiries. However, the judicial system presently holds such a financial and institutional disadvantage for property owners that many Texans refrain from contesting a condemnation proceeding, not because they believe that their rights were respected, but either because they could not afford legal representation or because the inevitable court costs would bite off enough of their damages as to make a legal victory not worth the heartache of a protracted fight.

To explain, despite landowner-friendly reforms, condemnations are still noticeably tilted in favor of the one initiating the petition. Condemning entities control almost the entire litigation process, from the decision to file, to the property's first appraisal and the amount offered before trial. They also have institutional competency over how condemnations work and what factors come into play when valuing property—knowledge that is born only from experience. This is to say nothing of their in-built resources, such as in-house counsel, established relationships with appraisers, and a string of experts on stand by.

> “Texas needs more substantive reforms if it is to guarantee its citizens’ categorical right to adequate compensation. A fee-shifting statute provides a possible solution.”

Landowners, conversely, enter the process with none of these adornments and instead must assume a heavy financial burden just to check the condemnors’ claims, much less pursue their rights in courts. As an example, in FKM Partnership, Ltd., the jury found the property owner’s “reasonable and necessary appraisal fees and expenses” to be $67,031. Once the jury accounted for the ensuing trial and appeal, it added another $495,642 and $150,000 respectively.[15] Likewise, in Brazos Electric, the property owner secured counsel after agreeing to a 20 percent contingency fee, which totaled $201,213 when the lawsuit was dismissed.[16]

Fortunately for these two property owners, they qualified to have those expenses reimbursed, but that is not an option in a compensation dispute, which represent the most frequently litigated issue in a condemnation proceeding. Here, Texans must subtract almost all their litigation expenses from the final verdict, meaning that not only do they fail to receive their full award but also that their decision to pursue a hearing must be made in light of the diminished amount. Compensation disputes can take years resolve, and the outcome is never certain regardless of how meritorious a claim. As a consequence, many Texans elect to forego their categorical right to adequate compensation for fear that the shrunken award would not be worth the time and anxiety spent.[17]

Of course, the decision not contest an inadequate offer has wider implications than a single landowner. As prevoiously mentioned, the legislature has neither the expertise nor the resources to scrutinize compensation disputes, whose outcomes rest on case-specific facts that are often open to interpretation. If Texas property owners are unable to step forward in the courts, then the state government will not be alerted to abusive and/or negligent practices and condemnors may feel emboldened to undertake shortcuts when preparing their initial offers. Condemnors fail to face consistent pressure to abide by prescribed limits, and the rights of Texas property owners remain undefended.

Enter Fee Shifting

All things considered, Texas needs more substantive reforms if it is to guarantee its citizens’ categorical right to adequate compensation. A fee-shifting statute provides a possible solution. Generally speaking, litigants in the Texas court system bear the costs of their own attorney fees, win or lose. This is the standard practice throughout the country and is grounded in the traditional American belief in liberal access to the courts, since an alternative rule, one where the losing party reimburses his opponent, could dissuade prospective plaintiffs from bringing forth credible grievances.[18] Legal commentators note that such a rule would not only have a disproportionate impact on middle-income claimants, but it could also foster behaviors injurious to the public if they are not stopped early-on by the courts in some private civil action.[19]

There are, however, several important exceptions where the pay-your-own-way model encourages the wrong behavior, either because it emboldens overzealous lawsuits or because it did not go far enough in removing the cost barrier.[20] In these cases, the government may elect to deviate from the traditional set-up by enacting a fee-shifting statute and order certain losing parties to pay the attorney fees of their prevailing adversary. This then allows the government to alter a party’s risk-benefit analysis leading up to and throughout the litigation process, so that it better aligns with the government’s public policy objectives, whether that be tort reform,[21] environmental conservation,[22] or the defense of civil rights.[23]

Texas itself already employs fee-shifting arrangements in a variety of contexts. The most well-known example is probably the Loser Pay rule,[24] which Texas expanded upon in 2003 and 2011 to combat runaway juries and frivolous lawsuits.[25]

But Texas also utilizes fee shifting to enforce property rights in certain circumstances exactly because of its ability to encourage “condemnors to act more responsibly and fairly toward landowners.”[26] For instance, under Section 21.019 of the Texas Property Code, a condemnor must pay the property owner “reasonable and necessary fees for attorneys, appraisers, and photographers and for other expenses incurred” if the condemnor motions to dismiss the case after initiating a taking—the idea being that condemnors should

not wield their power irresponsibly and unnecessarily. A weaker provision exists for when the entity had no right to condemn the property; only on that occasion, the court has discretion over whether attorney fees are appropriate.

However, the Texas Property Code does not yet contain a fee-shifting statute for valuation disputes despite the compensation requirement being one of the most difficult property rights for the political branches to enforce. As a result, many meritorious claims are left by the wayside as daunting litigations costs push property owners into accepting offers far below their land's fair market value. Condemning entities face negligible push back against suspect condemnation practices and many may feel emboldened to incorporate those practices into its standard business plan.

Recommendation

Texas already relies on fee-shifting arrangements to help ensure that its citizens' statutory rights can be enforced by the courts; it makes little sense to deny that same protection to a constitutional right so fundamental to Texans' liberty and crucial to keeping government power in check as the compensation requirement—doubly so in light of the partial coverage state law currently provides to landowners when condemning entities withdraw or misapply an eminent domain action.

The Foundation therefore recommends that Texas Legislature bring the state's condemnation procedures back into alignment with its commitment to both private property and open access to the courts and amend the Texas Property Code to include mandatory fee-shifting arrangements for when condemning entities undervalue the property at issue.

Specifically, that change should proceed as follows:

Amend Section 21.047, Texas Property Code, to direct the condemning entity to pay any and all reasonable attorney fees, appraisal costs, and other expenses incurred by the property owner when either 1) the commissioners award damages greater than 10 percent what the condemnor offered to pay in its initial offer letter or 2) the court awards damages greater than 10 percent what the condemnor offered to pay in its initial offer letter.

As it currently stands, condemning entities do not face persistent pressure to conform their behavior to the parameters outlined, first, in the Texas Constitution and, second, in the reforms passed by the Texas Legislature to shore up private property rights. The state government does not have the infrastructure in place to supervise the pretrial conduct of every institution with eminent domain authority. In addition, Texans caught up in the condemnation process confront a very real and very intimidating financial barrier when challenging a taking. This is especially true in a valuation dispute where the law denies property owners the chance to recoup their attorney fees even in the event of an undeniable legal victory. As a result, condemning entities can cut corners and push at the bounds of what is acceptable compensation without the risk of incurring a financial penalty. They may even save money long term since enforcement is sporadic, their savings considerable, and the judgment only that which the condemnor was already obligated to pay.

Fee shifting changes that dynamic. It breaks down the financial barriers that deter landowners from vindicating their right to receive adequate compensation for their property and thereby compels the condemnor to answer in court for any conduct that deviates from constitutional or statutory standards. More specifically, fee shifting introduces a new element for condemnors to consider when they appraise a property and make an initial offer, namely, that damages would now consist of not just the property's fair market value but also the expenses that a Texas landowner had accumulated in pursuit of his or her constitutionally-backed right to be made whole. Combined with the condemnor's own legal bills, a fee-shifting arrangement could change the cost-benefit analysis enough so that under-compensation would no longer be seen as a means of reducing a project's overhead. In this way, fee shifting turns the ones most familiar with and harmed by abusive condemnation practices into whistleblowers, capable of identifying violations as they happen and reinforcing the ceiling on eminent domain consistently. Put simply, Texas landowners become the looked-for check against unconstitutional seizures of private property.

Furthermore, any cost imposed on the condemnor is primarily self inflicted. The purpose of a fee-shifting arrangement is to secure Texans that which the condemnor already owes due to its voluntary decision to exercise eminent domain in lieu of the competitive market. It is not to penalize the condemnor or hinder the proper application of the government's taking power. Rather, by implementing a fee-shifting arrangement, the Texas Legislature would simply recognize the inescapable fact that the only party capable of

securing that compensation prior to trial is the one who initiated the taking. Condemning entities control nearly step of the condemnation proceeding whether it is the decision to file, the property's first appraisal, the rights and size of the easement, or the amount offered at the outset. They also, with few exceptions, have a visible advantage in both competency and resources when defending their decisions in court. A fee-shifting arrangement merely encourages condemnors to utilize those resources wisely and with eye toward satisfying their categorical duty to adequately reimburse Texans for any land taken. In other words, fee shifting puts the onus of court expenses on the one who could have avoided the need for litigation in the first place.

Conclusion

The vigor of private property rights—and every other right for that matter—depends on whether Texans have the opportunity to enforce them through the political process or in open court. At present, however, both avenues are closed to property owners facing an improper taking—this is especially so in the case of under compensation where Texans are denied any chance at recovering their litigation expenses. A fee-shifting arrangement would remedy this lapse by removing the biggest financial hurdle that stands between Texas property owners and open access to the courts. More than that, it would put consistent pressure on condemning entities to abide by constitutional limits and therefore deter the negligent and/or abusive practices from which violations occur.

The Texas Legislature has spent the last decade shoring up the Texas Constitution's promise of adequate compensation. Now is the time to fortify those reforms and equip property owners with the tools to defend the precedents and procedures that give the Constitution's promise life. ✯

Notes

[1] *Vanhorne's Lessee v. Dorrance,* 2 U.S. 304, 311 (1795).

[2] *Texas Highway Department v. S.J. Weber*, 147 Tex. 628, 632 (Tex. 1949).

[3] *U.S. v. Jones,* 109 U.S. 513, 518 (2007); City of Carrollton v. Singer, 232 S.W.3d 790, 796-97 (Tex. App.—Fort Worth 2007, pet. Denied).

[4] *Hubenak v. San Jacinto Sag Transmission Company,* 141 S.W.3d 172, 186-87 (Tex. 2003).

[5] *ExxonMobil Company v. Harrison Interests,* 93 S.W.3d 188, 192 (Tx. App.—Houston 2002, pet. Denied).

[6] *State v. Schmidt*, 867 S.W.2d 769, 774 (Tex. 1993); Beaumont v. Marks, 443 S.W.2d 253, 257 (Tex. 1969).

[7] Hubenak, 141 S.W.3d at 187.

[8] ExxonMobil, 93 S.W.3d at 194-95,

[9] *State v. Carpenter*, 126 Tex. 604, 618-19 (Tex. 1936).

[10] *LaSalle Pipeline, LP v. Donnell Lands*,. L.P., 336 S.W.3d 306 (Tex. App.—San Antonio 2010, pet. Denied).

[11] *Crosstex DC Gathering Co., J.V. v. Button*, No. 02-11-00067-CV, 2013 WL 257355 (Tex.App.—Fort Worth 2013, rehearing overruled).

[12] *Peregrine Pipeline Company, L.P. v. Eagle Ford Land Partners, L.P.*. No. E200700046, In the County Court at Law No. 2, Johnson County, Texas (2014).

[13] Texas Comptroller of Public Accounts, "*Senate Bill 18: Report of Eminent Domain Authority,*" p. 4.

[14] Ibid., 6.

[15] *FKM Partnership, Ltd. v. Board of Regents of the University of Houston System*, 255 S.W.3d 619, 625 (Tex. 2008).

[16] *Brazos Elec. Power Co-op., Inc. v. Weber*, 238 S.W.3d 582, 584 (Tex. App.—Dallas 2007, no pet.).

[17] Remarks by Sen. Lois Kolkhorst and Luke Ellis, *"Protecting Property Rights Amidst the Texas Miracle,"* Policy Orientation 2015, Texas Public Policy Foundation.

[18] *Straus v. Victor Talking Mach. Co.,* 297 F. 791, 798-99 (2nd Cir. 1924).

[19] Herbert M. Kritzer, *Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario*, 47 Law & Contemporary Problems, pp. 125, 137-38 (1984).

[20] Henry Cohen, *"Award of Attorney Fees by Federal Courts and Federal Agencies,"* Congressional Research Service (June 2008) p. 1.

[21] E.g. 2011 House Bill 274; Tex. Civil Practice and Remedies Code § 30.021.

[22] E.g. Tex. Water Code §§ 7.109 & 7.354.

[23] E.g. Civil Rights Act of 1964; Americans with Disabilities Act of 1990.

[24] Elaine A. Carlson, *Fee Shifting in Texas: Understanding the New Offer of Settlement Practice*, 7 J. Tex. Consumer L., Fall 2003.

[25] 2003 House Bill 4; 2011 House Bill 274.

[26] *Malcomson Road Utility District v. George,* 171 s.W.3d 257 (Tex. App. 2005—Houston, pet. Denied).

About the Author

Kathleen Hunker is a policy analyst with the Center for Economic Freedom at the Texas Public Policy Foundation. She is also a managing editor of the Foundation's research and publications, and specializes in comparative constitutional law and natural rights.

She graduated in 2012 with a Juris Doctor (J.D.) from Columbia University School of Law and a Masters of Law (LL.M) from the University College London. A former editor for the Columbia Journal of European Law, Hunker has written for such publications as Townhall.com, Ethika Politika, TheBelltowers.com, and the Harvard Journal of Law and Public Policy, among others.

About the Texas Public Policy Foundation

The Texas Public Policy Foundation is a 501(c)3 non-profit, non-partisan research institute. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach.

Funded by thousands of individuals, foundations, and corporations, the Foundation does not accept government funds or contributions to influence the outcomes of its research.

The public is demanding a different direction for their government, and the Texas Public Policy Foundation is providing the ideas that enable policymakers to chart that new course.

Texas Public Policy Foundation

900 Congress Ave., Suite 400 | Austin, Texas 78701 | (512) 472-2700 phone | (512) 472-2728 fax | www.TexasPolicy.com