

2019-20

LEGISLATOR'S GUIDE to the Issues



Property Rights and the Texas Courts

The Issue

In the wake of the 2005 *Kelo v. New London* decision, Texas courts have made significant headway in the direction of protecting property rights, and correcting weaknesses in the protection thereof.

For example, in *Laws v. Texas*, a couple sought to prove that a tract of land condemned by the state was, in fact, capable of being divided into several self-sustainable economic subunits, whose value collectively was greater than the value viewed in the greater unit by the state. The Supreme Court, examining this situation, agreed that the Lawses, and by extension anyone else whose land is under government scrutiny, could provide evidence in court that their property is more valuable than the state estimates. The courts still make final decisions, but the state cannot constrain evidence in such proceedings.

In another important case, the city of Dallas declared Heather Stewart's long-vacant home a public nuisance, demolished it, and refused to pay compensation, due to its prior declaration. However, the courts determined that she was, in fact, due compensation, because the condemnation was based only on facts presented by the city exercising its taking powers. The Supreme Court determined that the "protection of property rights...cannot be charged to the same people who seek to take those rights away."

In another case, the Supreme Court continued to re-emphasize the importance of private rights to property over supposed public interest. In *Texas Rice Land Partners v. Denbury*, Denbury received permission from the Railroad Commission to claim land for a CO₂ pipeline as a common carrier, and argued that such permission precluded a court case. However, the Supreme Court disagreed, saying that, in fact, just "checking the right boxes" to become a common carrier doesn't provide protection from suits to determine if the use is public rather than private.

More recently, the Texas Supreme Court issued its decision in *Severance v. Patterson*, in which the state of Texas was claiming that a rolling easement to beach access can eliminate a property owner's right to use her own property in the case of a rapid erosion event, such as a hurricane.

However, the Supreme Court determined there was simply no evidence in the record of an easement by prescription or dedication on such land, nor has the public had a "continuous right" to use it. Based on this, the Court ruled (twice) that while the public has acquired the right to access many beaches over time, it does not suddenly acquire the right to access private property that becomes the beach because of a major storm. Unfortunately, the Texas Legislature changed the law in 2013 to reduce the protection of property rights under *Severance*. This might ultimately lead to another lawsuit in time.

A more recent ongoing property rights action by the courts is less positive to date. A trial court and an appellate court have both upheld the city of Rowlett's taking of a driveway across a retail development to improve customer access to a grocery store on a neighboring tract. This was despite the fact that the neighboring developer refused to pay market value for the access but did pay most of the city's condemnation costs, all in an attempt to increase the value of the lease from its tenant and reduce the cost of acquiring access. The case, *KMS Retail v. City of Rowlett*, is currently pending before the Texas Supreme Court.

There is still much more to be done in the sphere of property rights. However, these decisions help protect those rights from executive and legislative abuse of takings powers, and the discussion of these rights and the threats to them—such as takings powers and taxation—is essential for moving our state and country forward economically.

The Facts

- Property rights are essential for economic prosperity and development.
- The Supreme Court of Texas has made many strides of late in protecting property rights from abuse by executive agencies and legislative acts, and has turned away from strict deference to the Legislature.

Recommendations

- Amend statute to shift the burden of proof in all property rights cases from the land owner to the condemnor.
- Reduce judicial deference to the decisions of executive agencies and local governments.
- Restore the constitutional right to both own and use property. Current case law, as held by the Texas Supreme Court, says, "Property owners do not acquire a constitutionally protected vested right in property uses."

Resources

Amicus Letter in Support of Texas Property Rights by Kathleen Hunker, Texas Public Policy Foundation (Oct. 2014).

Senate Bill 18: Presumption by Ryan Brannan and Bill Peacock, Texas Public Policy Foundation (Feb. 2011).

Amicus Brief in Beach Access Case by Vikrant Reddy, Texas Public Policy Foundation (June 2011).

Property Rights in Texas: Heading in the Right Direction by Bill Peacock, Texas Public Policy Foundation (Oct. 2011).

Amicus Brief in KMS Retail v. City of Rowlett by Bill Peacock and Robert Henneke, Texas Public Policy Foundation (March 2018).

