

Overview of Potential Changes in Eminent Domain Policy

Lee Christie

Pope, Hardwicke, Christie, Schell,
Kelly & Ray



NORTH TEXAS
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Eminent Domain in Texas: How Did We Get Here?

- Concept of just compensation for public taking of private property dates to Constitution of the Republic of Texas (1836)
- Constitution of 1876 added the proviso that “damage” to private property also gives rise to a right to just compensation



Just Compensation

- If a complete taking, the compensation is the market value on the date of taking, assuming a willing seller and willing buyer
- If a partial taking, the owner is also entitled to damages to the market value of his remainder property, which may be offset by any corresponding benefit, but only as to remainder damages
 - In federal condemnations, however, benefits to remainder may be used to offset the value of the part taken
 - In Texas, since at least 1863 owner always gets compensation for part taken, even if the value of the remainder is actually increased



Procedure

- Filing of petition, provision of appraisals, Landowner's Bill of Rights to owners [HB 1495-2007]
- Court appoints three special commissioners to determine value
 - Hearings typically very informal
 - No record or rules of evidence
 - Broad latitude to consider value
 - Owner is not required to but may appear and present evidence
 - Written award
 - May be appealed to Court, becomes a standard civil case with the condemnor as plaintiff
 - Condemnor may deposit award and obtain possession
- Procedure has been in place since 1850's



Kelo and the Counterrevolution

- Existing law: What property and interests to be taken is a legislative and not judicial function unless the use is clearly non-public or arbitrary and capricious
- Reluctance to let judiciary decide matters elected officials obligated to determine
- U.S. Supreme Court had allowed use of eminent domain for slum clearance in 1954



- *Kelo* followed 1954 decision and essentially held that the determination of whether a use is public is legislative and not judicial; left that decision in the hands of local government
- Texas has legislatively addressed *Kelo* – no longer an issue, if it ever was
 - Gov't Code § 2206 [SB 7] prohibits taking private property in order to confer a private benefit on a particular private party;
 - Prohibits if public use is a pretext for conferring such a benefit; and
 - Prohibits for “pure” economic development
- *Kelo* not relevant in the reservoir context, as is clearly a public use



Legislation Proposed to Make a “Level Playing Field”

- *Kelo*-type takings are no longer an issue
- As a practical matter, most landowners, especially in large projects, receive a *premium* to the value of land taken – anti-condemnation bias by public



Legislative Proposals

- Repurchase of Rights or Retained Use Where Land Not Used for Project
- Royalties on Water Impounded
- Enhanced Standards for Determining What is a Public Use
- Penalties/Attorney's Fees for Awards Exceeding Offers
- Effective Dates
- Compensation for Designating Land as Reservoir Site
- Expanding Definition of Compensation



Repurchase of Rights or Retained Use Where Land Not Used for Project

- Not unreasonable as long as is balanced and takes into account the long time line involved in major public projects. Current law does by allowing repurchase if project canceled within ten years.
- Lease-back rights pending construction [HB 2470-2007]
- Some legislation requires periodic reaffirmation and updates – extreme administrative burdens
- Some would require metes and bounds description of project – almost impossible until latest stages
- Requirement of drought plan



Royalties on Water Impounded

- Never included as part of landowner compensation since Republic of Texas
- May make many projects not feasible
- Doctrine of Unintended Consequences
 - Road takings – per car royalty?
 - Hospitals – per patient?
 - Jails – per inmate?
 - Is not a private benefit issue – is an added direct cost to public and windfall to landowners, who would also be paid for property
 - Landowner with remaining property will usually benefit



Enhanced Standards for Determining What is a Public Use

- One resolution would require a showing by clear and convincing evidence
- Allow judges and juries to second-guess
- Inconsistent decisions



Penalties/Attorney's Fees for Awards Exceeding Offers

- Creates incentive to inflate costs, not compromise – “gaming the system”
- Creates another lawsuit lottery system for the benefit of lawyers
- Will result in additional public costs



Effective Dates

- Unfair to current projects to change rules of game
- Affects plans and budgets already in place



Compensation for Designating Land as Reservoir Site

- Not traditionally compensable – no present limitation on use
 - If there is a limitation, is compensable
- Reservoir projects may take decades
- Doctrine of Unintended Consequences
 - City thoroughfare plans
 - Other long-range planning
 - Will limit flexibility and encourage secrecy



Expanding Definition of Compensation

- Would include anything that a “reasonably prudent person” would consider
- Changes 100 \pm years of developed law as to what is compensable
- So wide open that governmental entities may not be able to predict or budget for land costs
- Inconsistent awards



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