



Texas Conservative Coalition Research Institute
Property Rights and Land Use Task Force Report

Protecting Private Property Rights: Reforming Eminent Domain in Texas

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The contents of this document do not represent an endorsement from any individual member of the Board of Directors of the Texas Conservative Coalition Research Institute, any individual member of the TCCRI Property Rights & Land Use Task Force. There may be some policy recommendations or statement of philosophy that individual members may be unable to support. We recognize and respect their position and greatly appreciate the work of everyone involved with the task force.

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Summary of Recommendations

1. Public Use

- 1.1 Define “public use” in the Texas Constitution.
- 1.2 Define “public use” in the Texas Property Code.
- 1.3 Repeal Chapter 251, Local Government Code.

2. Adequate Compensation

- 2.1 Re-define “adequate compensation.”
- 2.2 Amend Property Code §22.042 so that property taxes are reimbursed whenever a property is condemned.

3. Slum, Blight, and Urban Renewal

- 3.1 Re-define slum and blight in Texas Law.
- 3.2 Repeal Chapters 373 & 374, Local Government Code.

4. The Condemnation Process

- 4.1 Require that all landowners targeted by condemnation receive a Texas Landowner’s Bill of Rights.
- 4.2 Improve transparency and public involvement regarding government actions involving a taking of private property:
 - a) Require prior public notice of a condemnation.
 - b) Require a public hearing prior to a condemnation.
 - c) Require that political subdivisions vote on any measure authorizing a taking.
- 4.3 Require that political subdivisions seeking to acquire land for public use engage in good faith negotiations.
- 4.4 Reform the appraisal process involved in condemnations to include incentives for government’s use of fair market values when assessing damages:
 - a) Improve appraisal disclosures to landowners.
 - b) Provide compensation for attorney’s fees, court costs.
 - c) Prohibit appraisal abuse
- 4.5 Prohibit condemning entities from taking possession of a landowner’s property pending litigation if the condemnation is challenged on grounds of public use.
- 4.6 Authorize landowners to repurchase their land for the price paid at the time of the government’s condemnation:
 - a) Create a five-year window for re-acquisition.
 - b) Allow repurchase at the original sales price.

- 4.7 Require that all political subdivisions engaged in the condemnation of private property report their activities to the state.

5. Other Land Use and Property Rights Issues

- 5.1 a) Expand applicability of the Private Real Property Rights Preservation Act
b) Lower the threshold of what constitutes a “taking.”
c) Include impervious cover restrictions in the definitions of a “taking.”
5.2 Repeal the applicability of the Public Information Act to private entities.

6. Repeal of Dead Agencies

- 6.1 Repeal Article 3264c, V.T.C.S. authorizing the State to condemn historic sites for the Texas Centennial Celebrations.
6.2 Repeal Water Code Chapter 19 creating the Texas Deepwater Port Authority.
6.3 Repeal Water Code Chapter 64 creating the Ogallala Water Import Authority.
6.4 a) Repeal Government Code Chapter 465 authorizing the Texas National Research Laboratory Commission.
b) Repeal the power of eminent domain prescribed to the University of Texas Board of Regents concerning the Superconducting Super Collider project.
c) Abolish Superconducting Super Collider Facility Research Authority.
6.5 Consolidate eminent domain references for Texas Woman’s University.

Background: Taxation by Eminent Domain

No modern economy can thrive without eminent domain. No free, liberal democracy can survive without private property rights. Government (and by grant, common carriers) has the legitimate authority to exercise the power of eminent domain. Property owners have the natural right to preserve and protect their land, homes and buildings against encroachment by the government. This natural tension – between government authority on one hand and individual rights on the other – is manifest in the Fifth Amendment to the United State Constitution.

However, in *Kelo v. City of New London*, the U.S. Supreme Court increased the power of government to seize personal property by expanding the permissible use of eminent domain to certain new forms of economic development: homes may be seized if the consequence of the seizure might increase revenue to a unit of government. Beyond all precedent, the decision raises the state's authority above individuals' property rights.

In short, New London's development plan promised that the city would derive increased tax revenues and more jobs through the implementation of a plan that required the use of eminent domain to seize 15 homes. A 5-4 majority of the Supreme Court saw merit in the plan, allowing New London -- and government entities across America -- a new means by which to achieve the ends of economic development, even displacing families. While eminent domain is derived from the Fifth Amendment, any reasonable person can only conclude that the *Kelo* decision extended a governmental power that has the potential to radically alter the balance of power in the United States to the detriment of individuals and to the benefit of government.

Even without *Kelo*, eminent domain -- though acknowledged in the Bill of Rights -- is government power in its rawest. In a certain respect, eminent domain is an oddity, outside the spirit of the other rights bestowed upon and guaranteed to the American people by the Bill of Rights. Comparing the Takings Clause of the Fifth Amendment to the "freedom of religion" clause in the First Amendment or the "right to keep and bear arms" clause of the Second, leads one to wonder just what the Founders' intent was. Under no other doctrine -- and where no crime has been committed -- can government so directly limit or take away such an important individual liberty: the right to own property.

The right to hold private property is a well-documented principle of the Founding Fathers. William Blackstone, whose *Commentaries on the Laws of England* shaped much of the Declaration of Independence and the Constitution, wrote that "the law of the land... postpone[s] even public necessity to the sacred and inviolable rights of private property."¹ Thomas Jefferson stated: "all power is inherent in the people... they are entitled to freedom of person, freedom of religion, freedom of property, and freedom of

¹ William Blackstone, *Commentaries on the Laws of England* 134-135 (1765)

press."² Thomas Paine, in *Rights of Man*, cites property, along with liberty, security, and resistance of oppression, as chief among inherent individual rights³.

Before Thomas Paine, the *Declaration of Rights of Man and of the Citizen*, a 1789 document crucial to the French Revolution, states:

“Property being an inviolable and sacred right, no one can be deprived of private usage, if it is not when the public necessity, legally noted, evidently requires it, and under the condition of a just and prior indemnity.”⁴

The “Public Necessity” test is a more narrow and appropriate approach to government seizure of private property than is the Takings Clause, which has been consistently broadened by the Supreme Court into a public-benefit test now benefiting one private party over another.

Given the nature of the Bill of Rights, eminent domain could never have been meant to be a means by which government could wantonly seize homes. In fact, Justice Thomas explains the appropriate interpretation of the 5th Amendment: “The Takings Clause is a prohibition, not a grant of power. The Constitution does not expressly grant the Federal Government the power to take property for any public purpose whatsoever.” The Fourth Amendment protects citizens against “unreasonable search and seizure,” and the Founders’ economic and intellectual ties to the agrarian life and property must also be considered. Indeed, property ownership was once used (wrongfully) as a criterion for voting rights. It would be directly contrast to the Founders’ principled belief in the sanctity of property to have also made property ownership so tenuous. *Kelo* can only represent a departure from long-standing practice rather than a current in the same stream.

Eminent Domain as Raw Government Power

Eminent domain is defined as:

“the power of a governmental entity (federal, state, county or city government, school district, hospital district or other agencies) to take private real estate for public use, with or without the permission of the owner. The Fifth Amendment to the Constitution provides that "private property [may not] be taken for public use without just compensation.”⁵

Two parts of this definition are important: the second word, “power,” and the phrase “with or without the permission of the owner.” If the power of government can be

² Thomas Jefferson to John Cartwright, 1824

³ Thomas Paine, *Rights of Man*

⁴ *Declaration of Rights of Man and of the Citizen*, Approved by the National Assembly of France, August 26, 1789

⁵ <http://dictionary.law.com/default2.asp?typed=eminent+domain&type=1>

exercised with or without consent of the property owner, the potential for abuse is evident. Another definition of eminent domain underscores the sheer government power:

“[t]he right of the government to take property from a private owner for public use by virtue of the superior dominion of its sovereignty over all lands within its jurisdiction.”⁶

“Superior dominion” and “sovereignty” speak loudly in that definition, especially since they form the very basis of the exercise of eminent domain.

The relevant portion of the Fifth Amendment to the Constitution reads: “...nor shall private property be taken for public use, without just compensation.” The critical concern is how “public use” is defined.

Keeping with the truer spirit of the Bill of Rights, “public use” had been more narrowly interpreted in Texas law than in *Kelo* and *Poletown*⁷. Texas courts have traditionally required two prerequisites in eminent domain challenges. First, the government body must prove that there is a public use under Texas law. Secondly, the government must prove that the exercise of eminent domain against property owners is necessary to advance or achieve the ostensible public use. This second idea is commonly referred to as the public necessity requirement⁸.

Following the *Kelo* decision, however, the existing Texas and federal Public Use Clauses are insufficient. An 1888 text on eminent domain notes that the word “use,” essentially, “is from the Latin *utor*, which means ‘to use, make use of, avail one’s self of, employ, apply, enjoy, etc.’”⁹ When applied to a highway, or even a public utility, the “public use” is clear. However, the above definition of “use” means that there is no “public use” from the New London development plan. In fact, under that view of “use”, and more largely, “public use”, the exercise of eminent domain to complete the New London development plan (and many other applications of eminent domain) is unconstitutional. Eminent domain was used for roads, schools, hospitals, and rail lines (deemed, along with public utilities, as “common carriers”). These applications fall under the rubric of public use because they are open to every member of the public in one way or another. Justice Clarence Thomas, in his *Kelo* dissent, wrote that “[t]he most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has legal right to use, the property, as opposed to taking it for public purpose or necessity whatsoever.”

Years of precedent have watered down “public use” so that a less stringent standard of “public benefit” is applied. As Justice Thomas references it, the “public purposes

⁶<http://dictionary.lp.findlaw.com/scripts/results.pl?co=dictionary.lp.findlaw.com&topic=a4/a41b5398389c6e7833ed4a6369dfe8f9>

⁷ *Poletown Neighborhood Council v. City of Detroit* 304 N.W.2d 455, 410 Mich. 616 (1981)

⁸ See, for example, *Bevley v. Tenngasco Gas Gathering Co.*, 638 S.W.2d 118, 120 (Tex. App.—Corpus Christi 1982)

⁹ J. Lewis, *Law of Eminent Domain* §165, p. 224, n. 4 (1888)

interpretation of the Public Use Clause.” Under that interpretation, slum clearance and redevelopment, as well as the construction of prisons and schools, can occur on land seized from private owners by the government. The public “benefit” of those uses of eminent domain is still evident, although the literal public “use” may be weak, or even absent. It is the public-benefit interpretation of the Takings Clause that has been weakened further by the *Kelo* decision. Very narrow economic development interests are now considered a legitimate basis for seizure of property under a strained interpretation of public use.

More traditional applications of Public Use include the construction of reservoirs, flood control, schools, and highways. All of those either are directly accessible and open to all members of the public, free of additional charge, or directly benefit all members of the public. The same cannot be said of the Pfizer research facility and the overall development plan of New London. The primary beneficiaries of this use of eminent domain are Pfizer and the political leaders of New London, who achieve their narrow interest of increased government revenues. The public “benefit” is ethereal, while 15 property owners lose.

The effect of the expanded definition of public use, with its twisted notion of economic development, is a gross expansion of government power. There are many ways to define and measure economic development, but the Stevens opinion gives weight to increasing tax revenue as a justifiable rationale for the use of eminent domain.

Forms of Economic Development Justified by Public Use

Economic development must certainly mean something more than government grants to universities and something less desultory than taking one person’s property and giving it to another. Under a more sensible view of the Takings Clause, economic development has a broader, more useful purpose. For instance, the Port of Houston is necessary to economic development in the truest sense because it has a far-reaching economic impact. The existence of the Port allows goods to be received and shipped between Houston and the world. The state as a whole benefits from the Port, while it also enhances the economic strength of the entire nation. A port is a more fitting exercise of eminent domain.

Additionally, the location of a port, unlike certain questionable projects (e.g., stadiums) justified under the rubric of “public use,” are constrained by geography and engineering. It really doesn’t matter where Houston’s Reliant Stadium is located; however, it is absolutely necessary to construct, deepen, and widen the Port of Houston in a very specific location.

The Port of Houston, the Erie Canal, and the St. Lawrence Seaway are precisely the types of projects the leaders of a new nation had in mind as they attempted to move from an agrarian nation to compete with international trading leaders and world economic powers such as the Dutch, British, and French. The imperative to have large, numerous, and safe water passages from the interior of the American continent to its ports along the eastern

seaboard -- to expedite transport of American goods to Europe, for example -- was paramount for the young nation to grow. That remains true today.

As it is, the New London Development Corporation (NLDC) offers other incentives to businesses, including government-sanctioned loans, tax credits, and special zoning designations. These tools should be sufficient for any government to attract, retain, and expand businesses without also seizing homes for the benefit of a single company. Yet, in this case, only Pfizer directly benefited from the government's superior dominion of its sovereignty over all lands.

Taxation by Eminent Domain

Increasing tax revenue, in and of itself, is not a paramount economic goal. Economic development, if successful, can achieve that end. Under the *Kelo* construct, increased tax revenue is now synonymous with economic development. Whether the plan increases revenue is inconsequential to the common good, and the intent of the Takings Clause.

While there must be clear limits to government-sponsored economic development, *Kelo* taints legitimate economic development because the city leaders needed (wanted) more revenue and used eminent domain to achieve that end even though there are other, accepted means by which to raise revenue. If a crucial city service such as police protection needs additional funding, the city could have raised an existing tax rate. A new tax could be levied. A bond could be issued. All of those measures would be transparent to the public, though subject to the approval of voters. In the event of a real shortfall that would have hampered the completion of a necessary city service (e.g., wastewater treatment or garbage collection), the public would likely agree to an increase in taxes. Instead, the Supreme Court has granted the power of taxation by eminent domain. The 15 homeowners displaced by New London pay (or have paid) taxes: a state income tax, state and local sales taxes, and property taxes. But those revenues were insufficient as far as city leaders were concerned, and justified seizing their property.

Property taxes are assessed by the value of the property and any improvements made to that property. The City of New London decided that certain individuals' property should be improved -- not to their benefit, as it would be through the addition of nearby parkland or better roads, for example -- but to the government's benefit. With the New London Development Plan, the value of that property increases, which boosts city tax revenue. Although the majority opinion in *Kelo* cites the economic woes of New London, the case for increased tax revenue is never made or questioned. Without clear justification of the need for higher revenue and the lack of supportable evidence that the revenue could not have been raised by other means, it must be assumed that the revenue simply fills the government coffers to increase the prestige of local politicians. Taxation by eminent domain became a dishonest, opaque power given to government by a 5-4 majority of the U.S. Supreme Court.

Dissents by Justice O'Connor and Justice Thomas champion a less powerful role of government and note the other problems inherent in the majority opinion. Justice

O'Connor, in defense of individual rights, writes: "...who among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory." Armed with a development plan and claims that the plan will lead to increased tax revenue and/or new jobs, a city can now shift private property from one owner to another just as Justice O'Connor insinuates.

Unfortunately, if a citizen attempted to maximize the use of his property, as New London is maximizing the use of previously private property of 15 individuals, he would fail due to government regulation. A home in a residential neighborhood could have many uses. The property owner could add a pool in the back and charge a fee to those who wish to use it, or utilize his garage to make car repair, change oil, and sell tires. The government wouldn't allow that in a residential area, though. Government regulations (government power) prevent the maximization of private property use. However, if a government determines that property can be put to better use, either to drive up tax revenues or create jobs, the government can punish the homeowner's under-realized property use. The notion of private property is all but dead with the combination of zoning laws and eminent domain for taxation under the guise of economic development.

Justice Thomas takes that point even further: "Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities." The *Kelo* dissents note that eminent domain used for economic development is bound to form a strong union between government and those with the money to influence government. That union, Justice Thomas notes, will come at the detriment to the poor and the politically weak.

In *Robin Hood in Reverse: The Case Against Economic Development Takings*, Ilya Somin, professor at the George Mason University School of Law, argues: "[Economic development] takings are usually the product of collusion between large and powerful interests and government officials against comparatively powerless local residents. They generally produce far more costs than benefits."¹⁰ That collusion is facilitated by the Supreme Court decision in *Kelo*, to the detriment of the property owner. The *Kelo* decision follows not only a slowly and incrementally expanded definition of the Public Use Clause, but can also be attributed to increased government attempts to promote economic development under new and very costly pretexts.

The Slide Towards Socialism

As previously noted, Justice Thomas states that "[t]he Takings Clause is a prohibition, not a grant of power. The Constitution does not expressly grant the Federal Government the power to take property for any public purpose whatsoever." Judicial precedent has

¹⁰ Ilya Somin, *Robin Hood in Reverse: The Case against Economic Development Takings*, February 22, 2005; Cato Institute

led to years of slowly watered-down interpretations of the Takings Clause, however, until we arrive at the *Kelo* decision, a gross expansion of government power.

The Takings Clause requires “just compensation” to the individuals whose property is taken. That has been interpreted, however, to mean that the government determines a value of the property (what a buyer might pay in the market for the property). That value does not include legal costs, moving costs, or any punitive damages to ease the pain of forced relocation. Justice Thomas argues the compensation received: “So-called ‘urban renewal’ programs provide some compensation for the properties they take, but no compensation is possible for the *subjective value* of these lands to the individuals displaced.” (Emphasis added)

Intellectually, the *Kelo* decision is a first cousin to socialism: private property becomes collective property when an economic interest or obscure government interest can be argued. Socialist theorists argue that in allowing the government to seize one person’s property following a government determination that the property can be better used to increase government revenue, the Supreme Court puts the needs of the state ahead of the rights of individuals.

Justice Robert Young, Jr. of the Michigan Supreme Court, prior to the *Kelo* decision, notes the slippery slope that can begin with expanded definitions of public use:

“[The] ‘economic benefit’ rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity. After all, if one’s ownership of private property is forever subject to the government’s determination that another private party would put one’s land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, ‘megastore,’ or the like.”¹¹

Justice Stevens’ argument that private property can be seized for other private purposes that will benefit the government is a central tenet of socialism: as Karl Marx, the socialist philosopher, stated, “[t]he theory of Communists may be summed up in a single sentence: abolition of private property.”¹² The *Kelo* decision is a step toward the abolition of private property.

Legislative Recourse

The *Kelo* decision is a travesty of jurisprudence that falls on the lap of five Supreme Court Justices and New London city officials, whose leaders sold one of their most vital natural rights for increased tax revenue. As a consequence, it has become necessary to amend the Texas and U.S. Constitutions to narrowly define the Takings Clause to protect the inviolable property rights of individuals, and to constrain the use of raw government power against the citizens of the United States. Fortunately, *Kelo* defers to state legislators. “States are within their rights to pass additional laws restricting

¹¹ Justice Robert P. Young, Jr., *County of Wayne v. Hathcock*, 684 NW2d 765 (Mich. 2004)

¹² Karl Marx and Frederick Engels, *Manifesto of the Communist Party*, 1848

condemnations if residents are overly burdened,” Justice Stevens noted. (At least Justice Stevens still has some vague recollection of what the 10th Amendment implies for states’ rights).

The Institute for Justice reports that as of September 2004, nine state supreme courts have ruled that property is safe from condemnation to increase tax revenue¹³. One of those states, Michigan, has recently narrowed the definition of public use and set forth criteria for the use of eminent domain towards economic development ends.

The Michigan Supreme Court, in 2004, ruled that private property may only be seized and given to another private party under three, stringent circumstances (*County of Wayne v. Hathcock*)¹⁴. First, private property may be seized by eminent domain for “instrumentalities of commerce”, which includes highways, railroads, utilities and ports. Secondly, eminent domain may be exercised to the benefit of a private party when the public retains a measure of control over the property, as in a Michigan case in which eminent domain was used to construct a gas pipeline; by regulation, the public maintained some control over the property. Finally, private property may be transferred to another private entity when the seizure itself (not necessarily the subsequent use of the property), is in the public interest. This final application is manifested in slum clearances that were alleged necessary for the public health and safety. Justice Robert P. Young, Jr. of the Michigan Supreme Court, and the majority for which he writes, notes that:

“[T]he landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce. We do not believe, and plaintiff does not contend, that these constellations required the exercise of eminent domain or any other form of collective public action for their formation.”

Although the three constitutional applications of private-benefit eminent domain can and should be argued, the Michigan high court should be lauded for defining and limiting the use of eminent domain.

The Texas Supreme Court, however, is not one of the nine state high courts to protect private property. Our Code and Constitution require amendments.

Recommendations for Action

The issue at stake in *Kelo* is not economic development but what constitutes “public use,” and “just [or adequate] compensation” for the taking. The fact that New London had an economic development plan that led to the ruling at issue is secondary to the lack of concrete definitions of public use and adequate compensation in the Texas Constitution.

The terms “public use” and “adequate compensation” require more-refined definitions. A short list of what would qualify for “public use” under a takings clause might include:

¹³ Institute for Justice, September 17, 2004;

http://www.ij.org/pdf_folder/private_property/national_ED_map.pdf

¹⁴ Justice Robert P. Young, Jr., *County of Wayne v. Hathcock*, 684 NW2d 765,(Mich. 2004)

schools, streets, highways, parks, water reservoirs, flood control, harbors, ports, bridges, railroads, and airports. Any list more expansive than the previous example leads down the slippery slope of “public benefit.”

Additionally, “just (or adequate) compensation” should be more broadly defined to discourage units of government from making frivolous decisions about condemnations for a public use. Takings have become too easy and too affordable. It should be very expensive for a government to take private property if property rights are to be protected. If prudence is not an inherent virtue of politics, the Texas Constitution might help impart it. Therefore, “adequate” as a basis for compensation is woefully inadequate. Justice Thomas hints at potential problems when he notes that compensation does not include the subjective value of the property.

Conclusion

In *Kelo*, the Supreme Court shirked its duty to uphold an “inviolable and sacred” right. Government power to take private property against the will of the owners is greatly expanded under this decision, and for all the wrong reasons. There are times when a government may face a real need to increase its tax revenues; but that increase should not come forcibly and not at the expense of politically weak individuals.

Justice Joseph Story (on the Bench from 1812 to 1845), notes that duty in *Commentaries on the Constitution* (1833): “personal security and private property rest entirely upon the wisdom, the stability, and the integrity of the courts of justice.” Although the Court in *Kelo* acted counter to Justice Story’s ideal role, all hope is not lost for private property rights.

Chapter 1: Public Use

The Fifth Amendment of the United States Constitution plainly states, "nor shall private property be taken for public use, without just compensation." This clause of the Constitution, commonly referred to as the "takings clause", limits the authority of government to take private property.¹⁵ Local, state and federal governments may only take private property provided that the taking serves a public use, and the property owner is compensated accordingly.

Although the takings clause of the Constitution limits governmental takings (i.e. condemnations) to public use, it fails to define what constitutes "public use." At first, the takings clause was subject to very narrow interpretation, where the condemnation of private land must result in the actual use by the public.¹⁶ As the size of the US economy and government began to expand, however, so did the interpretation of the meaning of public use. Soon, the scope of public use was expanded to include condemnations that provided widespread and immediate benefits to the public for uses such as railroads, milldams, and the irrigation of farmland.¹⁷ Later, the scope of public use was expanded again to address modern economic and social factors such as urban decay, land apportionment, and economic development. The course of this expansion by judicial interpretation culminated in the U.S. Supreme Court's decision in *Kelo v. City of New London* where the effort to condemn private property for economic development purposes and increased tax revenues was upheld.

The *Kelo* decision did not create the problem of condemnation for economic development purposes. Instead, the Supreme Court's decision simply upheld what other legislative bodies identified as an appropriate exercise of that authority. If anything, the *Kelo* decision was symptomatic of the problem of the expanded (and expanding) scope of the definition of public use. This problem is, in turn, reflective of a larger dilemma, namely the expansion of the size and role of government. Once relegated to providing for infrastructure (roads, bridges, ports), the role of government had expanded to include real estate developer, marketer, and market catalyst. This power had come at the cost of private property rights and the individual freedoms those rights represent. The backlash in the months following the *Kelo* decision reflected the public's disdain that government may exert its unyielding power of eminent domain for purposes that are inimical to the principles of democratic governance. The measures adopted by state legislatures, including Texas, largely sought to curb the powers of local governments.

Like the U.S. Constitution, the Texas Constitution does not define the public uses for which government may exercise the power of eminent domain, though statute does. While Senate Bill 7 prohibits condemnation for economic development purposes, or for

¹⁵ Carla Main, "How Eminent Domain Ran Amok", *Policy Review*, October and November 2005, page 6.

¹⁶ Adrienne Archer, "Restricting Kelo: Will Redefining 'Blight' in Senate Bill 7 be the Light at the End of the Tunnel?", *St. Mary's Law Journal*, 2006, page 807.

¹⁷ *Ibid.*

the transfer of property from one private party to another, the larger question remains for Texas policy makers with regard to the public uses that the power of eminent domain may be applied.

Problem 1.1: The Texas Constitution does not define public use.

Article I, Section 17 of the Texas Constitution states simply that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made." Like its federal equivalent, the Texas Constitution limits the power of government to condemn private property for public use only. Also like the U.S. Constitution, the Texas Constitution fails to define public use. Consequently, the interpretation of public use has come to rely largely upon the evolving interpretation of Texas courts, and amendment to state law.

Over the past century, Texas courts have evolved their interpretation of public use from a limited, conservative understanding to a broader acceptance of governmental power. At first, Texas courts interpreted public use simply: a public use was one where the public had a right to or use of the condemned property.¹⁸ Soon, however, the courts began to rule that public access was not necessary for fulfilling the definition of public use, and began upholding most condemnations as public use.¹⁹ The most significant change in the courts' interpretation of public use came during the mid-20th century, with the initiation of urban renewal efforts across the state. As cities condemned private property in slum areas and turned that property over for private development, the public use of such takings came into question. In response, the courts expanded their interpretation of public use to include the general concept of public welfare.²⁰ The fact that the public was better off as a result of the condemnation satisfied the court's interpretation of public use.

While the legal concept of public use has evolved in the eyes of Texas' courts, so, too, has the practical interpretation.²¹ Initially, public use represented a readily accessible, non-excludable purpose. To that end, roads, ports, and storage reservoirs were developed. Soon, the need to condemn for public use gave way to the idea of public benefit. Under the public benefit paradigm, private property could be condemned provided that the action endowed some general improvement for the public. "Public benefits", as upheld by the U.S. Supreme Court in *Kelo*, include economic development purposes and increased tax revenue.

Under the public benefit paradigm, slum clearance and redevelopment, as well as the construction of prisons and schools, can occur on land seized from private owners by the government. The public "benefit" of those uses of eminent domain is still evident, although the literal public "use" may be weak, or even absent. In some instances the public "benefit" is ethereal, while private property owners lose out. The effect of the

¹⁸ Ibid., page 823.

¹⁹ Ibid., page 824.

²⁰ Ibid., page 825.

²¹ Samuel R. Staley and John P. Blair, *Eminent Domain, Private Property, and Redevelopment: An Economic Development Analysis*, Reason Foundation, February 2005, page 2

expanded definition of public use, with its twisted notion of economic development, is a gross expansion of government power.

Due to the absence of some definition of public use, the Texas Constitution fails to appropriately limit the condemnation powers of government. The concept of public use is simple. It involves the public's actual use and enjoyment of a good or action resulting from a governmental condemnation. Roads, airports, and reservoirs have a public use. The same applies to ship channels, utility easements, and railroads. The concept of public use is distinct relative to that of public benefit. Trespasses upon private property rights notwithstanding, practically any condemnation could have a justifiable public benefit. The role of government should be limited and defined. Similarly, the power of government to condemn should be limited to endeavors that serve a strict definition of public use. Towards that end, the Texas Constitution should be amended to define public use, thereby providing an appropriate limitation on the power of eminent domain.

Recommendation 1.1: Define public use in the Texas Constitution.

A narrow definition of "public use" should be included in the Texas Constitution. Rather than an expansive definition that contemplates all types of public uses, such as reservoirs, roads, and public buildings, a constitutional definition should be simple. Accordingly, the Constitution could be amended to define public use as an act that "results to the public some definite right or use in a business or undertaking to which the property is devoted." This language is borrowed from the Texas' Supreme Court's 1905 decision in *Borden v. Trespalacios Rice & Irrigation Company* and was used by the Court to define its strict interpretation of the phrase. If applied today, the definition would appropriately limit the purposes for which governmental takings may be applied, possibly limiting the number of condemnations conducted while better protecting Texas landowners.

Problem 1.2: Texas law does not define public use.

Just as the Texas Constitution fails to define public use, the same applies to state law.

The argument for defining public use in state law mirrors that for including such a definition in the Texas Constitution. Furthermore, such a provision in the statutes would help better define and clarify the Constitution's intent.

Recommendation 1.2: Define public use in the Texas Property Code.

Chapter 21 of the Texas Property Code, which governs the condemnation process, should be amended to specify that a political subdivision may exercise its right of eminent domain only for a public use. The chapter should further define public use as follows:

1. The possession, occupation, or use of the land by the general public or by state or local governmental entities;
2. The use of the land for the creation or functioning of public utilities;
3. The providing of channels of trade or travel; such as airports or sea ports.

4. The advancement of purposes for which a political subdivision levies ad valorem taxes.

This definition of public use mirrors portions of that in H.B. 1313 approved by the Georgia Legislature in 2006. That bill also stressed that "the public benefit of economic development shall not constitute a public use," and emphasized that public utilities must "directly or indirectly serve the public." This recommendation incorporates portions of the Georgia measure in addition to limiting a political subdivision's power of eminent domain to its taxing purposes.

There are two arguments for linking the power to tax to the power of eminent domain. First, private property acquired through the condemnation process is paid with taxpayer dollars. A political subdivision's taxpayers should not be required to pay for property that will not be put to public use. Requiring that a political subdivision condemn property for uses that correlate with their taxing purposes would ensure that its taxpayers benefit from what they ultimately pay for. Secondly, strictly linking condemnation to taxing purposes may help further limit the purposes for which a political subdivision may exercise its power of eminent domain.

Problem 1.3: Chapter 251, Local Government Code authorizes Texas cities to condemn private property for a wide array of public purposes.

Chapter 251 of the Local Government Code addresses municipalities' power of eminent domain. In particular, the chapter authorizes municipalities to exercise their right of eminent domain for a "public purpose", not necessarily a public use.²² The chapter then lists 33 purposes for which Texas cities may exercise eminent domain. Some of the purposes listed in the law include the development of a sanatorium, market house, playground, slaughterhouse, warehouse, loading or unloading facility, and square.²³ The chapter also authorizes municipalities to exercise eminent domain "for any other municipal purpose the governing body considers advisable."²⁴

As emphasized earlier in this chapter, the power of eminent domain should be limited to public uses, not public benefits or purposes. The purposes listed in Chapter 251 for which municipalities may condemn private property are expansive, and in some cases patently absurd. There is no justification for subjugating private property rights so that municipalities may exercise their power of eminent for the development of playgrounds, slaughterhouses, and squares. Furthermore, the provision authorizing the use of eminent domain "for any other municipal purpose" that a city council approves represents a blatant and gross over-reach of government power.

Texas law should require that such an exercise be for a public use, not a public benefit. In addition, state law should narrowly tailor the purpose for which political subdivisions may condemn.

²² Local Government Code, 251.001(a).

²³ Local Government Code, 251.001(a)(1).

²⁴ Local Government Code, 251.001(a)(5).

Recommendation 1.3: Repeal Chapter 251, Local Government Code.

This chapter of the Local Government Code lists extraneous “public purposes” for which municipalities may exercise their power of eminent domain and is too permissive with regard to the purposes for which a municipality may exercise its right of eminent domain. Texas cities, like other political subdivisions in this state, should be strictly required to exercise their power of eminent domain for public use only.

Chapter 2: Adequate Compensation

Meaningful definitions and applications of “public use” and “adequate compensation” are central to protecting property rights. With the public use safeguard eroded by years of judicial interpretations by the U.S. Supreme Court, most recently by the infamous *Kelo v. City of New London* decision, the second Constitutional safeguard, just or adequate compensation, takes on greater import. The adequate compensation safeguard not only protects property owners once a public use is determined, but it can additionally serve as a preventative measure against condemnation.

Prior to 1993, the benchmark for compensation in Texas was a 1936 case, *State v. Carpenter*.²⁵ Under *Carpenter*, damages awarded to property owners who lost part or all of their property to a condemnation appropriately matched “fair market value”. That rule, to quote the *State v. Carpenter* decision, was that “all circumstances which tend to increase or diminish the present market value” should be considered. In numerous cases after *Carpenter*, the state Supreme Court repeatedly affirmed the *Carpenter* rule.

In 1993, however, the Texas Supreme Court overruled the Court of Appeals in *State v. Schmidt*²⁶ departing from the *Carpenter* rule of compensation, ruling that certain factors could be excluded from fair market value determinations.

The *Schmidt* case, which carved major exceptions to the *Carpenter* rule on adequate compensation, centered on an Austin business that was negatively impacted by the expansion of Highway 183/Research Boulevard: a business owner lost the front portion of his property and was compensated primarily for the physical square feet of property actually lost. Departing from precedent, the Court ruled that business owners:

“[are] *not* entitled to compensation for diminution in value of remainder due to diversion of traffic, increased circuitry of travel to property, lessened visibility to passersby, or inconvenience of construction activities.” [emphasis added]

The expansion of Hwy. 183 negatively impacted the visibility and ease of travel to Mr. Schmidt’s business. Although Mr. Schmidt was compensated for the loss of his *physical* property, his compensation did not account for all of the damages he incurred: he ultimately lost his business. The four factors that the *Schmidt* case precludes from consideration of compensation (decreased visibility, construction inconvenience, diversion of traffic, and increased circuitry to the property) go directly to the heart of commerce.

The value of property to a business owner is inextricably linked to the business transactions on the property. In other words, the structure is a means to an end. Valuing only the property misses the key point of commerce.

²⁵ 89 S.W.2d 194

²⁶ 867 S.W.2d 769

Problem 2.1: All factors are not considered in adequate compensation.

In real world transactions between two private parties, factors such as those excluded by the *Schmidt* case are considered in fair market value determinations. Under the *Schmidt* rule, however, governments, unlike individuals in private transactions, are allowed to exclude certain, measurable damages from their payment of adequate compensation. Of note is that, under the *Schmidt* rule, a government's property appraisal which should reflect "fair market value" may not be used for private transactions.

Recommendation 2.1: Return to the *Carpenter* rule of adequate compensation.

In considering what constitutes "adequate compensation", it is helpful to remember the only true determination of fair market value: the amount an owner is willing to accept from a buyer on a particular day. That is the principle that the Legislature should closely mirror in determining adequate compensation.

Several policy proposals exist that would legitimately allow the Legislature to legislatively reverse the *Schmidt* precedent in order to return to the *Carpenter* rule that was in effect for over 57 years.

The Legislature has previously considered bills to reverse the *Schmidt* rule and return to the *Carpenter* rule. In the 76th Legislature, for example, former Senator Buster Brown filed Senate Bill 1010, which would have amended Chapter 21 of the Property Code so that the *Schmidt* exceptions (diminution in value of remainder due to diversion of traffic, increased circuitry of travel to property, lessened visibility to passersby, or inconvenience of construction activities) are required in consideration of adequate compensation. Similar legislation was filed in the 75th Legislature by former Representative Tom Uher, House Bill 2740. The bill analysis that accompanied Rep. Uher's bill makes an important point:

"to ensure that property owners receive fair compensation for property involved in takings and that the compensation is based on a definition of 'market value' that includes those components commonly assumed to be a part of the definition."

The fiscal note associated with Rep. Uher's HB 2740, which would return the state to the *Carpenter* rule, notes that TxDOT estimates that it would face an annual increase in acquisition costs of merely \$64.7 million annually. When adjusted for inflation alone, the figure is a paltry \$76 million annually²⁷, only 2.5% of TxDOT's '06-'07 appropriation of over \$3 billion for "acquisition of land and other real property."²⁸ The cost associated with returning to the *Carpenter* rule is de minimis, while the benefit of strengthened property rights is far-reaching.*

²⁷ Consumer Price Index (CPI) Inflation Calculator, National Aeronautics and Space Administration

²⁸ Article VII, 2006-2007 General Appropriations Act (Conf. Committee Report, Senate Bill 1, 79R)

Despite that low annual cost estimate, opponents to these measures argue that requiring condemning entities, such as the Department of Transportation, to compensate property owners for a greater portion of their losses will drive up public costs associated with projects like highway construction. This argument, however, is easily addressed.

First, the actual *cost* of constructing any highway or completing any other project is static. When government has no obligation to consider all the damages that a condemnee incurs, that government and the taxpayers who fill its coffers may be getting a bargain, but the remaining “costs” associated with the project are disproportionately borne by the condemnee. For example, in the *Schmidt* case, the state Supreme Court ruled that the Department of Transportation did not have to compensate for *all* damages incurred by Mr. Schmidt. The cost of expanding Highway 183 was no less; it was just disproportionately borne by Mr. Schmidt, resulting in the loss of his business. In essence, *Schmidt* is an unfairly, unlegislated, and unconstitutional income tax. Such a rubric is a weak approach to property rights.

Secondly, when an entity with the power of eminent domain is forced to compensate as close to “fair market value” as possible, as under the *Carpenter* rule, that entity has every incentive to plan its project carefully and consider both sides of the cost equation. The entity must ask: what will this project cost under plan A, which employs the use of eminent domain *and* what will this project cost under plan B, which avoids any condemnation. When adequate compensation is properly calculated, a government may reconsider a decision to condemn. On the other hand, when “adequate compensation” is a bargain for the government, to the detriment of the property owner, condemnations become a more palatable option.

** This recommendation does not presume that funds should be taken from TxDOT to cover increased costs for compensation. The Legislature should instead make additional provision for these funds that TxDOT or the Comptroller of Public Accounts could administer.*

Recommendation 2.2: Reimburse Paid Property Taxes

While a return to the *Carpenter* rule would better compensate owners of condemned commercial property, it would not directly affect the owner of rural, non-commercial lands. Property owners, however, are compelled to pay property taxes. When a governmental entity condemns private property (commercial or non-commercial), the condemned party should be reimbursed all of the taxes paid to the condemning entity. Therefore, if a city condemns a property, then the city’s adequate compensation calculation should include *all* of the property taxes paid by the property owner to the city. If a governmental entity that doesn’t levy a property tax condemns (such as the Department of Transportation), then that entity should have to reimburse all property taxes paid by the property owner to all entities.

Legislators should amend the consideration of adequate compensation so that Property Code, §22.042 reads:

(b) If an entire tract or parcel of real property is condemned, the damage to the property owner is:

(1) the local market value of the property at the time of the special commissioners' hearing and;

(2) an amount equal to the total amount in property taxes paid by the present owner to the condemning entity for all years, as assessed by the county appraisal district, calculated at the time of the special commissioners' hearing, or;

(3) if the condemning entity does not levy a property tax then an amount equal to the total amount paid by the present owner to all entities taxing the property.

(c) If a portion of a tract or parcel of real property is condemned, the special commissioners shall determine:

(1) the damage to the property owner after estimating the extent of the injury,

(2) benefit to the property owner, including the effect of the condemnation on the value of the property owner's remaining property, and

(3) the total amount in property taxes paid by the present owner to the condemning entity for all years on condemned portion, as assessed by the county appraisal district, or;

(4) if the condemning entity does not levy a property tax then an amount equal to the total amount paid by the present owner to all entities taxing the property.

Conclusion

Condemnation should never be a cheaper option for governments to employ in achieving their ends. If anything, a strong property rights approach demands that condemnations serve as an *expensive* option. Adequate compensation that considers direct costs is an important means to fulfilling the intent of the constitution. More realistic high compensatory costs that properly spread the true costs of public projects serve as a check against the power of eminent domain.

The current standard of adequate compensation was put in place by the judicial branch of this state, and should be overturned by the Legislature in favor of a stronger property rights approach. In 1991, the Third Court of Appeals decision in *Schmidt* affirmed the Legislature's duty:

“The issue of what level of expense is acceptable in connection with public works is a matter placed exclusively in the legislative and executive departments of government.”

The Legislature should reconsider previously filed legislation which would legislatively reverse the *State v. Schmidt* decision and return the *State v. Carpenter* rule that, in

determinations of adequate compensation, “*all* circumstances which tend to increase or diminish the present market value” should be considered.

Chapter 3: Slum, Blight, and Urban Renewal

When Senate Bill 7 was passed by the Legislature, the measure was lauded as a necessary step towards eliminating the use of eminent domain for economic development purposes. The bill included several exemptions to the economic development prohibition, however. One particular exemption permits the exercise of eminent domain where economic development is a secondary result of a municipal urban renewal project to cure slum or blighted areas.²⁹ Opponents of the exemption convincingly argue that it allowed for cities to condemn large swaths of private property for economic development purposes on grounds that the area was slummed or blighted.

In fact, Senate Bill 7 did not authorize municipalities to condemn property to remedy slum and blight. That authority already existed under other sections of Texas law. Senate Bill 7 simply protected any economic development benefits that may arise from a municipality's effort to condemn property to eliminate slum and blight. Well before S.B. 7 was passed in 2005, municipalities drew their authority to condemn private property for eliminating slum and blight from chapters 373 and 374 of the Local Government Code and Chapter 311 of the Tax Code.

Chapter 373 of the Local Government Code, also known as the Texas Community Development Act of 1975, was adopted to assist the development of urban communities by creating housing and economic opportunities.³⁰ Chapter 374 is the Texas Urban Renewal Law. This chapter was approved to remedy slum and blight conditions and promote redevelopment through private enterprise.³¹ Chapter 311 of the Tax Code is known as the Tax Increment Financing Act. By the summer of 2005, when the Legislature addressed the implications of *Kelo v. City of New London*, these chapters had been on the books for decades. Senate Bill 7 simply exempted any economic development resulting from condemnation to eliminate slum or blighted areas under these acts.

If anything, S.B. 7 highlights two problems within state law. The first regards the use of slum and blight as a reason for condemnation. Under current law practically any defect in a private property could qualify it as slum or blighted, rendering it eligible for condemnation. Despite its intent to remedy the problems of urban decay, the law classifying property as slum or blighted is too vague, placing landowners, particularly those in low-income neighborhoods under the constant threat of condemnation.

The second problem regards the necessity for governmental urban renewal and community redevelopment programs in Texas law. These programs provide the legal foundation for justifying condemnation to cure slum and blight. Beyond this problem, however, government-based community development and urban renewal programs

²⁹ Texas Government Code, 2206.001(b)(3).

³⁰ Adrienne Archer, "Restricting Kelo: Will Redefining 'Blight' in Senate Bill 7 be the Light at the End of the Tunnel?", *St. Mary's Law Journal*, 2006, page 827.

³¹ *Ibid.*

represent a substantial expansion of governmental power. Not only do they authorize governments to condemn private property en masse, forcing the destruction of entire communities, they also allow governments to act as land developers, a function well beyond their appropriate role. The private sector is a superior force for community development and urban renewal. Couple this with the need to keep the growing powers of government in check, and a critical evaluation of Texas' community development and urban renewal statutes is prompted. This chapter explores these issues in greater detail.

Problem 3.1: Texas law authorizes municipalities to condemn private property for "slum and blight".

Texas law allows political subdivisions participating within the programs authorized by Chapters 373 and 374 of the Local Government Code to condemn private property that is blighted or within a "slum" area. The inset below, *Definitions of Blight and Slum in Texas Law*, highlights the legal distinctions for slum and blight in Chapter 374 of the Local Government Code. Private property condemned for reasons of slum or blight must meet the definitions in law.

Texas' definitions for slum and blight are too broad and imprecise, providing ample room to subjectively judge practically any property as slum or blighted. For example, according to the definition provided in the Local Government Code, a blighted area is one that "results in an economic or social liability to the municipality". The meaning of "economic or social liability" is undefined, and therefore open to the interpretation of the condemning entity. Accordingly, a political subdivision could classify certain types of neighborhoods as an economic liability on grounds that they generate little property tax revenue relative to a retail or up-scale residential development, thereby rendering them eligible for condemnation. The definition of blight contains several other nebulous standards, such as "healthful housing environment", "hazardous conditions", and defective street accessibility [defective street accessibility is particularly odious. Why not fix the street rather than taking a home?]. These standards

Definitions of Blight and Slum in Texas Law

Blighted area. An area that because of deteriorating buildings, structures, or other improvements; defective or inadequate streets, street layout or accessibility; unsanitary conditions; or other hazardous conditions, adversely affects the public health, safety, morals, or welfare of the municipality and its residents, substantially retards the provision of a sound and healthful housing environment, or results in an economic or social liability to the municipality.

Slum area. An area within a municipality that is detrimental to the public health, safety, morals, and welfare of the municipality because the area has a predominance of buildings or other improvements that are dilapidated, deteriorated or obsolete due to age or other reasons; is prone to high population densities and overcrowding due to inadequate provision for open space; is composed of open land that, because of its location within city limits, is necessary for sound community growth through replatting, planning and development for predominantly residential uses; or has conditions that endanger life or property by fire other causes or are conducive to the ill health of the residents, disease transmission, abnormally high rates of infant mortality, abnormally high rates of juvenile delinquency or crime, or disorderly development because of inadequate or improper platting.

Summarized from §374.003, Local Government Code.

lack definition, enabling a broad justification to classify as property as blighted. Practically any shortcoming on a property could qualify it as blighted, and therefore subject to condemnation.³²

State law defining slum is equally vague. The definition of a slum area runs the gamut from an overcrowded area with inadequate provision for open space to "open land" within municipal limits. A neighborhood of apartment complexes and no parks could be interpreted as a slum area as much as a vacant field adjacent to a city hall could be. The Texas definition of slum would make the entirety of Hong Kong and most of the borough of Manhattan – two of the most densely populated, yet economically vibrant places on earth -- subject to condemnation. Another example of the vagueness of Texas' definition of slum is that a slum area may be one where there are “abnormally high rates of infant mortality.” Under this definition, the City of Fort Worth could be condemned because according to the Texas Department of Health:

“Infant mortality in the Dallas/Fort Worth Metroplex, and in Tarrant County and Fort Worth in particular, is significantly higher than mortality in comparable cities throughout the State of Texas (cities with more than 250,000 population). These rates may indicate a problem in the overall health of the community, or more specifically, in maternal and infant care.”³³

State law defines slum and blight too broadly, giving governmental entities excessive latitude to rationalize condemnation where no commonsensical or reasonable basis exists. This predicament with current law is aggravated by the fact that private developers could identify areas that they regard as slum or blight, and encourage the municipality to condemn those areas in the name of community revitalization or urban renewal.³⁴ Conversely, cities wishing to expand their tax base or improve their aesthetic "look" may designate and condemn areas that they judge require improvement. The condemned land may, in turn, be transferred to private developers for subsequent improvement. While the remedy of slum and blight may serve a public purpose, the exercise of the power of eminent domain towards such end risks the application of a public power for a private gain, or simply for the excuse to raise revenue by other means.

Recommendation 3.1: Re-define slum and blight in Texas law.

The Texas Legislature should narrowly re-define slum and blight in state law. The reasons why a property may be identified as a slum or blighted must be specific, such as "unsafe structures", and not general, such as "an economic or social liability". Furthermore, Texas law should establish a test where a government entity must prove that several objective measures have been met before it may classify property as slum or blighted. Such a requirement would establish a necessary burden on a governmental entity to demonstrate that a property is blighted or part of a slum area before condemning it on such grounds.

³² Ibid., page 832.

³³ Texas Department of Health (2003), Texas Vital Statistics, 2001.

³⁴ Ibid.

In 2006, the Georgia Legislature passed H.B. 1313 reforming its eminent domain procedures. Included in the reforms was a definition of blighted property and blight that may be useful in the consideration of reforms in Texas. The new Georgia law reads as follows:

- (1) 'Blighted property,' 'blighted', or 'blight' means any urbanized or developed property which:
- (A) Presents two or more of the following conditions:
 - (i) Uninhabitable, unsafe, or abandoned structures;
 - (ii) Inadequate provisions for ventilation, light, air, or sanitation;
 - (iii) An imminent harm to life or other property caused by fire, flood, hurricane, tornado, earthquake, storm, or other natural catastrophe respecting which the Governor has declared a state of emergency under state law or has certified the need for disaster assistance under federal law; provided, however, this divisions shall not apply to property unless the relevant public agency has given notice in writing to the property owner regarding specific harm caused by the property and the owner has failed to take reasonable measures to remedy the harm;
 - (iv) A site identified by the federal Environmental Protection Agency as a Superfund site pursuant to 42 U.S.C. Section 9601, et seq., or environmental contamination to an extent that requires remedial investigation or a feasibility study;
 - (v) Repeated illegal activity on the individual property of which the property owner knew or should have known; or
 - (vi) The maintenance of the property is below state, county, or municipal codes for at least one year after notice of the code violation; and
 - (B) Is conducive to ill health, transmission of disease, infant mortality, or crime in the immediate proximity of the property.

Georgia's law also provides that a property may not be deemed as blighted because of its aesthetic conditions. The Georgia measure does not contemplate the definition of slum or slum area, presumably because that concept is embedded in its definition of blight.

Georgia's reformed condemnation law is instructive. First, rather than have separate definitions for slum and blight, it consolidates those concepts into one. Given that the problems of slum and blight are relatively consistent, the definitions in Texas law should be consolidated into a simple definition similar to Georgia's. Second, Georgia's law establishes a test for classifying a property as blighted. In order to meet that standard a property must meet the minimum of two criteria, such as abandoned structures *and* illegal activity, or poor sanitation *and* the consistent violation of building codes. A similar test should be applied in Texas law. Lastly, Georgia's criteria for a blight designation are particular, and require that a property violate certain standards. Unlike Texas law, where a property may be found deficient for violating nebulous concepts such as "an economic or social liability", Georgia's law measures blight in terms of objective, property-specific

standards. Amending Texas law to include a definition of blight similar to that adopted in Georgia would help protect landowners from unfair condemnation.

Problem 3.2: Texas' urban renewal and community development chapters authorize overreaching condemnation powers, including condemnation for economic development.

Texas' community development and urban renewal chapters provide legal justification for condemnation for economic development purposes. To be sure, the chapters do not contemplate economic development as a secondary "spin-off" of land acquisition, where economic development is a secondary result. Rather, they provide municipalities the authority and justification to condemn private property for the purpose of economic development, which run contrary to Senate Bill 7. For example, Chapter 373 of the Local Government Code, the Texas Community Development Act of 1975, identifies "expanding economic opportunities" and "the stimulation of private investment" in addition to "elimination of slums and areas affected by blight" as some of the reasons for municipal community development programs.³⁵ Chapter 374, the Texas Urban Renewal Law, provides that "private enterprise be encouraged to participate in accomplishing the objectives of urban renewal to the extent of its capacity and with governmental assistance as provided by this chapter."³⁶ Among the types of governmental assistance provided to private enterprise by Chapter 374 of the Local Government Code is the power of eminent domain.

Urban renewal began in 1949 as a federal program to address the problem of slums in American cities. Using public funds to build, and the power of eminent domain to condemn existing property, urban renewal programs sought to cure the problems that private enterprise could not.³⁷ The results were typically disastrous. In many instances vibrant, albeit blighted, communities were condemned to make way for urban renewal projects that, in the end, proved worse than what previously existed. As federal efforts at urban renewal came to a close in the 1970's, the crime-ridden slums left in their wake served as the epitome of their failure.³⁸

Shortly after the federal urban renewal program ended, an urban planning fad known as "new urbanism" began. Borrowing from the concepts of urban renewal, new urbanism sought to achieve the objectives of renewal and redevelopment through the expansion of the local tax base.³⁹ Here, urban renewal and community development became synonymous with economic development. To that end, political subdivisions could employ their power of eminent domain to clear private land for subsequent private development. While the abatement of slum and blight continued to serve as key justifications for urban renewal, this frequently provided the legal justification for

³⁵ Local Government Code, §373.002.

³⁶ Local Government Code, §374.002.

³⁷ Steven Greenhut, *Abuse of Power, How the Government Misuses Eminent Domain*, Seven Lakes Press, Santa Anna, California, 2004, page 107.

³⁸ *Ibid.*, page 111.

³⁹ *Ibid.*, page 114.

invoking the power of eminent domain. Consequently, neighborhoods were condemned on grounds of slum and blight to make way for newer development that expanded the local tax base. In many instances low-income homes were condemned to make way for residences for higher income families.⁴⁰

In the name of urban renewal, eminent domain has been exercised in Texas to the detriment of low-income neighborhoods. One example involving the City of Austin highlights the destructiveness of the power of eminent domain on low-income communities and the subsequent failure of the governments involved to put the condemned property to public use. During the late 1970's and early 1980's the City of Austin condemned scores of homes and businesses belonging to low-income families east of what is currently the Capitol Complex and the University of Texas.⁴¹ The condemnation was part of the city's urban renewal and redevelopment plan for the area. Despite its intent, Austin lacked a workable plan for developing the property after it had been condemned. Consequently, the bulldozed area, formerly home to the predominantly low-income University East, Capitol East and Blackshear neighborhoods, went undeveloped. Eventually the condemned area was developed, although for purposes other than the urban renewal and redevelopment that the city originally sought.⁴²

The urban renewal and community development chapters of the Local Government Code created a role for government that goes beyond any reasonable scope. In essence, the chapters authorize local governments to serve as land developers. The acts authorize governmental entities to condemn private property, and then slate it for development as they see fit. The unfortunate history of federal and Austin's urban renewal programs demonstrate that government acts as a poor land developer. However, the concept of urban renewal builds on the progressive and liberal philosophies that see an expansive government as necessary for achieving positive social ends. Chapters 373 and 374 are relics of the New Deal and Great Society era that ushered in many failed governmental experiments.

Government-led urban renewal projects not only reflect the presumption that government acts as a better land developer, but also the notion of the supremacy of government interests over private property rights. Homes, businesses and communities may be condemned by local governments for the greater good of urban renewal and community development. Under such a rubric, private property rights, in turn, are a privilege granted by the government; a landowner is secure on their property up until the point that their land is classified as slum, blighted, or any other impediment to government design. This represents a fundamental perversion of the role of government. Rather than protect property rights, government power under the banners of urban renewal and community development serve to obviate them.

⁴⁰ Ibid.

⁴¹ Interview with John Henneberger, Co-Director, Texas Low Income Housing Information Service, 25 January 2006.

⁴² Interview with John Henneberger. What was once the Capitol East Neighborhood now consists of state parking lots and a city park. Land that was part of the University East Neighborhood was annexed by the University of Texas. The Blackshear Neighborhood, located between Manor Road and Martin Luther King Boulevard east of I-35, developed through the assistance of non-profit housing organizations.

The continued existence of Texas' urban renewal and community development statutes overlooks the fact that the free market has played an effective role in revitalizing city centers while promoting economic development. In his book, *Abuse of Power: How the Government Misuses Eminent Domain*, Steven Greenhut points out that cities employ redevelopment and renewal program in areas where development would occur anyway.⁴³ The past twenty years has seen a resurgence of private market development in metropolitan core areas. Areas from which development capital once fled decades ago, are now hot real-estate markets. As U.S. Supreme Court Justice Stevens observed, "the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials."⁴⁴ Given the growing power of the private market to redevelop and renew cities with superior results, the continued need urban renewal and community development programs, where government assumed the role of land developer, is questionable.

Recommendation 3.2: Repeal the Texas Community Development Act of 1975 (Chapter 373, Local Government Code) and the Texas Urban Renewal Law (Chapter 374, Local Government Code).

The Legislature should eliminate the urban renewal and community redevelopment statutes in Texas law. These chapters of the Local Government Code were adopted during an era when government assumed a role in urban revitalization. However, since that time, public sector community development and urban renewal programs have been shown to fail to solve the problems that they are intended to fix. Equally, market-driven demand and private sector development has become a superior alternative to government-based development efforts. Beyond the fact of their ideological and functional obsolescence, Texas' community development and urban renewal laws authorize the broad application of municipal condemnation powers for economic development purposes. Simply put, they enable the use of the wrong tool for the construction of an inappropriate solution.

Undoubtedly, Texas cities have an interest in maintaining vibrant urban cores and healthy communities. These objectives may be achieved through methods other than the exercise of eminent domain authorized under the urban renewal and community development chapters. Options available to cities include improving local infrastructure or public transit, or even providing landscaping or streetscaping to an affected area. Alternatively, cities may employ incentive zoning to encourage private sector development of certain types of developments, or even reforming their own zoning codes to allow for faster and streamlined project approvals.⁴⁵ In addition, cities have the power to adopt tax rates, tax abatements, or other incentives to promote development in designated areas. Cities may also offer loan, grants, or other subsidies to developers in order to promote certain types

⁴³ Ibid., page 129.

⁴⁴ Linda Greenhouse, "Justice Weighs Desire v. Duty (Duty Prevails), *The New York Times*, 25 August 2005, at A1.

⁴⁵ Sanuelk R. Staley and John P. Blair, *Eminent Domain, Private Property, and Redevelopment: An Economic Development Analysis*, Reason Foundation, February 2005, page 6.

of development.⁴⁶ At the very least, if a city proposes to address the problems of slum and blight, it may begin by enforcing its own building codes and health and safety ordinances. Clearly, cities have a host of options other than the blunt instrument of eminent domain to promote economic development. While these tools are perhaps more limited in their powers, they are less extreme than the application of chapters 373 and 374 of the Local Government Code.

⁴⁶ Ibid.

Chapter 4: The Condemnation Process

The exercise of the power of eminent domain in Texas involves a process. Here governmental units simply cannot take with impunity any piece of property that suits their interests. Rather, they are required to follow a process defined by state law. While this procedural requirement may slow, and in some instances stop, public use projects, it provides landowners with the opportunity to protect their interests. Despite its good intentions, shortcomings exist within the condemnation process that place landowners at a disadvantage. Texas' condemnation process needs reform in order to ensure the fair balance between the interests of private property owners and political subdivisions. This chapter highlights several problems and shortcoming with the current condemnation process and identifies recommendations to improve the system.

Background: The Texas Property Code governs the condemnation process.

Chapter 21 of the Texas Property Code defines how the condemnation process works. The chart, *Texas' Condemnation Process* [page 41], outlines the process prescribed in Chapter 21. This section will explain that process in further detail.

The condemnation process begins with an offer to purchase or sell a particular piece of property which leads to a negotiation concerning the property's sale. Although this step is not explicitly prescribed in Chapter 21, a governmental entity attempting to acquire property for public use must first negotiate with the affected landowners over the amount of compensation to be paid for the property. At this point the governmental entity typically approaches the landowner with an offer to purchase their property for a certain amount. While the landowner may disagree with the government's proposition to condemn their property, the negotiation focuses primarily on the amount of compensation. State law does require that the political subdivision disclose to the property owner at the time of the offer to purchase any and all appraisal reports regarding the owner's property.⁴⁷

Governmental entities typically acquire the majority of their land for public use through negotiation. For example, of the 115 private properties affected by the condemnation involved in the infamous *Kelo* case, 100 were acquired through negotiation.⁴⁸ The owners of the remaining 15 properties would become the petitioners in the case. Like the example in the *Kelo* case, the majority of property acquisitions by Texas political subdivisions occur through negotiations. For example, of the thousands of real property acquisitions conducted by the Texas Department of Transportation each year,

⁴⁷ Texas Property Code, §21.0111.

⁴⁸ United States Supreme Court, *Suzette Kelo, et al., petitioners v. City of New London, Connecticut, et al.*, 23 June 2005.

approximately 87 percent are settled through negotiation⁴⁹. The remaining 13 percent are acquired through condemnation.⁵⁰

The condemnation process defined in Chapter 21 is triggered when negotiations fail. If the governmental entity and the property owner are "unable to agree" on the amount of damages, then the entity may file a petition with a district or county court at law initiating condemnation proceedings. The entity may file the petition regardless of the landowner's disagreement with the actual condemnation. The petition must describe the property to be condemned, the purpose for which the entity wishes to use the property, the name of the property owner, and the statement that the owner and the entity are unable to agree on the amount of damages.⁵¹ Upon receiving the petition, the court's judge shall appoint three "disinterested freeholders" to serve as special commissioners to assess the damages to the property owner. The commissioners must swear to assess damages fairly, impartially, and according to the law.⁵² The commissioners do not evaluate the merits of the proposed condemnation. Their sole task, as defined by state law, is to assess the amount of compensation to the landowner for the land selected for condemnation.

After being appointed, the special commissioners shall set and hold a hearing on the damages involved in the condemnation. During the course of the hearing the commissioners evaluate the damages to a property owner on the basis of evidence regarding the value of the property being condemned, the injury to the property owner, the benefit to the property owner's remaining property, and the use of the property for the purpose of condemnation.⁵³ The special commissioners may also adjudge the costs of an eminent domain proceeding against any party.⁵⁴ Once the commissioners have made their assessment regarding the amount of compensation due to the property owner, they must submit a written statement of their decision to the court.

Upon receiving the commissioners' findings, the judge of the court that has jurisdiction over the condemnation proceedings shall adopt the findings as the judgment of the court if no objections are filed by either party.⁵⁵ At this point the condemning entity may take possession of the condemned property pending the results of further litigation.⁵⁶ Before taking possession of the property the condemning entity shall either pay the property owner the damages assessed by the special commissioners or deposit that amount with the court subject to the order of the property owner. When the governmental entity takes possession of the property, it must notify the landowner in writing of their right to repurchase their land if it has not been put to a public use within ten years.⁵⁷

⁴⁹ Although it should be noted that the negotiated price at which a property owner agrees to sell their property to a government entity may not represent adequate compensation.

⁵⁰ Interview with JD Ewald, Texas Department of Transportation (TxDOT) Right of Way division, Randy Ward, TxDOT, and Patrick Murotta, TxDOT, 15 February 2006.

⁵¹ Texas Property Code, §21.012.

⁵² Texas Property Code, §21.014.

⁵³ Texas Property Code, §21.041.

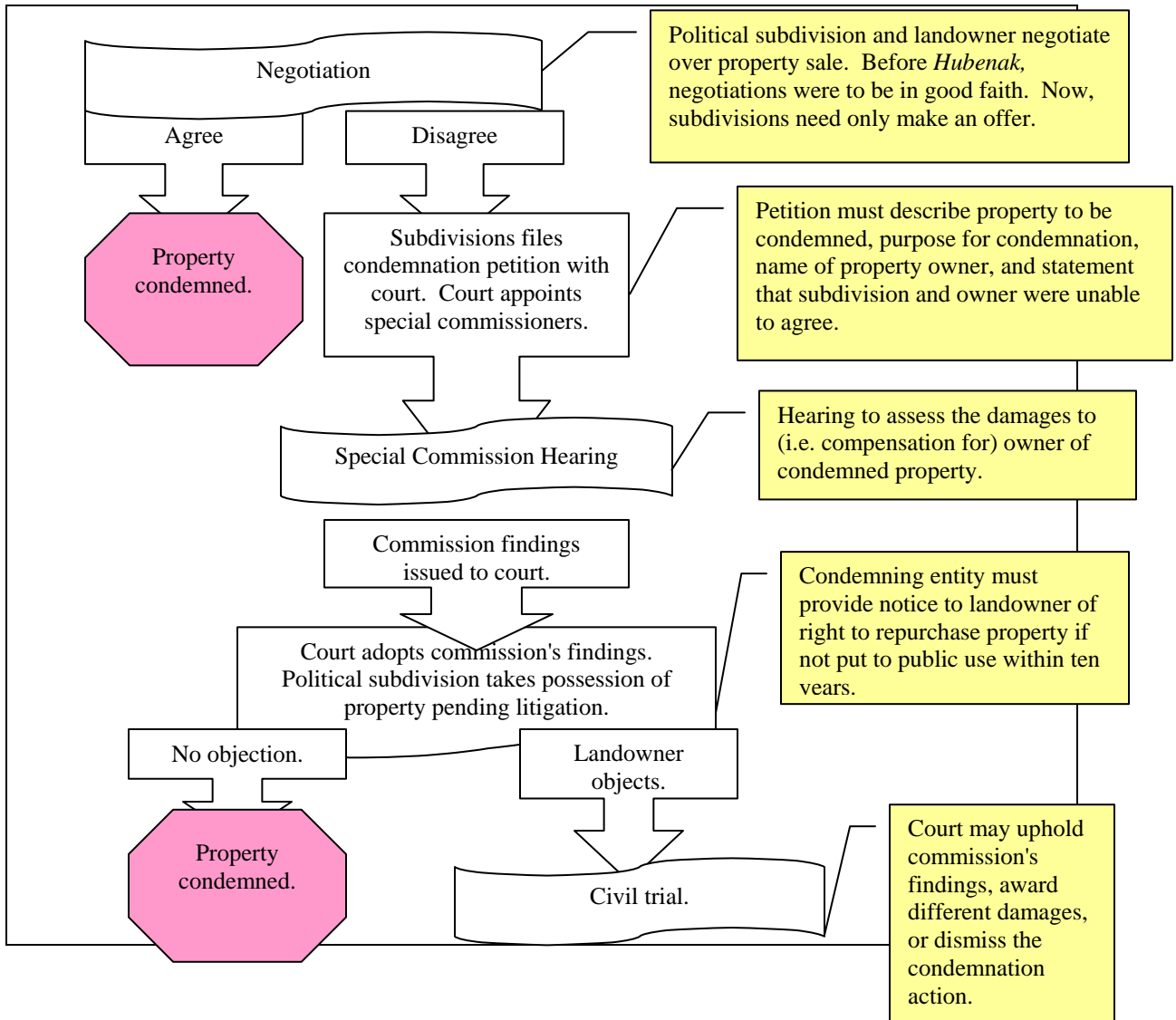
⁵⁴ Texas Property Code, §21.047.

⁵⁵ Texas Property Code, §21.049.

⁵⁶ Texas Property Code, §21.021.

⁵⁷ Texas Property Code, §21.023.

Texas' Condemnation Process



Although a governmental entity may take possession of a landowner's property upon a court's adoption of the special commission's findings, the landowner still has recourse. If a landowner objects to the commissioners' findings, then they may file that objection with the court. While the condemning entity has possession of the property pending litigation, the landowner may appeal the commissioners' decision regarding the damages.⁵⁸ The landowner may also appeal the merits and constitutionality of the condemnation. At this juncture the court may uphold the special commissioners' findings, provide a different ruling on the damages due to the landowner, or dismiss the government's condemnation. If the court rules that the condemning entity took possession of private property in the absence of proper authority, then the court may award the landowner damages for the illegal taking.⁵⁹

⁵⁸ Texas Property Code, §21.018.

⁵⁹ Texas Property Code, §21.044.

Texas law does allow, but does not require, condemning entities to pay for a landowner's relocation costs. A governmental entity may, under certain circumstances, pay for moving expenses, rental supplements and replacement housing costs for landowners displaced through condemnation.⁶⁰ The amount that a government may pay toward such costs is capped at the payments authorized under the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

Problem 4.1: The condemnation process intimidates landowners.

Landowners facing condemnation proceedings face an intimidating ordeal. The absolute power implicit in a government's intent to condemn private property is intimidating in its own right. After all, the power to evict someone from their home and actually take it in the name of government policy is a sobering. Beyond the power of eminent domain, governmental entities typically enter most condemnation proceedings with superior resources. These resources include an array of planners, appraisers, legal counsel, and the money necessary to successfully condemn an individual's property. In the face of a government's machinery for condemning private property, many landowners simply submit to governmental demands to acquire their property. Other landowners may lack the time, energy, or even the financial resources necessary to oppose a proposed condemnation. Landowners wanting to protect their property, or at least their interest in an adequate compensation for their property, are placed in a David versus Goliath-like situation. Here, the landowner, armed with the simple interest of protecting his property rights, faces a leviathan that possesses the legal resources, bureaucracy, money, and ultimately, the power of eminent domain.

In fact, some condemning entities have been found to use the threat of eminent domain to intimidate property owners to sell their property at below-market rates.⁶¹ Those landowners that resist attempts to condemn their property may be vilified as "contentious" or "unreasonable".⁶² Alternatively, they may be labeled as "greedy", placing their self-interest before that of the community's progress.⁶³ [In an on-going battle in Helotes, Texas, Mayor Jon Allan leveled this very claim against a landowner who has sued city officials over a takings dispute⁶⁴]. By the end of the ordeal, the place that the landowner called "home" no longer exists. His local neighborhood destroyed, neighbors disbursed, and the amount of compensation paid less than the actual costs endured.

While intended to protect landowners during the condemnation process, state law requires little disclosure with regard to landowners' rights during a condemnation proceeding. Although Chapter 21 of the Texas Property Code requires certain notices and disclosures to property owners, the law does not require that landowners be informed

⁶⁰ Texas Property Code, §21.046.

⁶¹ Samuel R. Staley and John P. Blair, *Eminent Domain, Private Property, and Redevelopment: An Economic Development Analysis*, Reason Foundation, February 2005, page 8.

⁶² Interview with Mr. Les Allison, landowner in Harris County, 8 May 2006.

⁶³ See Greenhut.

⁶⁴ Reimherr, Amanda & John Tedesco, "Landowner Sues Helotes officials," San Antonio Express News, 10/04/2006.

of their statutory and constitutional rights during a condemnation proceeding. Furthermore, while case law has afforded landowners additional protections -- or even revoked them in certain cases -- this knowledge may not be readily understood by most landowners. Some landowners may opt to hire legal counsel. While legal counsel may empower a landowner during a condemnation, this benefit is mitigated by the costs of attorney's fees and court costs.

Just as landowners have every right to oppose a proposed taking of their property, they should know of their rights and options in a condemnation. This information should be readily understood, and not necessarily imparted by a lawyer.

Recommendation 4.1: Require that all landowners targeted by condemnation receive a Texas Landowner's Bill of Rights.

This recommendation would require the Attorney General's Office to draft a written statement of rights for landowners affected by a condemnation. The statement of rights must include, but not be limited to, the right to notice, fair negotiations, damages, hearing, and the appeal of any award issued. The statement should also outline the condemnation process, and highlight the landowner's available options.

The Texas Landowner's Bill of Rights should be in plain language and easily readable. Any political subdivision engaging in the taking of private property for a public use must undertake a good faith effort to deliver the statement of right to the affected landowners. The notice must be delivered no later than four weeks before the initiation of condemnation proceedings.

Texas landowners facing condemnation need full disclosure of the condemnation process and their rights under state law. This recommendation would help inform landowners of their rights and options when confronted with a condemnation. While such disclosure may not tip the balance of condemnation proceedings in the landowner's favor, such a bill of rights may work to assuage the intimidation that landowners face in the process.

Problem 4.2: Government actions to condemn private property are not transparent.

In November 2005 the Nature Conservancy, a non-profit organization that works to preserve natural habitats, learned that Willacy County commissioners voted to condemn the organization's property on South Padre Island. The commissioners voted to condemn 1,500 of the Conservancy's 2,500 acres on the northern portion of the island for development as a tourism destination.⁶⁵ No Willacy County official approached the Nature Conservancy with regard to the condemnation in advance of the vote. Although the County had planned on condemning the property for some time, the Conservancy learned of the County's intentions through articles in the local newspapers.⁶⁶

⁶⁵ "Willacy County Officials Misuse Eminent Domain", *Victoria Advocate*, 17 January 2006, page 10.

⁶⁶ Telephone interview with Mr. Carter Smith, Director, Nature Conservancy, 15 March 2006.

The Nature Conservancy's experience with Willacy County highlights a significant shortcoming in the condemnation process: government actions involving the exercise of eminent domain are not readily transparent to the public. State law does not require that governmental entities seeking to condemn private property notify affected landowners or the general public of their intended action. Consequently, as was the case in Willacy County, landowners targeted by a government's condemnation action may learn of it well after the agency has initiated takings procedures. Furthermore, the voting public has no opportunity to learn of the condemnation that will involve the expenditure of public funds or its intended public use.

Just as the public received no notice with regard to an anticipated condemnation action, it has limited opportunity to provide input as a matter of public policy. Condemnations entail two noteworthy policy elements. The first is that they involve the expenditure of taxpayer dollars for the acquisition of property. In some instances, the amount that a governmental entity spends to acquire property can be quite significant. Current law does not explicitly require that taxpayers be provided the opportunity to provide input on such expenditures. The second noteworthy policy element entails the actual exercise of the power of eminent domain. Put simply, the power of eminent domain is an exercise of raw government force. Just as lesser acts of governance necessitate, and sometimes require, public input, so too should the exercise of the power of eminent domain. Despite the importance of public input on condemnations as a matter of policy, political subdivisions are not required to hold a public hearing or meeting with regard to the proposed policy action that involved the condemnation of private property.

In addition to the absence of notice or public hearing for a proposed condemnation, legislative bodies for condemning entities are not required to define their purposes for condemning private property. In August 2001 the Austin City Council voted to condemn the downtown property of Harry Whittington. The Council's resolution stated that the condemnation was for a public use, but failed to define what that public use would be.⁶⁷ Two months later the City's attorney's filed a petition to condemn Whittingtons' property for public use as a parking garage and an Austin energy chilling plant. Neither of these claimed public uses was identified in the resolution approved by the Austin City Council in August 2001.

Texas law should explicitly require that the legislative bodies of governmental entities vote on a condemnation action. The bodies are not explicitly required to authorize the actual condemnation, approve the public use, or deliberate the amount of compensation paid for the property. As was demonstrated in the case of Harry Whittington, cities may approve a condemnation for public use without specifying the nature of that use. Just as the actions of condemning entities should be more transparent, the final actions related to eminent domain made by public officials should occur during open public hearings during which public comment is solicited so that the elected officials can be held accountable for their efforts to condemn.

⁶⁷ Whittington v. City of Austin, Tex App. Dist. 3, 30 September 2005.

Recommendation 4.2: Improve transparency and public involvement regarding governmental actions involving the taking of private property.

Texas government has a tradition of being open and transparent. The public information and the open meetings acts reflect that openness. Just as openness and transparency applies to government functions, it ought to apply to governments' exercise of the power of eminent domain. Toward that end, the following three recommendations aim to improve the transparency of the condemnation process.

Recommendation 4.2a: Public notice.

This recommendation would require that any governmental entity attempting to take private property must provide public notice with regard to its intent. The notice must identify the property sought through a condemnation, the name of the entity condemning the property, and specify the intended public use. The notice must be in plain language, and be furnished at least two weeks before a hearing is scheduled for the proposed action involving the taking. Notice should be provided in a newspaper of general circulation, on the governmental entity's web-site, and in the right of way, if applicable, adjacent to each property subject to the proposed takings. The notice must also list the time, date, and place for the hearing regarding the proposed takings action.

In addition to providing the public notice of an intended condemnation, the governmental entity should also provide affected registered landowners with similar information. Such notice should be provided in addition to a copy of the Texas Landowner's Bill of Rights identified in Recommendation 4.1.

Recommendation 4.2b: Public hearing.

As part of this recommendation, the political subdivision must hold a public hearing on the proposed taking. The hearing must be held at least 48 hours before any legislation authorizing the taking of private property is formally considered. The outcome of the vote, identifying how each member of the voting body voted on the question of condemnation, should be made public.

Recommendation 4.2c: Disclosure of vote.

This recommendation would require that the decision-making body of the political subdivision seeking to take private property vote on a measure authorizing the taking. The legislation considered must describe the property identified for taking, the registered property owners, and the specific public use intended by the taking. The outcome of the vote, and how each member of the decision-making body voted should then be made available to public in a newspaper of general circulation

Problem 4.3: Good faith negotiations are no longer required before initiating condemnation proceedings.

Texas' condemnation law encourages condemning entities and landowners to negotiate over a property's taking before the initiation of condemnation proceedings. In fact, the exercise of the power of eminent domain is an exercise of last resort: most frequently, condemnations occur through the less imperious method of negotiation. Before July 2nd, 2004, condemning entities were required to make a bona fide attempt to purchase a landowner's property at a fair price through the course of good faith negotiations. This standard for takings negotiations was not prescribed by state law; years of case law established the good faith negotiation rule. As discussed in the background section of this chapter, in the event that the parties to negotiation were "unable to agree", the condemning entity may file a petition to initiate condemnation proceedings in court.

Although not required by law, the good faith negotiation rule provided a fair balance between the interests of the political subdivision and affected landowners. When applied, the good faith negotiation rule provided four safeguards for landowners. First, the rule prohibited governmental entities from making offers for the taking of property that were arbitrary, capricious, or in bad faith.⁶⁸ Second, the rule required that political subdivisions offer to purchase land at fair market price. While the constitution of fair market price may have been debatable, and arguably more of a reflection of the pecuniary interests of the subdivision, the requirement inserted a fairness standard from which landowners could begin to argue on behalf of their interests. Third, the good faith negotiation standard required fair, honest dialogue between the condemning entity and the landowner. During the required negotiations both parties had equal footing in the dialogue regarding the property's disposition. The fourth, and perhaps the most salient, safeguard the rule provided was that if a condemnation was not conducted in such a manner, then the condemnation petition could be dismissed. Therefore, governmental entities seeking to acquire property had a strong incentive to make a bona fide attempt to purchase and to negotiate in good faith for a landowner's property. Failure to do so would result in the court's dismissal of their petition to condemn.

The requirement that governmental entities abide by the good faith negotiation rule provided a substantial protection for landowners. The rule not only provided for fair negotiations, it also precluded the condemning entity from filing its condemnation petition with a court until the negotiations were complete.⁶⁹ Then came *Hubenak*.

On July 2nd, 2004 the Texas Supreme Court issued its decision in *Hubenak v. San Jacinto Gas Transmission Company*. At issue in *Hubenak* was whether a gas utility company's offer to purchase land for an easement to construct a natural gas pipeline was made in good faith. Rather than rule on the question of if the negotiations were conducted in good faith, the Court ruled that good faith negotiations based on fair market

⁶⁸ Judon Fambrough, "This Property Condemned", reprinted from *Tierra Grande*, January 2005.

⁶⁹ *Ibid*.

value were not required by law before the initiation of condemnation proceedings.⁷⁰ In its ruling the Court found that Chapter 21 of the Property Code authorizes the initiation of condemnation proceedings only if the two parties are "unable to agree". Accordingly, the Court found that the offer alone by a political subdivision satisfied the law's expectations. If the landowner ignored or rejected the government's original offer, then the standard of being "unable to agree" was met, thereby triggering the initiation of condemnation proceedings. Similarly, the Court found that reciprocal efforts by the parties involved and the use of counteroffers were unnecessary.⁷¹ Good faith negotiations were not necessary to determine whether the parties were unable to agree. After *Hubenak*, a landowner may either take a government's initial offer or go through the condemnation process.

By removing the case law requirement for good faith negotiations with its decision in *Hubenak*, the Texas Supreme Court removed landowner-friendly hurdles to the initiation of condemnation proceedings. Now, landowners must either accept the original offer made for their land, regardless of whether the offer reflects fair market value, or endure the burden of condemnation proceedings. The *Hubenak* decision simultaneously increased landowners' burdens while easing those for the condemner. In the words of one legal analysis, "it is now legally irrelevant if the condemning party fails to negotiate in good faith or alternatively refuses to negotiate."⁷² *Hubenak* tipped the balance in favor of condemning entities, likely increasing the number of condemnations (in lieu of negotiations) that will be enforced in Texas.

Recommendation 4.3: Require that political subdivisions seeking to acquire land for public use engage in good faith negotiations with landowners.

The legislature should restore the requirement that political subdivisions and landowners engage in good faith negotiations before the initiation of condemnation proceedings. Rather than rely on case law, which is interpreted and applied by judges, to enforce this standard, the Legislature needs to define its expectation that good faith negotiations between the landowner and the government entity occur before the initiation of condemnation proceedings.

Provision should be made for the dismissal of a condemnation case if the landowner proves in court that a governmental entity failed to negotiate in good faith. In the event that the court rules with the landowner, and finds that the governmental entity failed to negotiate in good faith, then it would be required to pay the landowner's court costs and attorney's fees.⁷³

⁷⁰ B. Tyler Milton, "The 'Unable to Agree' Requirement and Texas Condemnation Law: A Critical Analysis of *Hubenak v. San Jacinto Gas Transmission Co.*", *St. Mary's Law Journal*, 2006, page 587.

⁷¹ *Ibid.*, page 588.

⁷² *Ibid.*, page 596.

⁷³ This requirement is similar to the provisions of House Bill 3017, 79th Regular Session by Representative Rob Orr.

This recommendation has several advantages. First, it would restore the balance of power between governmental entities and landowners before the initiation of condemnation proceedings. Landowners would no longer have the sole option of either accepting or rejecting a government's offer before the initiation of condemnation proceedings. Under this recommendation they would have the reasonable opportunity to protect their interests at a negotiation table outside of a courthouse. Furthermore, requiring good faith negotiations before the initiation of condemnation proceedings would help avoid condemnation lawsuits by providing the needed incentive for governmental entities to acquire real property through the negotiation process.

Problem 4.4: The appraisal process employed by political subdivisions sometimes fails to reflect fair market value.

The reasons why landowners reject a political subdivision's offer to purchase their property vary. Some object on sentimental grounds, where the property in question may have been family property for years. Others may object on principle. Another reason, which may be the most common, involves the initial monetary sum offered by the political subdivision for the landowner's property.

Before initiating proceedings for the taking of property, a condemning entity must identify the value of the property being sought. The appraised value of the property will have a bearing on the amount that the governmental entity offers the landowner as compensation for the property sought. In order to determine this amount, the governmental entity may either conduct its own appraisal or contract with an appraisal company. Anecdotal evidence uncovered during research interviews suggests the existence of a cottage industry of appraisal firms that specialize in conducting appraisals for political subdivisions seeking to acquire private land. The contractual relationship between these appraisal companies and political subdivisions present the most basic of market phenomenon: the seller (an appraisal company) needs to satisfy the consumer's (political subdivision) interest. In this case, appraisal companies working for political subdivisions have an incentive to identify the lowest value for property sought through condemnation.

An appraisal conducted on behalf of a governmental entity seeking to take private property reflects the entity's interests. Understandably, the condemning entity's interest lies in acquiring the property at the lowest reasonable price; as a political subdivision, the entity has the fiduciary responsibility of saving taxpayers' dollars. The purchase price derived from these appraisals oftentimes conflicts with the interests of the landowner, who may believe that his property is worth more than what the entity is offering. For example, the City of Victoria recently offered to purchase a landowner's property at \$630 per acre for use as a public landfill.⁷⁴ The landowner believed his property to be good farm land worth at least \$730 per acre, the price for which he had recently purchased his property. Furthermore, when the City of Victoria bought the original property to establish the landfill, it purchased the land at \$2,000 per acre, well above the \$630 it

⁷⁴ Bobby Horecka, "From Dreams to Dumps, South Texas Farmer Fights Eminent Domain for Land," *Texas Agriculture*, 3 March 2006.

offered for the landowner's property. In light of the *Hubenak* decision, the landowner had little choice: he was advised by the City to either accept their offer or have his property condemned.

Another case highlights how the appraisal process may be manipulated by governmental entities for their own interest. In 2003 the Harris County Hospital District sought to acquire a 20-acre lot adjacent to the LBJ Hospital for use as a parking facility. Although the landowner sought to negotiate with the District for its use of his property, the District's board of directors voted to initiate condemnation proceedings.⁷⁵ In its efforts to condemn the landowner's property, the District contracted for 27 appraisals of the landowner's 20 acres. The appraisals were selectively conducted to make the case that his property was blighted and of no commercial value. The appraisals drew this conclusion through a highly selective presentation of the property's description, which failed to mention the proximity to the hospital or the owner's development of a parking lot.⁷⁶ Furthermore, because the district has ordered 27 appraisals of the property, the owner was required to file 27 cases in court challenging the District's commendation, one for each appraisal. Fortunately for the landowner involved in the case, a judge dismissed the District's condemnation attempt. Despite this favorable outcome for the landowner, this case highlights how governmental entities may use appraisers to advance their own interests.

Landowners that disagree with a condemning entity's compensation offer, as a result of that entity's appraisals, face several challenges. In light of the *Hubenak* decision, landowners that disagree with the amount of compensation offered risk the initiation of condemnation proceedings. At that point, the appraisal data used by the condemning entity becomes more of a problem for the landowner. During the trial the appraiser's findings typically become part of the court record. Most landowners lack the resources with which to counter the appraiser's findings. Those landowners that do wish to counter the appraiser's findings must hire their own appraiser and, in some cases, legal counsel. Each represents an expense to the landowner.

Recommendation 4.4: Reform the appraisal process involved in condemnations to include incentives for government's use of fair market values when assessing damages.

Recommendation 4.4a: Improve appraisal disclosure to landowners.

Landowners deserve more information regarding a condemning entity's appraisal of their property. They also deserve a clearer understanding of the appraisal process. This recommendation would require that landowners be provided the opportunity to accompany a condemning entity's appraiser during their inspection of private property. This recommendation would also require that the condemning entity provide a full explanation of how and why it arrived at its appraisal values for the landowner's property. As part of this recommendation, a condemning entity would be prohibited from

⁷⁵ Interview with Mr. Les Allison, landowner in Harris County, 8 May 2006.

⁷⁶ Interview with Mr. Les Allison, landowner in Harris County, 8 May 2006.

making a compensation offer to a landowner that is less than the amount identified by the entity's appraisal.

Recommendation 4.4b: Compensation for attorney's fees, court costs

This recommendation would require that landowners who contest a condemning entity's compensation offer in court, and win the court's judgment, be compensated by the entity for their court costs and attorney's fees.

Recommendation 4.4c: Prohibit appraisal abuse.

This recommendation would require that condemning entities use their appraisal process in good faith as part of their obligation to offer fair compensation to the landowner. Governmental entities would be prohibited from using the appraisal process to intimidate, affirmatively burden, or deliberately undervalue a landowner's property. If a landowner proves that a condemning entity used the appraisal process in bad faith, then the landowner may be awarded an amount up to, but not to exceed, ten times the compensation offer made by the condemning entity, in addition to recovery of court costs and attorney's fees.

Problem 4.5: Condemning entities may take possession of landowner's property pending litigation even if the public use is questionable.

Under current law, condemning entities may take possession of a landowner's property upon the court's upholding of the special commissioners' judgment. At this point the condemning entity may take possession of the landowner's property pending litigation. In other words, although the landowner may still contest the taking in court and potentially win judgment against the condemning entity's takings action, the condemning entity retains possession of, and development right to, that property until the landowner prevails in court.

The problem with current law is that it allows for condemning entities to take possession of private property in instances where the stated public use for the condemnation is questionable. In these cases the landowner must surrender their land, and potentially have it developed by the condemning entity, while contesting the claimed public use of the condemnation in court. The case of Harry Whittington best illustrates this problem. In 2001, after receiving a judgment from the special commissioners, the City of Austin took possession of Mr. Whittington's downtown Austin property. Mr. Whittington subsequently filed suit against the City of Austin contending that its intended use of the property was not a permissible public use.⁷⁷ Over the next three years the City of Austin and Mr. Whittington contested the public use of the condemnation in court. During that time the City built a parking lot on his property. On September 30th, 2005 the court ruled in Mr. Whittington's favor. In its ruling, the court found that the City of Austin failed to appropriately demonstrate that it condemned the property for a public use. By the time

⁷⁷ Whittington v. City of Austin, Tex App. Dist. 3, 30 September 2005.

Mr. Whittington won his case, however, the City had already built a parking lot on his property.

Condemning entities should not be allowed to take possession of a landowner's property when the public use of the condemnation is in question. Understandably, state law allows for condemning entities to take possession of a property pending litigation in order for the public use, and, by extension, public benefit, to come into fruition as soon as possible. Expediency towards implementing a project, however, should not come at the cost of fairness to the landowner. Obviously, governmental entities should neither be allowed to condemn private property in the absence of a justifiable public use, nor take possession of a property when the stated public use is in question. Allowing condemning entities to take possession of private property pending litigation in cases of questionable public use places the landowner at a disadvantage. Not only must the landowner litigate to regain possession of their property, their property may also be altered by the condemning entity pending the outcome of the litigation, as the City of Austin did to Mr. Whittington's property, so as to render it unusable by the original owner.

Recommendation 4.5: Prohibit condemning entities from taking possession of a landowner's property pending litigation if the condemnation is challenged on grounds of public use.

This recommendation would preclude a condemning entity from taking possession of a landowner's property if the landowner challenges the public use claimed for the condemnation. Under this recommendation the condemning entity would be authorized to take possession pending litigation of the landowner's property no earlier than two weeks after the entry of the special commissioner's findings. During that time if the landowner objects to the public use for the condemnation, and makes the appropriate motions before a court, then the condemning entity would be precluded from taking possession of the property until the court's ruling on the question of public use. If, however, the landowner does not object with regard to the professed public use, then the condemning entity may take possession of the property pending litigation no earlier than two weeks after the court makes a ruling regarding the special commissioners' findings.

Problem 4.6: Landowners lack the fair opportunity to recapture their land.

During the late 1980's the City of San Antonio condemned a portion of Balous Miller's family farm for the construction of the Applewhite Reservoir to serve the area's growing thirst.⁷⁸ Unfortunately for the region's water planners, San Antonio's development of the Applewhite Reservoir ended as quickly as it began. Local opposition questioning the project's necessity brought construction to a halt in 1991. For years the land that the city condemned remained fallow. Rather than offer to sell the land back to the original landowners the city eventually sold the property to another buyer, the Toyota Corporation. Mr. Miller would have preferred to have sold his family property to the Toyota Corporation on his own. Instead, that opportunity went to the City of San Antonio, which reportedly profited from the land transaction.

⁷⁸ Interview with Mr. Balous Miller, landowner in Bexar County, 17 March 2006.

In 2003 the Texas Legislature passed Senate Bill 1708, relating to the repurchase of real property acquired by a governmental entity through eminent domain. The bill contained two key provisions. First, S.B. 1708 required that the condemning entity disclose to the condemned property's owner that they may repurchase their property if it is not put to public use within ten years of the initial condemnation. The notice must be issued in writing at the time the governmental entity takes possession of the property, and must state that the property's repurchase price will be its fair market value at the time the public use is cancelled.⁷⁹ S.B. 1708's second key provision required a governmental entity to notify a property owner of the cancellation of the public use for which their property was initially condemned. Upon providing this notice, the governmental entity may resell the property to the original owner at its fair market value at the time the public use was cancelled.⁸⁰ The bill did not address the issue of reselling the condemned property to individuals other than the original owners.

While S.B. 1708 took a step in the right direction with regard to landowners' rights to repurchase their property, the bill grants governmental entities too much of an opportunity to profit from their exercise of the power of eminent domain. Typically, the fair market value of most properties appreciates over ten years. Authorizing a governmental entity to sell property at market value that it purchased years before, at a cheaper market price, allows that entity to profit from its original purchase. During the time that it actually possesses the property the governmental entity does not pay any taxes and, as suggested by the cancellation of public use, fails to make any improvements to the land. Government should not be involved in the land speculation business, especially if the property involved was acquired through the power of eminent domain. Allowing a property's original owner to repurchase their land at current fair market value places the property owner at a financial disadvantage. Not only do the property owners have to pay a higher price to repurchase property that was originally theirs, they also suffer the opportunity costs of not having that property under their control during the years that the governmental entity had possession of it.

Recommendation 4.6: Authorize landowners to repurchase their land for the price paid at the time of the government's condemnation.

Recommendation 4.6a: Five year window for re-acquisition

This recommendation would authorize landowners to repurchase their land if the governmental entity fails to put it to public use within five years of its condemnation. Under this recommendation a landowner may petition to repurchase their condemned property if the governmental entity either cancels the public use for which it originally condemned the property, or fails to make a reasonable effort toward implementing the public use development. Understandably, some public use developments, such as water storage reservoirs, necessitate a longer timeframe for implementation. This recommendation does not require the full implementation of a public use development.

⁷⁹ Texas Property Code, §21.023(2).

⁸⁰ Texas Property Code, §21.103(b).

Rather, this recommendation simply provides that a landowner may petition to repurchase their condemned property if the original public use is cancelled, or fails to be reasonably implemented within five years. A five year window is more than adequate for governmental entities to begin implementing the public use purpose for which they condemned the property. In the absence of any activity toward that end, the original landowner should have the opportunity to buy back his property.

Recommendation 4.6b: Repurchase at original sale price.

This recommendation would remove the provisions in current law authorizing an individual to repurchase their condemned property at present day fair market value. Under this recommendation the individual would have the option to purchase the property at fair market value or the purchase price paid at the time of the taking, whichever is less.⁸¹

Problem 4.7: Information regarding the total number of condemnations in Texas is not available.

Data regarding the total number of condemnations in Texas, and for the public purpose for which they were enforced, does not exist. While some state agencies, such as the Texas Department of Transportation, may catalogue the number of condemnations that they conduct each year, they are not required to annually report on their condemnation activity. Similarly other governmental entities in Texas, such as cities, counties, and special districts, are not required to report on their condemnation activities.

In the absence of a central catalogue of annual condemnations conducted in Texas, policy makers have little grasp with regard to the actual magnitude of the use of eminent domain. In short, we do not have any idea how many condemnations occur, who conducts them, and for what public use. The only data available regarding the total number of condemnations each year in Texas comes from the Office of Court Administration. In its *Annual Statistical Report for the Texas Judiciary* for the 2005 fiscal year, the Office reported that six percent of the 613,193 civil cases filed in district courts across the state were condemnation cases.⁸² These figures indicate that in F.Y. 2005 there were nearly 37,000 condemnation cases filed in Texas district courts. The data in the Office of Court Administration's report does not identify the condemning entities, the public use claimed for the condemnation, or the outcome of the condemnation trial. The only other sources of information regarding condemnations in Texas include court records and incidents highlighted by the media.

Some other states require the reporting of condemnation actions. Perhaps the most comprehensive reporting requirements may be found in the State of Connecticut where condemnations are reported to the state and classified according to the type of public use.

⁸¹ The recommendation that the individual have the option to purchase the property at fair market value or the purchase price paid at the time of the condemnation was actually part of the introduced version of S.B. 1708.

⁸² Texas Office of Court Administration, *Annual Statistical Report for the Texas Judiciary*, F.Y. 2005.

For example, between 1998 and 2002, there were 1,819 condemnations in Connecticut. Of those, 543 were for redevelopment, 1,189 for state highways, 27 for other state or municipal purposes, 4 for public utilities, and 56 for other purposes.⁸³ While Connecticut's recent history with eminent domain serves as an example of poor policy, the state's condemnation reporting requirement serves as a model. Texas would be well served by requiring a similar level of transparency.

Recommendation 4.7: Require that all political subdivisions in Texas engaged in the condemnation of private property report their activities to the state.

This recommendation would require all governmental entities in the state, including state agencies, to report on their annual private property takings activities. Under this recommendation, each entity that actually engages in a private property taking for that year must report on the following:

- ♦ The total number of private properties condemned for that year;
- ♦ The total number of private properties acquired through negotiation;
- ♦ The public use for which each property was condemned;
- ♦ The total sum disbursed for adequate compensation; and
- ♦ The total number of condemnation cases pending at the year's end.

This recommendation would provide policy makers a better picture of the extent of the use of eminent domain in Texas. Because of this recommendation Texas policy makers would gain a clearer understanding of who condemns private property, how often, and why.

Summary

The recommendations in this chapter aim to strengthen landowner protections throughout the condemnation process. These recommendations accomplish this objective by improving landowner disclosure, public notice and hearings regarding proposed takings, requiring good faith negotiations before the initiation of condemnation proceedings, the use of fair market data when making an offer to purchase private property, and giving landowner the reasonable option to repurchase their property. The chart, *Texas' Reformed Condemnation Process* [see Appendix on page 67], delineates how the reforms suggested by this chapter would work to improve Texas' condemnation process.

⁸³ Dana Berliner, *Public Power, Private Gain* (Washington, D.C.: Institute for Justice, April 2003), http://www.castlecoalition.org/pdf/report/ED_report.pdf.

Chapter 5: Other Land Use and Property Rights Issues

In 1995, the 74th Legislature enacted Chapter 2007, Government Code: the Private Real Property Rights Preservation Act (Act). PRPRPA, although limited in its application, contains several meaningful property rights protections. First, the Act requires governmental entities to provide thirty days public notice, in a newspaper of general circulation, of an action that may result in a taking. Such notice is consistent with the Task Force recommendation in Chapter 4 (page 39).

Secondly, the Act requires that the governmental entity proposing the action issue a takings impact assessment that arms property owners with necessary information, seen in the inset at right.

When a primary natural right is at stake, government transparency should be maximized.

Importantly, the Act states that a takings impact assessment is public information, accessible to any member of the public on request (pursuant to Chapter 552, Government Code).

Problem 5.1: The applicability of the Private Real Property Rights Preservation Act is limited.

The Takings Impact Assessment
Government Code §2007.043

- the specific purpose of the proposed action, including:
 - whether and how the proposed action substantially advances its stated purpose; and
 - the burdens imposed on private real property and the benefits to society resulting from the proposed use of private real property;
- whether engaging in the proposed governmental action will constitute a taking; and
- reasonable alternative actions that could accomplish the specified purpose and compare, evaluate, and explain:
 - how an alternative action would further the specified purpose; and
 - whether an alternative action would constitute a taking.

First, Government Code §2007.003 limits the governmental actions to which PRPRPA applies. The act primarily applies to the adoption of an ordinance or rule; importantly, §2007.003(b)(8) notes that the Act does *not* apply to a formal exercise of eminent domain. The Act then exempts nearly all municipal actions, with the exception of ordinances or rules that impact a municipality's extraterritorial jurisdiction. In effect, the Act only really applies to state agencies. Their knowledge and/or use of the Act, however, is lacking.

In a survey of 81 state agencies, the Property Rights and Land Use Task Force found that, of those agencies responding, only the Texas Commission on Environmental Quality has employed the Act. Other agencies replied that the Act did not apply to them because of the nature of their work or specific exemptions in the Act. Government Code

§2007.002(5) defines a “taking” as an action that causes "a reduction of at least 25 percent in the market value of the affected private real property.”

Recommendation 5.1a Expand applicability of the Private Real Property Rights Preservation Act

Although the Act was initially enrolled to protect private property against regulatory takings, the protections in the Act are strong and appropriate to be considered in eminent domain condemnations. The exemption in §2007.003(b)(8), removing eminent domain from the Act’s protections, should be removed. Additionally, §2007.003(b)(1) should be removed so that the protections of the Act apply to all actions of a municipality, not only those that occur in a municipality’s extraterritorial jurisdiction.

Recommendation 5.1b: Lower the threshold of what constitutes a “taking”.

Government Code §2007.002(5) should be amended so that any action that causes “a reduction of at least ~~25~~ 20 percent in the market value of the affected private real property” would constitute a “taking.” This would trigger increased issuance of takings impact assessments, and would potentially increase the use of the Private Real Property Rights Preservation Act.

Recommendation 5.1c: Include impervious cover restrictions in the definition of a “taking”.

An example of regulatory legislation not currently included under PRPRPA is the Save Our Springs “water quality” ordinance of 1992 which affected Travis County. This ordinance was passed in order to prevent the pollution of Barton Springs, Barton Creek, and the Barton Springs Edward’s Aquifer by restricting impervious ground cover. However, a side effect of this environmental legislation was that some property owners, according to the Supreme Court of Texas, lost 90% of the value of their property. Clearly this is an example of inverse condemnation.

House Bill 2833 (R. Cook, 79th Regular Session) would have expanded the definition of a “taking” to include impervious cover restrictions, causing entities to better consider land use regulations and compensating overly regulated property owners. However, HB 2833 does not limit an entity’s ability to make regulations that are for the benefit of all; it merely seeks to provide just compensation for the private property owners who suffer an undue burden because of such legislation. Legislators should return to that legislation and amend the definition of a “taking”, §2007.002(5), by adding the following:

(C) except as provided by Section 2007.003(g), a governmental action or series of actions that has the effect of limiting the overall impervious cover of any development or use of an owner's private real property to less than 45 percent of the surface area of the property, excluding any portion of the property that is within the 100-year floodplain as determined by the most

recent maps published by the Federal Emergency Management Agency or that slopes more than 35 percent.

(6) "Impervious cover" means impermeable surfaces, such as pavement or rooftops, that prevent the infiltration of water into the soil. The term does not include a rainwater collections system for a domestic water supply.

** This text is copied from the Engrossed version of House Bill 2833, as passed by the House on May 11, 2005.*

Problem 5.2: Subjecting private entities to the Public Information Act creates an excessive and undue burden.

As the 79th Legislature rushed to address the *Kelo* decision with Senate Bill 7, legislators subjected private business records to the Public Information Act (Chapter 552, Government Code). According to Section 2 of the bill (enacted as Government Code §552.0037), a condemnation action by any entity, including nongovernmental entities such as common carriers or utility companies, is subject to the Public Information Act.

The potential for such a provision to serve as a form of property rights protection is apparent: if an entity is going to condemn private property, its records on condemnations present and past should be reviewable as an accountability measure. Applicability of the Public Information Act to private entities, however, carries inherent problems.

In a clarification letter issued by the Attorney General, §552.0037 is interpreted so that “information concerning an entity’s general practices concerning eminent domain and any current, former, or proposed future policies relating to the use of eminent domain power” is public information, regardless of whether an actual condemnation petition has been filed. The potential for lawsuit abuse under this provision could pit one private company against another in public information requests. The requirement to comply to a public information request could pose an extreme cost to private enterprises, especially when information on former eminent domain policies is requested.

Recommendation 5.2: Repeal the applicability of the Public Information Act to private entities.

Government Code §552.0037 should be repealed. The potential for excessive requests that include the exposure of proprietary information is too great a harm to private enterprise. Additionally, with the other reforms recommended by this report in place, property owners will have sufficient checks against eminent domain exercised by either a governmental or private entity.

Chapter 6: Repeal of Dead Agencies

In response to a request submitted by Representative Callegari's Office in February 2006, the Texas Legislative Council published a document listing all references regarding the power of eminent domain in state law. The document lists 208 references granting entities the power of eminent domain, and 81 references limiting or prohibiting the exercise of that power. Some of the references grant the power of eminent domain to certain types of entities, such as cities, counties, common carriers, and hospital districts. Other references grant the power of eminent domain to particular entities. For example, Chapter 2166, Government Code grants condemnation power to the Texas Building and Procurement Commission as Chapter 13, Parks and Wildlife Code does for the Texas Parks and Wildlife Department.

Careful review of the list of references granting the power of eminent domain identified several agencies that, although established by state law, no longer exist. The reasons why these agencies no longer exist vary. Some, such as the Commission of Control for Texas Centennial Celebrations, simply expired after their purpose drew to a close. Others, such as the Texas Deepwater Port Authority and the Ogallala Water Import Authority, ultimately lacked the momentum to materialize. And others, such as the Texas National Research Laboratory Commission, faded as federal support dwindled.

The fact that "dead" agencies and statutes exist in Texas law, and are endowed with the power of eminent domain, is cause for clean-up. On occasion old statutes may be revived for policy purposes that defy the interests of a sitting legislature.

Unused, antiquated statutes should be removed from the books. Texas' legal cannon should be contemporary, not a compendium of historical curiosities. This is especially true when the power of eminent domain is involved. The unused chapters of law identified here were approved by previous legislatures to address certain facts and issues of their time. Invariably, conditions change, rendering some laws obsolete.

The Land Use Task Force recommends that the 80th Legislature consider the abolition of the following statutes. These statutes create or authorize agencies that have the power of eminent domain, yet do not exist today.

Problem 6.1: Although Texas Centennial Celebrations ended decades ago, the Commission of Control for Texas Centennial Celebrations has the legal authority to condemn historic sites.

In 1935 the 44th Texas Legislature passed legislation creating the Commission of Control for Texas Centennial Celebrations. Charged with administering local celebrations and erecting monuments in tribute to Texas' 100th anniversary, the Commission of Control received a \$3 million appropriation (the equivalent of a \$41 million appropriation by the

79th Legislature) to fund its activities.⁸⁴ The Legislature also authorized the Commission of Control to condemn land "for the purpose of preserving, restoring, or marking any place of historical significance."⁸⁵

During its brief tenure, the Commission of Control worked with the Advisory Board of Texas Historians, the Work Projects Administration, and the Texas Highway Department to establish buildings, monuments and grave markers in observance of the state's centennial.⁸⁶ Some of the buildings and sites developed by the Commission of Control included the Alamo Museum, the Gonzales Memorial Museum, the San Jacinto Monument and Museum of History, the Big Bend Historical Museum, the Texas Memorial Museum in Austin and several others across the state.⁸⁷ As Texans celebrated their state's unique heritage between the years of 1935 and 1937, the Commission of Control helped identify and fund Texas' historic sites.

Seventy years after the Texas Centennial celebrations, the Commission of Control's activities are now catalogued in the state archives. State law, however, still reflects one vestige of the Commission's activities. The provision authorizing the Commission to condemn historical sites for centennial celebrations remains as Article 3264c Vernon's Texas Civil Statutes. While this provision may have been useful to the Commission's activities in 1936, it remains part of Texas' legal cannon too long past its purpose.

Recommendation 6.1: Repeal Article 3264c, V.T.C.S. authorizing the State to condemn historic sites for the Texas Centennial Celebrations.

Article 3264c, Vernon's Texas Civil Statutes, authorizing the Commission of Control for Texas Centennial Celebrations to condemn property of historical significance, should be repealed. Just as the Commission no longer exists, neither should the statutory language granting it the power of eminent domain.

Problem 6.2: The Texas Deepwater Port Authority no longer exists.

During the mid-1970's Texas explored the possibility of developing a deepwater port for the shipment of oil. The plan was for a private consortium known as Seadock to invest in a \$650 million buoy and pumping station located 25 miles off of the Texas coast. Once built, this deepwater facility would be capable of unloading 2.5 million barrels of oil a day from deep-draft supertankers.⁸⁸ Since the hulls of supertankers were too deep for Texas' coastal port facilities, the Seadock project would give the tankers needed unloading access for importing foreign oil into Texas.

⁸⁴ Texas Commission of Control for Texas Centennial Celebrations, Texas Archival Resources Online, <http://www.lib.utexas.edu/taro/tslac/20063/tsl-20063.html> (accessed October 23, 2006).

⁸⁵ Vernon's Texas Civil Statutes, Title 52., Eminent Domain, Article 3264c, Condemnation of Historical Sites.

⁸⁶ Handbook of Texas Online, s.v., <http://www.tsha.utexas.edu/handbook/online/articles/TT/lkt1.html> (accessed October 23, 2006).

⁸⁷ Ibid.

⁸⁸ Art Weise, "Agency rules states can't veto building of Texas superport," *Houston Post*, 26 March 1976.

The Seadock venture came to a halt in 1977. Restrictive government requirements set forth in the venture's license issued by the U.S. Department of Transportation prompted the consortium's majority stakeholders to pull out of the project.⁸⁹ With the major financiers withdrawing from the project, and the Department of Transportation's licensure requirements precluding further participation, Seadock died in July 1977, at a time when the Texas Legislature was in special session.

In July 1977, Governor Dolph Briscoe called the Texas Legislature into special session to consider legislation affecting public education. Less than a week into the session, after legislators had approved a public education finance bill, Governor Briscoe expanded the session's call to include legislation for the regulation of nursing homes and the creation of a deepwater port.⁹⁰ The idea at the time was that given the economic importance of a deepwater port, and the likelihood that the Seadock venture would cease, the State of Texas should have its own backup plan for the development of such a facility. The idea was an economic development project. Shortly after Governor Briscoe expanded the special session's call, the Legislature approved Senate Bill 7 creating the Texas Deepwater Port Authority.

Chapter 19 of the Texas Water Code provides for the creation and power of the Texas Deepwater Port Authority. Under the Act, the Authority could only be created when the governor determined that such a port could not be developed by private enterprise. The Act authorized the Authority to issue revenue bonds to finance the development of a deepwater port. The bonds and the port's operation would be financed through the fees paid by the port's users. In addition, the Authority had broad powers to develop port facilities, including the engineering, construction, operation and maintenance of facilities such as wharves, pipelines, tanks, warehouses, and navigable waterway systems. The Act also gave the Authority the power of eminent domain.⁹¹

In 1978, one year after S.B. 7 passed, Governor Briscoe authorized the creation of the Texas Deepwater Port Authority. The agency, however, ended as quickly as it began. The rising interest rates of the late 1970's, coupled with an on-going overseas oil crisis, reduced oil companies' interest in a deepwater port. Consequently, the letters of intent from oil companies to use the port, which were necessary for the Authority to procure its bond financing, fell short of the amount needed for the bonds. In March 1980, after exploring all possible options to secure bond financing for the project, the Authority's Board met in Houston for one last time. There, the Board approved its final motion to reduce its office space and staff and explore its remaining options before its federal permit expired in May.⁹² The Authority's Chairman then said that he may or may not call another meeting of the Board. Records at the Texas State Archives indicate that another meeting never occurred. The Texas Deepwater Port Authority had expired.

⁸⁹ Sam Fletcher and Fred Bonavita, "Seadock apparently dead," *Houston Post*, 13 July 1977.

⁹⁰ Michael Wallis, "Briscoe adds Seadock, rest homes to session," *Beaumont Enterprise Journal*, 16 July 2006.

⁹¹ Water Code, §19.052.

⁹² Transcript of Proceedings Before the Texas Deepwater Port Authority, 20 March 1980, Houston, Texas.

Recommendation 6.2: Repeal Water Code Chapter 19 creating the Texas Deepwater Port Authority.

The Legislature should repeal Chapter 19 of the Texas Water Code; the agency created by this chapter has been dormant for more than 25 years. Given the absence of an actual Deepwater Port Authority that derives its authorization from this statute, the Chapter should be repealed. Moreover, the chapter is a relic of the era when government had such hands-on involvement in economic development projects. As such, it warrants elimination.

Should the necessity for a deepwater port arise again in Texas, which may be unnecessary given the lightering method⁹³ of shipping oil from supertankers to shallow ports, then the Legislature may want to consider legislation. Even then, the Legislature should defer to private enterprise, and not a government agency of its own creation, for such an endeavor.

Problem 6.3: Although authorized by statute, the Ogallala Water Import Authority of Texas never formed.

During the late 1970's the issue of water supply was as important to West Texas as it is now. Anticipating severe water shortages in the high plains within ten to twenty years as the supply of the Ogallala aquifer declined with increased use, water planners looked elsewhere to find water to serve the area's growing agricultural demand. One popular idea at the time was to develop infrastructure to import water to the area from water-rich areas of the country. Under such a plan, large pipeline systems would pump water from the Mississippi River or Arkansas River, or other areas with water surpluses, to those areas that needed it most.

Although some regarded water importation as an expensive way to provide water, and a threat to local control, Texas considered several measures relating to the importation of water. In 1969 Texas' voters rejected a \$3.5 billion bond issuance for the importation of water from the Mississippi River.⁹⁴ Eight years later, in 1977, the Texas Legislature rejected a measure authorizing the creation of water import authorities across the state.⁹⁵ Finally, in 1979, the Legislature passed House Bill 2205 creating the Ogallala Water Import Authority of Texas.

H.B. 2205 created what is now Chapter 64 of the Texas Water Code which provides for the creation and power of the Ogallala Water Import Authority. The Authority's purpose was to import water to areas that overlie the Ogallala aquifer in the Texas Panhandle. At the time of H.B. 2205's passage, officials thought that water could be transported from

⁹³ Lightering involved the transfer of oil from a supertanker to a smaller tanker with a shallower draft for transport into a port.

⁹⁴ Saralee Tiede, "Water importation costly venture," *Dallas Times Herald*, 20 June 1977.

⁹⁵ Austin Bureau of The News, "Water import measure delayed, may be killed," *Dallas News*, 18 May 1977.

the Arkansas and Mississippi rivers to the Panhandle area.⁹⁶ Under the Act, the Authority had the power to issue bonds and levy taxes to finance its projects. The Authority was also authorized to develop the infrastructure necessary for the importation and distribution of water within its service area. Toward that end, the Authority was authorized to condemn property of any kind within its boundaries, except water, necessary to the exercise of its powers.⁹⁷

Despite its authorization by Texas law, the Ogallala Water Import Authority never formed.

Recommendation 6.3: Repeal Water Code Chapter 64 creating the Ogallala Water Import Authority.

Chapter 64 of the Texas Water Code should be eliminated. The Authority created by this chapter has not been created within the 27 years since the law was passed. In the absence of an active entity authorized by the chapter, the section of Texas law should be repealed.

Problem 6.4: The need for two agencies established by state law ceased with the termination of Congressional support for the Superconducting Super Collider project.

In 1983 a national team of physicists recommended to the U.S. Department of Energy that it develop a superconducting super collider (SSC). The idea behind the SSC was to use high powered magnets to smash atoms into each other so as to expose subatomic particles. By slamming atoms together and exposing their subatomic materials, SSC experiments would help enhance scientists' understanding of the building blocks of matter. Beyond this knowledge, experiments involving the SSC were anticipated to have spin offs regarding cancer treatment, computer applications, medical technology, and other technological advances.

Following the advice of physicists, the U.S. Department of Energy began its research on a SSC project. In 1985 the 69th Legislature passed Senate Bill 1169 creating the Texas National Research Laboratory Commission (TNRLC) to prepare proposals for siting the SSC in Texas.⁹⁸ Two year later, President Ronald Reagan accelerated the nation's quest for a supercollider by announcing that the United States was committed to the design and construction of the world's largest and most powerful superconducting super collider.⁹⁹ One year later, in November 1988, the Department of Energy selected a site near Waxahachie as the future home of the SSC.

⁹⁶ "State approves agency to bring water to plains," *Dallas News*, 26 May 1979.

⁹⁷ Texas Water Code, §64.092(10).

⁹⁸ *Handbook of Texas Online*, s.v., <http://www.tsha.utexas.edu/handbook/online/articles/TT/mdtty.html> (accessed 23 October 2006).

⁹⁹ Kent Jeffrey, "Super Boondoggle: Time to Pull the Plug on the Superconducting Super Collider" Cato Institute Briefing Papers, May 26, 1992, <http://www.cato.org/pubs/briefs/bp-016.html> (accessed 25 October 2006).

With Texas selected as the home of the superconducting super collider, the Legislature quickly expanded the powers and duties of the Texas National Research Laboratory Commission. In 1989 the 71st Legislature passed S.B. 852 authorizing the TNRLC to participate in the financing, development and operation of the SSC.¹⁰⁰ The Commission was also authorized to acquire land and issue upwards of \$1 billion in bonds to fund necessary site preparation, construction, and equipment preparation. In order to accomplish this objective, the TNRLC was granted the power of eminent domain.¹⁰¹ Beginning in 1990, the Commission initiated the taking of 16,550 acres in Ellis County.¹⁰² Construction on the SSC began one year later. By 1993, 14.6 miles of tunnel were bored and 17 shafts sunk in Texas soil. Then the project began to unravel.

Citing cost overruns, an expensive price tag, and a need to save taxpayers' dollars, the U.S. Congress voted to discontinue funding for the superconducting super collider project in October 1993. By that time the State of Texas had contributed nearly \$1 billion in bonds to the project. Soon after Congress stopped the SSC, the Texas Legislature authorized the TNRLC to dispose of state-owned SSC assets, and to return bonds to the state in order to pay off its bonds.¹⁰³ In addition to this obligation the Commission began to downsize its operations. In 1997 the Legislature passed Senate Bill 728, transferring the remaining functions of the TNRLC to the General Land Office. According to records at the Texas State Library and Archives, the Texas National Research Laboratory Commission had ceased its operations by the 1996-1997 biennium.

Recommendation 6.4a: Repeal Government Code Chapter 465 authorizing the Texas National Research Laboratory Commission.

The rise and fall of the Texas National Research Laboratory Commission and the Superconducting Super Collider project is a telling story of how public dollars and resources can go to waste. The TNRLC is no more, and the purpose for which it was created in 1985 ceased more than a decade ago. Still, the chapter of Texas law authorizing the agency's creation and powers, including the exercise of eminent domain, remains. While the Legislature would do well to remember the lessons of the SSC, Government Code Chapter 465, authorizing the Texas National Research Laboratory Commission, should be repealed.

Recommendation 6.4b: University of Texas Board of Regents clean-up.

Education Code §65.33(c) authorizes the University of Texas System's Board of Regents to exercise its power of eminent domain for creating a research site "[i]n the event that the federal government awards the Super-conducting Super Collider Accelerator project to one ore more institutions of higher education in the State of Texas."¹⁰⁴ In light of the

¹⁰⁰ Laura Saegert, Texas National Research Laboratory Commission, Texas State Library and Archives Commission Archives and Information Services Division Records Appraisal Report, 4 August 1998.

¹⁰¹ Texas Government Code, §465.008(d).

¹⁰² Laura Saegert, Texas National Research Laboratory Commission, Texas State Library and Archives Commission Archives and Information Services Division Records Appraisal Report, 4 August 1998.

¹⁰³ Ibid.

¹⁰⁴ Education Code, §65.33(c).

fact that Congress eliminated the SSC project in 1993, the UT System's Board of Regents no longer requires the power of eminent domain prescribed to it in Education Code §65.33(c). Accordingly, this section should be repealed.

Recommendation 6.4c. Abolish Superconducting Super Collider Facility Research Authority.

In 1987, as Texas competed with other states to be chosen as the site for the SSC project, the Legislature passed H.B. 2085 authorizing the creation of a superconducting super collider research authority. The bill authorized two or more public entities in the state, including cities, counties, river authorities, and even municipal utility districts, to join in establishing a research authority to assist with projects needed for the location of the SSC. Such an authority would have the power of eminent domain to acquire the land, easements, and property interests that it determined to be necessary.¹⁰⁵

That bill created what is now Chapter 2301 of the Government Code. Given the termination of the SSC project in 1993, this chapter of law, and the research authority that it provided for, is no longer needed. Chapter 2301 of the Government Code should be repealed.

Statutory Clean-up Recommendation 6.5: Consolidate eminent domain references for Texas Woman's University.

Texas Woman's University currently has two, separate references granting it the power of eminent domain. One reference is in Article 3264d, Vernon's Texas Civil Statutes (V.T.C.S.) which vests the Board of Regents of the Texas State College for Women of Texas with the power of eminent domain. That reference was established by legislation passed in 1943. Fourteen years later, the Texas State College for Women of Texas' name was changed to Texas Woman's University (TWU). Currently, Chapter 107 of the Education Code grants TWU's Board of Regents the same powers as the University of Texas System's Board of Regents, including the power of eminent domain.¹⁰⁶ Given that TWU's contemporary statute grants its Board of Regents the power of eminent domain, the older reference in Vernon's Texas Civil Statutes is unnecessary. Article 3264d, V.T.C.S should be repealed. This recommendation would clean-up state law by removing an antiquated, redundant reference.

¹⁰⁵ Government Code, §2301.034.

¹⁰⁶ See Education Code §107.41 regarding the power of Texas Woman's University's Board of Regents; see Education Code §65.33 regarding the condemnation powers belonging to the University of Texas System's Board of Regents.

Appendix: Texas Reformed Condemnation Process

