

EMINENT DOMAIN AND PUBLIC USE UNDER *KELO*

WILLIAM W. KRUEGER, III
KEVIN M. CURLEY
Fletcher & Springer, L.L.P.
8750 N. Central Expressway, 16th Floor
Dallas, Texas 75231
(214) 987-9600
Email: bill@fletchspring.com

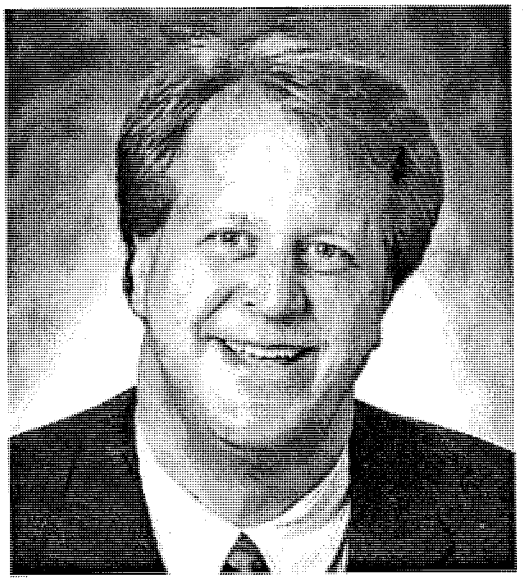
823 Congress, Suite 1300
Austin, Texas 78701
(512) 476-5300
http://www.fletchspring.com

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CHAPTER 13

WILLIAM W. KRUEGER, III
bill@fletchspring.com



WILLIAM W. "BILL" KRUEGER, III was born in Houston, Texas and raised in Bryan, Texas. He attended Bryan High School, Texas A&M University, and the Baylor University School of Law. Bill holds a Bachelor of Business Administration Degree in Accounting, as well as Doctorate of Jurisprudence. He has been actively engaged in the defense of civil rights, employment, labor, tort and insurance litigation for over 21 years.

Bill is licensed and admitted to practice in all Texas courts, the United States Supreme Court, the United States Court of Appeals for the Fifth Circuit, and all United States District Courts in Texas. He successfully defends and tries cases through the State of Texas and in all the Federal Districts in Texas. Mr. Krueger handled two cases before the United States Supreme Court and he has twelve published opinions. The Martindale-Hubbell rating system scores Bill at the top with regard to legal ability and general ethic standards. He scores an "A-V" – the highest rating possible.

Bill has worked with Doug Fletcher and Steve Springer for more than seventeen years. Mr. Krueger started the Austin Office of Fletcher & Springer, L.L.P. in 1995. He was Managing Partner of that office for nine years before relocating to Dallas.

Mr. Krueger has been the General Counsel to the Texas Police Association since 1998. He lectured at seminars for the Texas Police Association, Texas Municipal League, Texas Association of Counties, Texas City Attorneys Association and the Texas State Bar. He has testified before the Texas Legislature on employment issues. Bill was an eight-year member of the Evidence Committee for the State Bar. He is a member of the Planning Committee for the "Suing and Defending Government Entities" seminar.

Bill is a Fellow of the State Bar of Texas and a Member of the American Bar Association, the Dallas County Bar Association, The Texas Association of Defense Counsel, Dallas Association of Defense Counsel, Federal Bar Association, Bar Association of the Fifth Federal Circuit, and Texas City Attorneys Association. Bill is fluent in Spanish.

Mr. Krueger is married to the former Lydia Scott Blocker. They have three children, Christopher, Ashley and Sarah. Bill has six brothers and sisters-in-law, as well as 19 nieces and nephews in Dallas. The Kruegers are happy residents of Richardson, Texas.

KEVIN M. CURLEY

kevin@fletchspring.com



KEVIN M. CURLEY, *Associate,* born in Garland, Texas, 1980; Admitted to the Texas Bar, 2005; Admitted to practice before the United States District Court for the Northern and Eastern Districts of Texas; Preparatory Education: Dallas Baptist University (B.S., Criminal Justice, *cum laude,* 2002); Legal Education: Texas Tech University School of Law (J.D., *magna cum laude,* 2005); Professional Affiliations: Member/State Bar of Texas.

Kevin Curley is currently handling a broad range of insurance defense litigation including personal injury, premises liability and the defense of governmental entities.

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Chicago B & 2.R.Co. v. Chicago,
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City of Austin v. Travis County Landfill Co.,
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EMINENT DOMAIN AND PUBLIC USE UNDER *KELO*

I. INTRODUCTION

This paper was written, and it is meant, to outline and discuss the Law of Eminent Domain as defined by constitutional, caselaw precedence and statutory authorities. The paper addresses the following topics:

- Eminent Domain
- Texas Property Code Chapter 21
- Types of Takings
- *Kelo* "Public Use"
- Economic Development As A Public Purpose
- Increase Tax Revenue As Public Purpose
- Texas' Response to *Kelo*

This paper addresses the Urban Renewal of the 1940s-1960s. The United States Supreme Court's interpretation of the Fifth Amendment is outlined in three critical decisions. The constitutional interpretations are confirmed in various federal and state court cases. Finally, the paper addresses recent and proposed legislation in response to the judicial determinations.

II. EMINENT DOMAIN

Eminent Domain is the inherent right of a sovereign state to appropriate privately owned property for the general welfare of the general public. *City of Austin v. Nalle*, 120 S.W.996 (Tex. 1909). This right of the state, or to those whom the power has been delegated, is superior to the rights of the individual property owner. *City of McAllen v. Humphreys*, 40 S.W.2d 241 (Tex. Civ. App.—San Antonio 1931, writ refused). The exercise of eminent domain powers includes condemnation. However, eminent domain and condemnation must be distinguished. While often used interchangeably, the two terms are distinctly different. Condemnation constitutes the actual procedures or processes the state uses to exercise its right to take private property for the general welfare of the public. Eminent Domain is the sovereign power to appropriate private property for the general public.

Of course, the State's right to exercise its eminent domain power is not without limitations. The "takings clause" of the Fifth Amendment to the United States Constitution provides:

> "Nor shall private property be taken for public use without just compensation." U.S. Const., Amdt. 5.

The Fifth Amendment is made applicable to the individual states by way of the Fourteenth Amendment. See *Chicago B & 2.R.Co. v. Chicago*, 16 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

The Texas Constitution also provides limitations on the State's ability to take private property. Article I, Section 17 provides:

> "No persons property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the State, such compensation shall be made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the legislature, or created under it's authority shall be subject to the control thereof."

Tex. Const. Art. I, § 17

As can clearly be seen, the takings clauses of the United States and Texas Constitutions contain different language. Arguably, the use of "taken, damaged or destroyed" in the Texas Constitution may allow for a broader scope of protection for the private property owner. However, as a general rule, federal standards established under the federal takings clause are applied by Texas Courts when analyzing the Texas Takings Clause. *See, City of Austin v. Travis County Landfill Co.*, LLC, 73 S.W.3d 234, 239 (Tex. 2002); *City of Corpus Christi v. Pub. Util. Comm'n of Texas*, 51 S.W.3d 231, 242 (Tex. 2001); and *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932 (Tex. 1996).

A. Types of Claims

A landowner may file suit under the United States Constitution, the Texas Constitution or both. A claim under these takings provisions alleges land was taken without the required "just" or "adequate" compensation. Under the actual takings clauses, the private owner seeks monetary recovery for the property interest taken. Issues encountered in takings claims are addressed throughout this paper. However, in addition to the general "just compensation" claim, it is imperative that the eminent domain practitioner be aware of other types of claims a private property owner may assert. These claims are briefly outlined below.

1. Substantive Due Process

First, the landowner may assert a due process claim under United States or Texas Constitutions. The Fifth Circuit applies a rational basis test when analyzing substantive due process claims in land use matters. *See Shelton v. City of College Station*, 780

F.2d 475, 482 (5th Cir. 1986) (cert denied, 477 U.S. 905 (1986)). For example, a zoning ordinance is not unconstitutional unless it is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare. *Id.* Texas courts presume municipal ordinances and other land use legislation is valid. Accordingly, an extraordinary burden is placed on the property owner to show "that no conclusive or even controversial issueable facts or conditions exist which would authorize this City council to exercise the discretion confided to it, and that if reasonable minds may differ as to whether or not a particular zoning ordinance has a substantial relationship to the public health, safety, morals or general welfare, no clear abuse of discretion is shown and the ordinance must stand as a valid exercise of the city's police power." *Thompson v. City of Palestine*, 510 S.W.2d 579, 581 (Tex. 1974).

2. Equal Protection

Second, the landowner may assert an equal protection claim under the United States or Texas Constitutions. Generally, these challenges are also examined under the general rational basis test. In other words, legislation is presumed to be valid if the classification is rationally related to a legitimate state interest. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). However, a strict scrutiny test is applied if the classification drawn by the legislation includes a suspect class (race, alienage, or national origin. Legilsation based on these classes will only be withheld if they are "suitably tailored to serve a compelling state interest." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S.432, 105 S.Ct. 3249 (1985).

3. Procedural Due Process

A landowner may also contest the legislation applied to his or her property on a procedural due process argument. However, procedural due process rights do not attach to legislative action by the governmental body. *County Line Joint Venture v. City of Grand Prairie, Tex.*, 839 F.2d 1142, 1144 (5th Cir. 1988). If the legislation is administrative or adjudicative, then due process rights have the potential for attaching. *Id.*

B. Who may exercise eminent domain powers?

Under the general grant of the legislative power, the Texas Legislature, and those agencies to whom the legislature delegates authority, may exercise the eminent domain power. *Davis v. Lubbock*, 326 S.W.2d 699, 714 (Tex. 1959). State agencies such as the Texas Department of Transportation, Texas Transportation Commission, Board of Directors of the Texas Turnpike Authority, Texas Parks and Wildlife Department, Texas Water Commission, and a number of other state agencies have been granted such authority. *See* Tex. Trans. Code §224.001 et seq., Texas Trans. Code §51.001 et seq., Tex. Trans Code §3161.001 et seq., Tex. Parks & Wildlife Code §13305(a) and Tex. Water Code §12.015(a)-(b).

Counties may be designated as an agency of the state to exercise eminent domain power. *See Richardson v. Cameron County*, 275 S.W.2d 709 (Tex. Civ. App.—San Antonio, 955) and *Wade v. Jackson County*, 547 S.W.2d 371 (Tex. Civ. App.—Corpus Christi 1977, writ refused n.r.e.). For an example of specific authority, *see* Tex. Local Government Code §261.001 et seq. The State may also delegate eminent domain powers to a city. However, a city may only take eminent domain action when authorized by a vote of its governing body. *City of Galveston v. Brown*, 67 S.W. 156 (Tex. Civ. App. 1902). Gas or electric corporations also have been granted authority to exercise eminent domain powers. *See* Tex. Util. Code §181.004. Common carriers are also granted such right. *See* Tex. Nat. Res. Code §111.019. The Texas Legislature also grants eminent domain authority to other agencies not listed above. If presented with an entity or agency exercising or desiring to exercise eminent domain powers, it is important to remember, the entity or agency must find a specific grant of authority by the Texas Legislature to exercise eminent domain against a private property owner.

C. Brief Overview of Takings Claims

Typically, there are three areas or categories of takings claims: (1) regulatory takings, (2) exactions (or required dedications), and (3) physical occupation claims. Regulatory takings generally present the most issues and make up the most takings litigation. City ordinances, county subdivision regulations, and other local legislation impacting property rights provide a substantial amount of property disputes. For example, a statute regulating the uses that can be made of property effects a "taking" if it "denies an owner economically viable use of his land." *Lucas v. South Carolina Coastal Counsel*, 505 U.S. 1003, 1016-20 (1992). Also *see Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932 (Tex. 1996).

However, even if the regulation does not "deny all economically beneficial productive use of land," a taking may still result. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Penn Central set forth three factors for courts to analyze in determining whether a taking still results. These three factors are: (1) the character of the governmental

action, (2) the economic impact of the regulation upon the claimant, and (3) the extent to which the regulation has interfered with the distinct investment backed expectations. *Id.* In other words, there are two sub-categories under the regulatory takings category. First, either all economically beneficial or productive use of the property is denied. Also, if this test is not met, the *Penn Central* factors are analyzed, allowing the private property owner a second bite at the regulatory takings claim.

The second category of takings claims consists of exactions. An exaction applies in situations where, as a condition of development approval, a dedication of land is required. *See Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); and *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836 (1987). *Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620 (Tex. 2004).

The final category and perhaps the most easy to recognize, is a taking by physical occupation of property. A physical invasion into the property requires just compensation, regardless of whether the interest taken consists of the entire parcel or merely a part thereof, or whether the taking is permanent or temporary. *Tahoe-Sierra Preservation Counsel, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 322-333 (2002).

A property owner may also bring an "inverse condemnation" claim against the government for exercise of its eminent domain powers. The land owner proceeds under an inverse condemnation claim when the government allegedly exercised its eminent domain powers *without* following the procedures set by Chapter 21 of the Texas Property Code.

III. TEXAS PROPERTY CODE CHAPTER 21

In Texas, the condemnation procedure is outlined by Chapter 21 of the Texas Property Code. Chapter 21 sets forth the specific procedures required for the government to exercise its eminent domain powers. The procedures in Chapter 21 must be *strictly* followed and are liberally construed for the benefit of the private property owner. *John v. State*, 826 S.W.2d 138 (Tex. 1992).

Condemnation procedures involves two distinct aspects: (1) an administrative proceeding, and if necessary (2) the continuation of the administrative proceeding into a judicial proceeding. *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W. 3d 172 (Tex. 2004). Until a party files its objections to the Commissioner's award, the parties are engaged in the "administrative proceeding." *Id.* at 179. The portion of the procedure following the objection to the commissioner's award constitutes the "judicial proceeding." *Id.*

A. Parties must attempt to agree.

The government exercising its eminent domain powers must attempt to agree with the private property owner on the amount of just compensation. Tex. Prop. Code § 21.012(a). Section 21.012(a) expressly requires the parties to attempt to agree prior to a petition being filed. Section 21.012 also imposes a statutory duty of good faith, by both parties, in the negotiations. To satisfy the statutory good faith negotiations requirement of section 21.012, a "bona fide" offer by the condemnor must be based on a "reasonably thorough investigation and honest assessment of the amount of just compensation due to the land owner as a result of the taking." *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W. 3d 172 (Tex. 2004).

Hubenak, also addressed whether the prerequisite "attempt to agree" was jurisdictional. In *Hubenak*, the condemning authority failed to plead that the parties were unable to agree on the damages. The court noted that under section 21.012, it was *mandatory* to plead that the parties attempted to reach an agreement. However, the court noted that the failure to meet this pleading burden did not deprive the court of subject-matter jurisdiction, reversing the Appellate Court's decision that the pleading requirement was a jurisdictional requirement.

It should be noted that once a land owner contests the condemnation, the land owner waives any right to complain of the lack of good faith negotiations as a prerequisite to suit. See *Austin Homes Center Assoc. v. State*, 794 S.W.2d 593, 595 (Tex. App.—Austin no writ).

B. Condemnors Petition.

Once the government and the property owner conclude that they are unable to agree on the amount of just compensation, the government must proceed with filing its petition for condemnation. (Note that under Chapter 21, the condemnor always files the petition for condemnation.)

1. Where to file the petition.

Tex. Prop. Code §21.001 provides that the district courts and county courts at law have concurrent jurisdiction in eminent domain cases. Section 21.001 expressly states that constitutional county courts have no jurisdiction in eminent domain cases. However, it

is important to check jurisdictional statutes that create exclusive jurisdiction in a specific court. For example, in *Taub v. Aquila Southwest Pipeline Corp.*, 93 S.W.3d 451 (Tex. App.—Houston [14th Dist.] 2002) the court found that the county court at law had *exclusive* jurisdiction under Tex. Gov. Code §251.032(c). Section 251.032(c) specifically provided that the Harris County Civil Court at Law had exclusive jurisdiction in Harris County for eminent domain proceedings, both statutory and inverse, regardless of the amount in controversy. Accordingly, the *Taub* Court affirmed the district court's entry of a take nothing judgment and its award of costs against *Taub*.

The proper venue of a condemnation proceeding is the county in which the owner of the property being condemned resides, if part of the property is located in that county. Otherwise, the venue of a condemnation proceeding is any county in which at least part of the property is located. *See* Tex. Prop. Code §21.013(a).

2. Specific Requirements of Petition.

Section 21.012(b) requires the following to be included in every petition for condemnation:

(1) Description of the property to be condemned;
(2) Statement of the purpose for which the entity intends to use the property;
(3) Statement of the name of the owner of the property if the owner is known; and
(4) Statement that the entity and the property owner are unable to agree on the damages.

The Texas Supreme Court has held that the description of the property to be condemned is measured by the same standard used to test the adequacy of property descriptions in a deed. *Coastal Indus. Water Auth. v. Celanese Corp.*, 592 S.W.2d 597, 600 (Tex. 1979). The property description is sufficient if a surveyor could go upon the land based on the description and mark out the property designated. *Id.* A sufficient petition describes the property by meets and bounds. *Id.*

Under Tex. Prop. Code §21.012(b)(2), the petition need only give "adequate statement" of the intended use. *Id.* (statement that land was to be used "for the construction, inspection, operation, maintenance, repair, replacement with the same or different size pipe and removal of a pipeline for transporting gas, liquefied minerals and other mineral solutions in the normal appurtenances to such pipeline" was adequate for purposes of stating the purpose in the condemnation petition). In *Celanese*, the petition's purpose stated "for the transportation of water and other facilities and other uses incidental thereto or in connection therewith for [the wastewater system]."). *Celanese*, 592 S.W.2d at 600.

The petition must also state the name of the landowner, to the extent the owner is known. "It has been repeatedly held that the word "owners," when used in special assessment, eminent domain, or condemnation statues, embraces the holders of every kind of lien, claim, or equity in the property involved." *Nalle v. Eaves*, 5 S.W.2d, 500 (Tex. Civ. App.—1928), citing *Rabbvla Feriamut Canal Co.*, 130 S.W.916, 918 (Tex. Comm'n App. 1910). Accordingly, the owner includes all persons who have an interest in the property that will be affected by the condemnation. *Houston North Shore Ry. Co. v. Tyrrell*, 98 S.W.2d 787, 793 (1936).

As previously discussed, it is mandatory that the petition state that the condemnor and property owner are unable to agree on just compensation damages. However, this was a requirement, though mandatory, is not a jurisdictional element. *See Hubenak*, 141 S.W. 3d 172. However, the condemnor is not required to negotiate with a land owner who refuses to in good faith attempt to agree on just compensation. *Anderson v. Clagon Gas Co.*, 677 S.W.2d 702, 704 (Tex. App.—Houston [1st Dist.] 1984). If there are multiple "owners," the condemnor need only show the inability to agree with one of them to satisfy the unable to agree requirement. *Texas-New Mexico Power Co. v. Hogan*, 824 S.W.2d 252 (Tex. App.—Waco 1992, writ denied).

C. Appointment of Commissioners.

Once the petition is filed in the proper court, the judge of the court shall appoint three disinterested freeholders who reside in the county as "special commissioners". The special commissioners' duties are to assess the damages of the owner of the property being condemned. Tex. Prop. Code §21.014(a). If the condemnor and the property owner(s) agree on a person(s) to serve as commissioners, the judge shall give preference to such person(s). *Id.*

Once appointed, the special commissioners shall swear, under oath, to assess the damages fairly, partially and according to the law. Tex. Prop. Code §21.014(b). Once sworn, the commissioners have the ability to compel the attendance of witnesses, and testimony, administer oaths, and punish for contempt. *Id.*, at subsection (c). If a party does not object to the failure to administer oaths in the trial court, any such

objection is waived. *PGP Gas Products, Inc. v. Fariss*, 620 S.W.2d 559, 560-61 (Tex. 1981).

D. Commissioner's Hearing.

Once appointed, the special commissioners must "promptly" schedule a hearing for the parties at the earliest practical time and at a place that is as near as practical to the property being condemned or at the county seat of the county in which the proceeding is being held. Tex. Prop. Code §21.015(a). The commissioners should not set the hearing prior to being administered their oaths. However, if the commissioners do prematurely schedule the hearing, this should not affect the result. The Austin Court of Appeals addressed this issue in *Pape v. Guadalupe-Blanco River Auth.*, 48 S.W.3d 908 (Tex. App.—Austin 2001 pet denied). Though the procedures set forth in Chapter 21 of the Property Code are to be strictly followed and liberally construed to the benefit of the land owner, the court found that the commissioners were not required to take their oaths of office prior to the scheduling of the hearing. *Id.* Neither side gained an advantage and the property owner was not harmed in any way by the hearing being scheduled prior to the oaths being administered. *Id.* at 911-12.

The special commissioners must then see that written notice of the hearing is served on each party. Such service must be accomplished no later than eleven (11) days prior to the hearing date. Tex. Prop. Code §21.016. Section 21.016(c) sets forth specific requirements for the service and return of service of the notice. The original notice must be returned to the special commissioners on or before the date of the hearing. *Id.* Furthermore, the person accomplishing service shall indicate how and when the notice was served. *Id.* Any person competent to testify may serve the required notice. *Id.* at subsection (b).

Once the hearing is scheduled and proper notice of the hearing is served on all parties, the special commissioners may conduct their hearing and admit evidence pursuant to Tex. Prop. Code §21.041. However, the commissioner's hearing is not subject to the rules of procedure or evidence. *Dueitt v. Harris County*, 249 S.W.2d 636, 639 (Tex. Civ. App.—Galveston 1952, writ ref'd). The commissioners shall admit evidence on the following:

(1) value of the property being condemned;
(2) the injury to the property owner;
(3) the benefit to the property owner's remaining property; and
(4) the use of the property for the purpose of condemnation.

It should be noted that the special commissioners have no authority to resolve any issues of law. Their function is only to the determination of the amount of compensation owed. *Amason v. Natural Gas Pipeline Co.*, 682 S.W.2d 240, 241-42 (Tex. 1984). All three special commissioners do not have to agree on the amount of compensation. An award may be entered upon the majority of the special commissioners. *Angier v. Valser* 48 S.W.2d 668, 672 (Tex. Civ. App.—Austin 1932, writ ref'd).

The commissioners then shall assess damages according to the evidence presented at the hearing. Tex. Prop. Code §21.042(a). Once a majority of the commissioners agree on the amount of just compensation, the commissioners must file a written statement of the award with the court on either:

(1) the day the decision is made, or
(2) the next working day after the decision is made. *See* Tex. Prop. Code §21.048.

The judge of the court must then inform the clerk of the court as to the commissioners' decision on either: (1) the day the decision is filed, or (2) the next working day after the decision is filed. Tex. Prop. Code §21.049. No later than the next working day after the decision is filed, the court clerk shall send notice of the decision to the parties in the proceeding, or to their attorneys of record. *Id.*

E. Appeal from Commissioner's Findings.

Either party may object to the commissioners' findings by filing a written statement of their objections. The objections must contain supporting grounds and must be filed on or before the first Monday following the twentieth (20th) day after the commissioner's findings were filed with the court. Tex. Prop. Code §21.018(a). If neither party files timely objections, the court's jurisdiction is limited to acceptance and adoption of the commissioner's award as its judgment under Tex. Prop. Code §21.061. *Balsingame v. Kruger*, 800 S.W.2d 391 (Tex. App.—Houston [14th Dist.] 1990, no writ). Accordingly, timely filing objections is extremely important in preserving the ability to contest the special commissioner's findings.

If a party timely files an objection, the court shall cite the adverse party and try the case as other civil cases. Tex. Prop. Code §21.018(b). Accordingly, it is the filing of timely objections that converts the

administrative portion of Chapter 21 into a formal judicial proceeding.

If timely objections are filed, it may be quite a while before the civil case is final. One important issue is who has the right to possession of the property pending the civil court's determination. Importantly, after the commissioner's enter an award, the condemnor may take possession of the property pending the judicial proceedings. Tex. Prop. Code §21.021(a). However, the condemnor must strictly comply with the provisions of §21.021, including depositing the amount of money awarded by the commissioners with the court. *Id.*

IV. TYPES OF TAKINGS

A. Regulatory Takings.

Undoubtedly, proceeding through condemnation proceedings, such as those set forth in Tex. Prop. Code Chapter 21, and actually taking portions of property constitute a "taking." However, land use restrictions may also arise to the level of a taking under the United States or Texas Constitutions. In other words, regulations applied to private property may be "so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle v. Chevron USA, Inc.*, 544 U.S. 528, 125 S.Ct. 2074 (2005). Regulatory actions generally will be deemed *per se* takings when the government requires a private property owner to suffer a permanent physical invasion of property, see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).

1. "Substantially Advances" Test

Assuming a physical invasion is not in question, a taking results when regulations completely deprive an owner of all economically beneficial use of his or her property. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Initially, this determination had a two part test, set forth by the United States Supreme Court in *Agins v. City of Tiburon,* 447 U.S. 255, 100 S.Ct. 2138 (1980). The Court concluded a regulatory taking occurs if a regulation: (1) does not substantially advance legitimate state interests, or (2) denies an owner economically viable use of his land. *Id.* at 260.

The Texas Supreme Court, construing the Texas Takings Clause, accepted the *Agins* test in its 1998 decision in *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998). The court stated:

> as a general rule, the application of a general zoning law to a particular property constitutes a regulatory taking if the ordinance "does not substantially advance legitimate state interests" or it denies an owner all "economically viable use of his land." *Id.*, *citing Agins v. City of Tiburon.*

Accordingly it appeared (at least in 1998) that the proper analysis for a regulatory taking under both the U.S. and Texas Constitutions required examination of whether the governmental regulation substantially advanced a legitimate public interest. If answered in the affirmative, the second step required analyzing whether the action denied the private property owner of all economically viable use of its land.

However, in 2005 the United States Supreme Court determined that the "substantially advances a legitimate public interest" inquiry is not a valid question in identifying whether a regulatory taking has occurred. *Lingle,* 544 U.S. 528. The Court held that the formula inquiring into whether a governmental regulation of private property "substantially advances" legitimate state interests, while proper for a due process analysis, is not an appropriate test for determining whether a regulation constitutes a taking under the Fifth Amendment.

The Court noted the "substantially advances test:

> suggests a means-ends test, asking, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. Such an inquiry is not a valid method of discerning whether private property has been "taken" for Fifth Amendment purposes. In stark contrast to the three regulatory takings tests discussed above, the "substantially advances" inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights or how any regulatory burden is *distributed* among property owners. Thus, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause. Moreover, the *Agins* formula's application as a takings test would present serious practical difficulties. *Id.*, at 529.

However, the Supreme Court's decision in *Lingle* did not dictate whether the "substantially advances" analysis was to be applied to Texas courts analyzing the Texas Takings Clause. This question remained undetermined in Texas jurisprudence for some time.

However, in 2004, the Texas Supreme Court decided the *Sheffield Development Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660 (Tex. 2004). *Sheffield* made a number of important holdings relating to Texas regulatory takings law, including that the "substantially advances" test remains in Texas. *Id.* Refusing to generally state the test applies to takings claims, the court held the inquiry was still required, *at least in some situations.* Specifically, the court noted:

> apart from what the Supreme Court has said, we continue to believe for purposes of [Texas] constitutional law, as we held in *Mayhew*, that the statement in *Akins* is correct: that whether a regulation substantially advances legitimate state interest is an appropriate test for a constitutionally compensable taking, *at least in some situations*. *Id.*, at 674-75.

Unfortunately, *Sheffield* did not elaborate as to what these "situations" are. However, all should agree *Sheffield* benefited Texas municipalities by providing a test that is deferential to a city's stated purpose for the regulation. For example, under Sheffield, even issues the city *may* have considered when enacting the legislation are considered.

2. *Penn Central* Factors

Even if all economically beneficial use of property is not lost, a regulatory taking may also occur under the three-factor test set forth in *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631. The three factors are: (1) the character of the governmental action, (2) the economic impact of the regulation upon the claimant, and (3) the extent to which the regulation has interfered with the distinct investment backed expectations. *Id.*

Sheffield also clarified also addressed the three-factor test set forth by the United States Supreme Court in *Penn Central.* Prior to Sheffield, the Texas Supreme Court appeared to apply only the last two *Penn* factors: (2) the economic impact of the regulation upon the claimant, and (3) the extent to which the regulation has interfered with the distinct investment backed expectations.

> "Determining whether the government has unreasonably interfered with a landowner's right to use and enjoy property requires a consideration of two factors: the economic impact of the regulation and the extent to which the regulation interferes with distinct investment-backed expectations. *Mayhew*, 964 S.W.2d at 935.

In light of *Mayhew*, it appeared courts addressing the Texas Takings Clause did not fret over the character of government action. However, the Texas Supreme Court, in *Sheffield*, expressly applied the "character of government action" factor. *Sheffield*, at 672.

Not only did *Sheffield* apply all three *Penn Central* factors, the decision noted the three-factors were not exclusive:

> Nor are the three *Penn Central* factors the only ones relevant in determining whether the burden of regulation ought "in all fairness and justice" to be borne by the public. Whether a regulatory taking has occurred, the Supreme Court has said, "depend[s] on a complex of factors *including* " the three set out in *Penn Central.* The analysis "necessarily requires a weighing of private and public interests" and a "careful examination and weighing of all the relevant circumstances in this context." *Sheffield*, at 672.

B. Exactions

The second identified category of takings claims applies when development approval is conditioned upon a required dedication of land—commonly termed an exaction. A municipality can exercise its police power to require "the 'donation' of streets, alleys, water mains, and sewer mains as a condition to subdivision development." *See City of College Station v. Turtle Rock Corp.,* 680 S.W.2d 802, 806, (Tex.1984).

The appropriate test to determine whether the exercise of this power constitutes a taking, at least for purposes of the Fifth Amendment, was set forth by the U.S. Supreme Court in its *Nollan* and *Dolan* decisions.

Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S.Ct. 3141 (1987) involved a public easement across beachfront property to be dedicated prior to receiving a building permit. The Court concluded the easement requirement constituted a taking under the Fifth Amendment. In reaching its conclusion, the Court noted the California Coastal Commission failed to establish that a sufficient "nexus" existed between the required beachfront easement and the projected impact of the reconstructed beach house. ("Here the Commission's imposition of the access-easement condition cannot be treated as an exercise of land-use regulation since the condition does not serve the public purposes related to the permit requirement.") *Id.*

In reaching its conclusion, the Court set forth the "essential nexus" test. "In short, unless the permit condition serves the *same governmental purpose* as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion'." *J.E.D. Associates, Inc. v. Atkinson,* 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981); see Brief for United States as *Amicus Curiae* 22, and n. 20. See also *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S., at 439, n. 17, 102 S.Ct., at 3178, n. 17." *Nollan*, at 837.

In 1994, the Supreme Court decided *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Court, while tweaking *Nollan's* "essential nexus" test, added the "rough proportionality" test. In deciding *Dolan*, the Court found an essential nexus, under *Nollan*, existed between the required 15-foot exaction and the proposed development. Nonetheless, the Court found the exaction constituted a taking. The Court examined the required degree to which the connection between the exaction and the projected impact of proposed development. *Id.* "We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 361. With these magic words, the "rough proportionality test" was born.

The Texas Supreme Court expressly held that the *Nollan/Dolan* factors applied to a taking under the Texas Takings Clause in *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d. 620 (Tex. 2004). "We restate the rule of *Nollan* and *Dolan* generally as follows: conditioning government approval of a development of property on some exaction is a compensable taking unless the condition (1) bears an essential nexus to the substantial advancement of some legitimate government interest and (2) is roughly proportional to the projected impact of the proposed development." *Id.*, at 634.

Stafford also addressed the issue of whether a viable exaction claim could be found where no dedication of *actual* private property was required, but that the condition imposed was improvement of existing public property. *Id.*

> "For purposes of determining whether an exaction, as a condition of government approval of development, is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved. The *Dolan* standard should apply to both. *Id.*, at 640.

The Texas Legislature responded to *Stafford* by codifying its holdings in Tex. Local Gov't Code § 212.904.

C. Physical Occupations

The third and final category of takings claims is found when physical occupation or invasion of private property occurs. As previously discussed, regulations can rise to the level of a physical occupation. For example, a New York law requiring a landlord to permit installation of cables on rental property constituted a constitutionally compensable taking. *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419, 102 S.Ct. 3164 (1982).

Obviously, an entity may inadvertently install public equipment (telephone poles, pipeline, light signals, etc.) on private property. The entity may believe it owns the subject property or that a proper easement has been obtained. Upon such action, the municipality could very well be served with an inverse condemnation claim, alleging a physical taking. If the entity does not own the property or have a proper easement, the only remaining issue becomes the compensation required. However, a number of physical taking claims are also seen in the context of flooding or damaging private property in order to confer a public benefit. These claims present more in-depth legal analysis.

When private property is physically invaded, factors such as "denial of all economically viable use" or those set forth by *Penn Central* are not considered. "A permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Loretto*, at 426. Typically the only issues contested are whether the entity "intended" to take the property and/or whether the property was taken for "public use."

In 2004, the Texas Supreme Court addressed the "intent" issue in a takings claim under Art. I, Sec. 17 of the Texas Constitution. *See City of Dallas v. Jennings*, 142 S.W.3d 310 (Tex. 2004). In *Jennings*, homeowners brought an inverse condemnation action against the City of Dallas for recovery of damage to their home as a result of the city's efforts to unclog a sewer line. *Id.*

The parties in *Jennings* did not dispute that an intent element is required for the inverse condemnation claim; however, they disagreed as to what the intent was attributed to. *Id.* The homeowners argued the city

only needed to intend the *act* of unclogging the sewage backup. *Id.* The city, however, argued the homeowners must establish the city intended the *damage* to the property. *Id.*

The *Jennings* court disagreed with both positions. The court held the appropriate intent, for purposes of an inverse condemnation claim under Art. I, Sec. 17, is found when, "in order to confer a public benefit", the governmental entity (1) knows that a specific act is causing identifiable harm; or (2) knows that a specific property damage is substantially certain to result from an authorized government action. *Id.*, at 314.

Dismissing the claim against the city, the court found no evidence that *at the time* the city unclogged the sewer line, the city knew that any flooding damage would occur. *Id.* at 315.

Accordingly, at least as applied to flooding/damage claims under Art. I, Sec. 17, a successful plaintiff must establish:

> (1) his or her property was taken, damaged, or destroyed,
> (2) for public use, and
> (3) either the governmental entity:
> (i) knew that a specific act was causing identifiable harm; or
> (ii) knew that a specific property damage was substantially certain to result from an authorized government action.

In 2005, the Texas Supreme Court, relying on the *Jennings* decision, decided *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005). The City of Keller approved the development of a new subdivision. Wilson brought suit alleging that the approval of the subdivision (and the storm water drainage plans, as amended) caused Wilson's property to flood, resulting in a taking under Art. I, Sec. 17.

The Court noted the following: (1) Wilson's expert testified that flooding was inevitable, (2) Keller knew the development would increase runoff at the head of the drainage system, and (3) the prior drainage plan had required drainage ditch across landowners' property, which was not required on an amendment. *Wilson*, at 828-29. However, three sets of engineers certified that revised plans complied with the city's codes and regulations and would not increase downstream flooding, and no evidence showed that city knew more than it was told by the engineers. *Id.* Accordingly, the court dismissed Wilson's claims, finding the "intent" element had not been met. *Id.*

To prevail on any taking claim, including a flooding claim, the landowner must establish that whatever property interest was allegedly taken, was taken for public use. Both the United States and Texas Constititutions require just compensation for a taking "for public use." Accordingly, an entity has no power to take property that is not for public use.

V. *KELO* AND "PUBLIC USE"

The remainder of this paper explores the public use requirement found in the United States and Texas Constitutions. Specifically, the paper introduces and analyzes the United States Supreme Court's extension of the public use requirement in its 2005 decision in *Kelo v. City of New London, Connecticut, et al*, 545 U.S. 469, 126 S.Ct. 326 (2005). *Kelo* extended (or at least expressly stated) the public use doctrine, at least as applied to the Fifth Amendment, to include the exercise of the eminent domain power for furtherance of economic development plans.

A. Facts of *Kelo v. City of New London*

In 1990, New London, Connecticut was designated by a Connecticut state agency as an "economically distressed city". *Id.* at 473. New London's unemployment rate was double that of Connecticut. *Id.* Its population was the lowest since 1920. *Id.*

State and local officials began efforts to introduce an economic development plan to revitalize portions of New London. The New London Development Corporation (NLDC), was reactivated to assist in the revitalization. In 1998, Connecticut authorized issuance of a 5.35 million dollar bond to support NLDC's planning activities and a 10 million dollar bond towards the creation of a Fort Tumbull State Park. Also in 1998, Pfizer Inc., made plans to build a 300 million dollar facility, projected to assist in bringing other business into New London.

In May 1998, the New London City Council authorized NLDC to submit its plans to various state agencies. A number of agencies analyzed the development plan's impact on the proposed area. *Id.* at 474, n. 2. NLDC obtained state approval, and began its plans to revitalize approximately 90 acres of the Fort Trumbull area.

Officials believed the development plan would provide over 1,000 jobs and would increase tax and other revenues to the city. *Id.* at 472. The city council approved the development plan in January 2000. *Id.*, at 475. New London authorized the NLDC to exercise

the city's eminent domain power to take any necessary property. *Id.*

Importantly, New London did not allege that any of the properties sought were in poor condition. The properties were to be condemned only because of their location and only because of the economic development plan. The City negotiated the purchase of the majority of the property in the 90 acre area. *Id.* However, not all property owners agreed to New London's requests.

Susette Kelo moved to the Fort Trumbull area in 1997. Charles and Wilhelmina Dery lived 60 years of marriage in their Fort Trumbull home. In fact, Wilhelmina Dery was born in their home in 1918, living her entire life in that residence. Nine petitioners, including Ms. Kelo and Mr. and Mrs. Dery, who owned 26 parcels of the property being sought, refused to sell their property. New London instituted condemnation proceedings.

B. Procedural History

The nine petitioners brought suit in New London Superior Court in December 2000, alleging the taking of the property violated the public use requirement of the Fifth Amendment. The Superior Court conducted a seven (7) day bench trial, granting a permanent restraining order prohibiting the taking of some of the properties, but allowing the taking of others. *Id.* at 476.

Both the petitioners and New London appealed. The Connecticut Supreme Court held that all of the takings were permissible under the Fifth Amendment. *Id.* The court noted that takings for economic development projects were premissible, as such projects were in the public interest and constituted "public use." (Relying on Conn. Gen. State. § 8-186, et seq.). *Id.* The court also relied on case law, including two U.S. Supreme Courts in reaching its conclusions. *Id.*

The Connecticut Supreme Court's decision included a dissent, advocating a "heightened standard" when analyzing a taking justified by economic development. *Id.* at 477. The dissent would have found a valid public use in theory; but, the city did not show, by clear and convincing evidence, that the benefits were substantially certain. Id.

The United States Supreme Court granted certiorari to address the issue of whether a taking for the purpose of economic development satisfies the "public use" requirement of the Fifth Amendment.

C. Public Use Generally

Any taking must be "rationally related" to a proposed public use. *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 241, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984); see also *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954). This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses, see, *e.g., FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313-314, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

"Private transfers" do not constitute public use. In other words, property taken from one private property owner and transferred to the private benefit of another private party for that private party's benefit does not constitute "public use." "The City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party." *See Midkiff,* 467 U.S., at 245, 104 S.Ct. 2321 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void")." *Id.* at 477.

Likewise, a pretextual public use will not suffice. "Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 478.

Furthermore, public use does not require actual "use." *Kelo* noted that New London was not condemning the land in its entirety to be *used* by the general public. "On the other hand, this is not a case in which the City is planning to open the condemned land-at least not in its entirety-to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers." *Id.*

Originally, courts applied a strict "public use" interpretation, requiring the condemned property to actually be put into use for the general public. However, the Court noted that the strict "use" test eroded at the end of the 1800's. Indeed, the Supreme Court adopted the more liberal "public purpose" test due to the difficulty in administering the strict interpretation. *Id.*, at 479-80. (*citing Fallbrook Irrigation Dist. V. Bradley*, 164 U.S. 112, 17 S.Ct. 56 (1896).

Accordingly, the Court examined whether the economic development proposed by New London would meet the "public use" requirement, by

determining whether the development would serve a public *purpose*. *Id.*, at 480. A 5-4 Court concluded that the economic development plan did satisfy the "public use" requirement of the Fifth Amendment. Justices Stevens, Souter, Ginsburg composed the majority, with Justice Kennedy, the deciding vote, filed a concurring opinion. Former Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Thomas dissented.

D. Great Deference to the Municipalities' Determination of Public Purpose

The Court repeatedly identified the Court's "longstanding policy of deference to legislative judgments in [public purpose determinations]." *Id.* Continuing, the Court noted:

> Our earliest cases in particular embodied a strong theme of federalism, emphasizing the "great respect" that we owe to state legislatures and state courts in discerning local public needs. See *Hairston v. Danville & Western R. Co.*, 208 U.S. 598, 606-607, 28 S.Ct. 331, 52 L.Ed. 637 (1908) (noting that these needs were likely to vary depending on a State's "resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people"). For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power. *Id.* at 482-83.

For example, *Berman v. Parker*, 348 U.S.26, 75 S.Ct. 98 (1954) found that a "better balanced, more attractive community" constituted a public purpose. That Court noted, "it is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." Furthermore, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321 (1984) held that transferring title to reduce the concentration of land ownership constituted a public purpose. *Kelo* noted "social and economic evils of a land oligopoly qualified as a public use." *Kelo*, at 482, citing *Midkiff*, at 241-42.

Accordingly, the *Kelo* gave deference to New London's determination that the area was sufficiently distressed to justify a program of economic rejuvenation. *Kelo*, at 484. Furthermore, once the public purpose requirement is met, the entity's determination of the amount of land needed is also treated with great deference. *Id.*, at 488-89. ("We also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project.")

VI. ECONOMIC DEVELOPMENT AS A PUBLIC PURPOSE

The *Kelo* Court expressly rejected the petitioners' argument for a bright line rule that economic development does not satisfy the public use requirement of the Fifth Amendment. "Promoting economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized." *Id.* Accordingly, Kelo expressly held that an economic development plan does constitute public use.

It is important to note that the economic development plan presented in *Kelo* was somewhat precise. The majority opinion noted that the plan implemented by New London was "carefully formulated." ("The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including-but by no means limited to-new jobs and increased tax revenue.") *Id.* Perhaps this language leaves room for the landowner to contest the detail of any economic development plan proposed.

A recent Fifth Circuit decision applying *Kelo* supports the argument of a detailed development plan requirement. *See Western Seafood Co. v. United States, et al*, 202 Fed. Appx. 670 (5th Cir. 2006). In *Western Seafood*, the owner of a shrimp trawler servicing business sought to prevent the City of Freeport from condemning its riverfront property for purposes of constructing a proposed privately operated marina. *Id.* The Fifth Circuit, relying on *Kelo*, affirmed the district court's granting of summary judgment—finding a public use. The court found the taking of Western Seafood's property was in furtherance of Freeport's economic development plan to revitalize a "flagging local economy", which under *Kelo* constituted a public use. *Id.*, at 675. However, the court noted the taking was pursuant to a "carefully considered development plan." *Id.* Continuing, the court directed attention to the fact that the plan "followed a commissioned study that reported on the economically depressed downtown area and suggested strategies for its revival." *Id.*

Accordingly, the entity desiring to exercise eminent domain powers for economic development purposes should consider preparing a detailed and "carefully considered" development plan. This potentially removes the landowners ability to

distinguish *Kelo* and *Western Seafood* on the basis of economic detail and findings.

In *Kelo*, the Court rejected petitioners' argument that economic development used as a public use allows takings for private persons. As you will recall, property taken from one private property owner and transferred to the private benefit of another private party does not constitute "public use." However, simply because a private party is benefited does not remove public use. Indeed, the Court expressly recognized that economic development may indeed benefit private parties, "quite simply, the government's pursuit of a public purpose will often benefit individual private parties." *Kelo*. at 485. The determinative factor is that a legitimate public purpose be achieved and be the primary purpose for the condemnation.

The Court also rejected petitioners' contention that New London must establish with "reasonable certainty" that the anticipated public benefits will actually accrue. Quoting *Midkiff*, the Court reaffirmed "when the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings-no less than debates over the wisdom of other kinds of socioeconomic legislation-are not to be carried out in the federal courts." *Kelo,* at 488. In other words, if the city asserts a benefit will result, the court will not engage in second guessing the likelihood of such benefit coming to fruition.

In *Kelo*, Justice Kennedy wrote a concurring opinion. His concurrence focused on the possibility for a more stringent standard of review in *some* takings cases. Kennedy noted the project developer and Pfizer, Inc., in the *Kelo* condemnation, stood to gain substantial private benefit. However, he noted that the benefit did not constitute the "primary motivation" for the condemnation. *Id.* at 492. However, he recognized there "may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause." *Id.*, at 493. Nonetheless, in his opinion, economic development, in and of itself, does not require the heightened standard. *Id.*

VII. INCREASED TAX REVENUE AS A PUBLIC PURPOSE?

Undoubtedly, increased tax revenue can be argued to benefit the general public. However, do not be misled into believing that *Kelo* stands for the proposition that one persons' property may be condemned and transferred to another simply because the acquiring person will put the property to a more productive use, generating more tax revenue. This type of condemnation would leave all property owners wondering whether they were making the best use of their property.

While *Kelo* does not expressly prohibit such an exercise of eminent domain power, it does not authorize such use either. In fact, the Court expressly refused to address this issue: "a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case." *Id.* at 487. However, the Court noted that such an exercise of eminent domain power would "certainly raise a suspicion that a private purpose was afoot." *Id.* This language implies that increased tax revenue, outside the scope of a "carefully formulated" development plan will not by itself satisfy the "public use" requirement of the Fifth Amendment. Accordingly, property owners should rest easier. It is unlikely that property can be taken, under *Kelo*, simply because a more productive use exists.

VIII. THE RESPONSE TO *KELO* GENERALLY

Kelo noted that the states could place further restrictions on their ability to exercise eminent domain powers for economic development purposes. "We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline." *Id.* at 489.

Indeed, the federal government and twenty-seven states passed legislation attempting to protect property owners following *Kelo*. *See* Somin, Ilya, Assistant Professor of Law, George Mason University School of Law, *The Limits of Backlash: Assessing the Political Response to Kelo* (2007) (Citing H.R. 340 and identifying the specific states' legislative responses to *Kelo*). Most likely, the legislative action was in response to the public concern for private property rights following the *Kelo* decision. Two national surveys indicated that 81% and 95% of persons responding indicated opposition to *Kelo*. *Id.*, at p. 6.

IX. TEXAS' RESPONSE TO *KELO*

The response to Kelo in Texas (prior to the enactment of section 2206.001) appeared to be one of relief for governmental entities exercising eminent domain powers. These entities considered that *Kelo* did not provide any additional eminent domain authority. *See* Peacock, Bill, *Protecting Private Property Rights In Texas After Kelo* (2005), noting Texas Municipal League's website comment that *Kelo* "simply confirms what cities have known all along;

under the Fifth Amendment to the U.S. Constitution, economic development can be as much a 'public use' as a road, bridge, or water tower." However, it is safe to say most governmental entities received more clarification and protection from *Kelo*'s holding.

In 2005, the Texas Legislature made its response to *Kelo*. The Legislature enacted Tex. Gov't Code § 2206.001. The section, on its face, appears to greatly regulate the ability to use eminent domain powers. The legislation expressly limits the ability to exercise eminent domain powers for economic development purposes. The statute, in its entirety, is included in the Appendix for your convenience. **(Attach Tx. Gov't Code §2206.001.**

Section 2206.001 provides that a governmental or private entity many not take private property through the use of eminent domain if the taking:

(1) confers a private benefit on a particular private party through the use of the property;

(2) is for a public use that is merely a pretext to confer a private benefit on a particular private party; or

(3) is for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas under:
(A) Chapter 373 or 374, Local Government Code, other than an activity described by Section 373.002(b)(5), Local Government Code; or
(B) Section 311.005(a)(1)(I), Tax Code.

However, what does Section 2206.001 do to the additional authority, if any, provided by *Kelo*? Unfortunately, there have been no reported cases interpreting the language of section 2206.001. *Western Seafood*, cited above, is the only reported decision to even cite section 2206.001. *Western Seafood*, 202 Fed. Appx. 670. However, the district court in *Western Seafood* denied Western Seafood's state law constitutional claim prior to the enactment of 2206.001. *Id.* at 675-76. Remanding the state law claim for the district court to apply 2206.001, the Fifth Circuit refused to address the Texas Takings claim or section 2206.001's impact. *Id.* The decision simply stated, "the Act places new limitations on the use of eminent domain for economic development purposes, or where the taking confers a benefit on a particular private party." Id.

The three subsections precluding specific activity are analyzed below. However, as a general rule, it is safe to conclude that Section 2206.001 has much more "bark" than it does "bite."

A. Subsection (b)(1)—"Confers a Private Benefit"

Taken literally, subsection (b)(1) precludes any taking that directly or indirectly confers a benefit on a particular private party. Subsections (b)(1) –(3) are disjunctive and provide separate bases to restrict the exercise of eminent domain power. Accordingly, (b)(1) stands on its own as a restriction on eminent domain if the taking "confers a private benefit on a particular private party through the use of the property." There is no doubt the language is overbroad and concerning.

There are few, if any, examples of takings that could not arguably provide some benefit to a private property owner. Recall, *Kelo* expressly recognized the exercise of eminent domain power will likely benefit private parties, "quite simply, the government's pursuit of a public purpose will often benefit individual private parties." *Kelo*, at 485.

Sure, the language of (b)(1) will entice landowners to argue the subsection, read independently, restricts the exercise of eminent domain simply because a private party is benefited. However, it is unlikely a court will strike down an attempt to exercise eminent domain powers simply because a private party is indirectly benefited. The court may more closely scrutinize the taking for a legitimate public purpose, but as long as such purpose is found, the condemnation should not be restricted by (b)(1). The safe conclusion is that subsection (b)(1) is intended to state the already established: that "a *purely* private taking could not withstand the scrutiny of the public use requirement"; it would serve no legitimate purpose of government and would thus be void". *See Midkiff,* 467 U.S., at 245. Perhaps (b)(1) should be analyzed under Justice Kennedy's concurrence. Recall Justice Kennedy noted in his concurrence in *Kelo*, that the benefit to the private person could not constitute the "primary motivation" for the condemnation. *Kelo*, at 492

Furthermore, subsections (b)(2) and (b)(3) would be superfluous if the true intention of the "confer a private benefit" language of (b)(1) were to be construed liberally. Accordingly, governmental entities (and others exercising eminent domain powers)

should not be too concerned that subsection (b)(1) ends all eminent domain that may incidentially benefit a private third party.

B. Subsection (b)(2)—"Public Use as a Pretext"

While Section 2206.001 was passed in response to *Kelo*, presumably to *restrict* the decisions' impact, subsection (b)(2) expressly *affirms* dicta in the opinion. *Kelo* noted a pretextual public purpose would not satisfy the public use requirement of the Fifth Amendment: "Nor would the City be allowed to take property under the *mere pretext* of a public purpose, when its actual purpose was to bestow a private benefit." *Kelo*, at 478. (Emphasis added).

Accordingly, subsection (b)(2) simply states established law, and while providing much bark, does not contain much bite that was not already clearly established by the United States Supreme Court. Accordingly, eminent domain powers are not at all further limited by Section 2206.001(b)(2).

C. Subsection (b)(3)—No Public Purpose in Economic Development...*UNLESS*

Considering the first two restrictions provided no additional protection to the property owner (that was not already held) subsection (b)(3), provides the real "teeth" of Section 2206.001. There is no doubt that (b)(3) restricts an entities ability to regulate for economic development purposes. However, as discussed below, the language of subsection (b)(3) taken in a practical sense, contains a number of loopholes which can be argued to still allow for economic development takings.

The language of (b)(3) is worth a second look. Subsection (b)(3) provides that eminent domain powers may not be exercised if the taking:

> is for economic development purposes, *unless* the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas under:
>
> (A) Chapter 373 or 374, Local Government Code, other than an activity described by Section 373.002(b)(5), Local Government Code; or
>
> (B) Section 311.005(a)(1)(I), Tax Code. (Emphasis added).

Pursuant to the statute, takings for economic development secondary to *municipal community development* or improving *slum or blighted areas*, are not precluded. Accordingly, while the economic development cannot expressly be the *primary* purpose of condemnation, it undoubtedly can be a purpose. By incorporating a "carefully considered" economic development plan, into a "carefully considered" community development plan, the governmental entity may exercise its Eminent Domain power.

Drawing a bright line between when economic development does not improve the "community", and when community development does not provide economic benefits may be difficult. The two concepts greatly overlap. One author notes:

> "Virtually any 'economic development' can be plausibly characterized as also advancing 'community development.' It is difficult to see how the two concepts can be meaningfully distinguished in real world situations." *See* Somin, *supra*, at p. 22.

Tex. Local Gov't Code § 373.005(a) provides that a municipality may adopt a "community development" program by ordinance or resolution. A "community development program" can include "acquisition of real property, including air rights, water rights, and other interests in real property, that is blighted, deteriorated, deteriorating, undeveloped, or *inappropriately developed from the standpoint of sound community development and growth.*" Tex. Local Gov't Code § 373.005(b) (Emphasis added). Somin notes "sound community development and growth" will almost always include economic development and growth. *See* Somin, *supra*, at p. 22.

Agreeing with Somin, the language italicized above could be invoked in almost any situation and greatly lessen the impact of subsection (b)(3). No case law interpreting this language could be found. However, one would assume the beachfront property in *Kelo* and the riverfront property in *Western Seafood* were being taken because that property was not "appropriately" developed from the standpoint of community development and growth. The "carefully formulated" plan in *Kelo* and the "carefully considered" plan in *Western Seafood* appear to be powerful evidence of this conclusion. If a condemning entity wishes to condemn for economic development, that purpose should be considered in light of how it will impact the community and whether a "sound community development and growth argument can be made."

Furthermore, Tex. Local Gov't Code § 373.004 provides the following constitute community development:

> (1) improving the living and economic conditions of persons of low and moderate income;
> (2) benefiting low or moderate income neighborhoods;
> (3) aiding in the prevention or elimination of slums and blighted areas;
> (4) aiding a federally assisted new community; or
> (5) meeting other urgent community development needs, including an activity or function specified for a community development program that incorporates a federally assisted new community.

The door is open to argue that most economic development plans can be categorized as being a secondary benefit to some objective of community development or improvement of slum or blighted area. (Note that Tex. Local Gov't Code § 374.003(3) provides an extremely liberal definition of the term "blighted area.")

However, if no community objective can be argued to be the primary purpose for the condemnation, subsection (b)(3) precludes the condemnation for economic development purposes. For example, recall the *Kelo* majority refused to directly address the question of whether condemnation and transfer to a new owner could occur simply for the purpose of increasing tax revenues. Subsection (b)(3) provides the answer, at least as applied to Texas takings. Taking one private person's property for the sole purpose of putting that property to a use generating higher tax revenue will not, in and of itself, provide a basis for condemnation. It is unlikely a sufficient community development purpose could be argued to constitute the primary purpose of the taking, when only tax revenues are at issue.

To summarize, community development should be the *primary* purpose. However, economic development can be a product of community development. Nothing prohibits economic development from being considered in determining whether property was appropriately developed from a community development and growth standpoint.

D. Great Deference to the Governmental Entity is Lost

However, the governmental entities' given purpose or explanation that economic development is secondary, will no longer be given deference. Subsection (e) provides that an entity's determination or statement that a specific condemnation does not violate the provisions of § 2206.001(b) does not create a presumption that the condemnation is valid. See Section 2206.001(e). In other words, if challenged, the condemning entity has the burden of proof that the property being condemned is not prohibited by section 2206.001. The findings or conclusions of the condemnor no longer constitute a presumption requiring the condemnee to disprove.

E. Exceptions to Section 2206.001

Where the Legislature gave to private property owners with one hand in its response to *Kelo*, it took away with the other. Subsection (c) sets forth 11 types of condemnations that are not subject to the restrictions set forth in section 2206.001. (See Section 2206.001 set forth in its entirety in the Appendix for the complete list of condemnation projects not subject to section 2206.001.) These exceptions range from condemnations for roadways, to public buildings and parks, to a library or museum, to "a sports and community venue project approved by voters at an election held on or before December 1, 2005, under Chapter 334 or 335, Local Government Code." If you have any question, only one sports stadium fits the exemption set forth in § 2206.001(c)(6). Indeed, the proposed $650 million Dallas Cowboys stadium to be built in Arlington, Texas is exempted from the restrictions on economic development condemnation. If any of the enumerated exemptions apply, the condemning authority may exercise its eminent domain powers *solely* for economic development purposes.

F. Interim Committee

The 2005 Legislature required an interim committee to study the general use of eminent domain power. *See* Section 8 of Acts 2005, 79th Leg., 2nd C.S., Chapter 1. The committee consisted of five members of the House of Representatives and five members of the Senate. The committee was directed to "study the use of the power of eminent domain, including the use of the power of eminent domain for economic development purposes...." The committee was to prepare a report of the study, to be filed with the Legislature by December 1, 2006. This report will provide the Legislature with the problems facing condemning entities and the impact of Section 2206.001 in its current form.

G. Passed and Proposed Legislation Impacting Section 2206.001

At this time, the 80th Legislature passed bills clarifying the rights of property owners in eminent domain proceedings. The passed legislation is outlined below.

1. HB 1495

House Bill 1495 establishes a bill of rights for property owners whose property may be acquired by governmental or private entities through eminent domain that includes rights to notice and due process. Before eminent domain may commence, an entity must provide a copy of the bill of rights to the affected property owner.

At this time, the following proposed legislation address issues set forth by *Kelo* and Tex. Gov't Code § 2206.001:

1. SB 576

Senate Bill 576 adds to section 2206.001 by prohibiting the exercise of eminent domain powers for "recreational purposes." Recreational purposes *include*: parks and recreation systems, or improvements to same, and parks, greenbelts, and trails.

2. HB 3055

House Bill 3055 seeks to remove any limitations on a common carrier's ability to be exempted in § 2206.001(c)(7). Currently, the statute limits a common carrier's exemption by provisions of the Natural Resources Code and the Texas Business Corporations Act.

3. HB 3057

House Bill 3057 seeks to add a definition of "public use" in the Texas Property Code to expressly exclude economic development. Proposed Section 21.010 appears to move closer to the "public use" requirement than the "public purpose" requirement now used. The bill also expressly states, "Public use does not include the public benefit of economic development." If enacted, this section would abrogate the "community development" exception of section 2206.001(b)(3).

4. HB 2006

House Bill 2006 requires Legislative vote in public for eminent domain to proceed and says that entities must make a good-faith effort to acquire properties from their owners voluntarily. Vetoed by Governor June 15, 2007.

X. CONCLUSION

It will be interesting to follow urban developments and revitalization projects in the post-*Kelo* world. There is little doubt that federal, state and local governments will continue to plan for growth and revitalization. Eminent Domain will continue to be used, within the confines of statutory and constitutional law, to obtain properties for urban renewal. The post-*Kelo* restrictions must be addressed in the urban revitalization process. To date, 34 states adopted legislation restricting the use of eminent domain for economic development. None of these statutes, however, will completely preclude government from condemning private property in service of urban revitalization schemes. Most of the statutes limit revitalization projects to those that address blight; accordingly, it will be more difficult, or at least more costly, to involve private developers in the revitalization process. This may require more governments to move into the business of running retail and commercial enterprises. In fact, the City of Freeport, Texas, appears to have decided to go into the marina business rather than continue to defend its embattled revitalization project under post-*Kelo* Texas statutes. There is a great and serious concern that urban revitalization in the post-*Kelo* world is likely to be less efficient, less effective and less fair than it has the potential to be. We will have to wait and see.

Vernon's Texas Statutes and Codes Annotated
Government Code
Title 10. General Government
Subtitle E. Government Property
Chapter 2206. Limitations on Use of Eminent Domain

§ 2206.001. Limitation on Eminent Domain for Private Parties or Economic Development Purposes

(a) This section applies to the use of eminent domain under the laws of this state, including a local or special law, by any governmental or private entity, including:

(1) a state agency, including an institution of higher education as defined by Section 61.003, Education Code;
(2) a political subdivision of this state; or
(3) a corporation created by a governmental entity to act on behalf of the entity.

(b) A governmental or private entity may not take private property through the use of eminent domain if the taking:

(1) confers a private benefit on a particular private party through the use of the property;
(2) is for a public use that is merely a pretext to confer a private benefit on a particular private party; or
(3) is for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas under:
(A) Chapter 373 or 374, Local Government Code, other than an activity described by Section 373.002(b)(5), Local Government Code; or
(B) Section 311.005(a)(1)(I), Tax Code.

(c) This section does not affect the authority of an entity authorized by law to take private property through the use of eminent domain for:

(1) transportation projects, including, but not limited to, railroads, airports, or public roads or highways;
(2) entities authorized under Section 59, Article XVI, Texas Constitution, including:
(A) port authorities;
(B) navigation districts; and
(C) any other conservation or reclamation districts that act as ports;
(3) water supply, wastewater, flood control, and drainage projects;
(4) public buildings, hospitals, and parks;
(5) the provision of utility services;
(6) a sports and community venue project approved by voters at an election held on or before December 1, 2005, under Chapter 334 or 335, Local Government Code;
(7) the operations of:
(A) a common carrier subject to Chapter 111, Natural Resources Code, and Section B(3)(b), Article 2.01, Texas Business Corporation Act; or
(B) an energy transporter, as that term is defined by Section 186.051, Utilities Code;
(8) a purpose authorized by Chapter 181, Utilities Code;
(9) underground storage operations subject to Chapter 91, Natural Resources Code;
(10) a waste disposal project; or
(11) a library, museum, or related facility and any infrastructure related to the facility.

(d) This section does not affect the authority of a governmental entity to condemn a leasehold estate on property owned by the governmental entity.

(e) The determination by the governmental or private entity proposing to take the property that the taking does not involve an act or circumstance prohibited by Subsection (b) does not create a presumption with respect to whether the taking involves that act or circumstance.

CREDIT(S)

Added by Acts 2005, 79th Leg., 2nd C.S., ch. 1, § 1, eff. Nov. 18, 2005.

AN ACT

relating to a bill of rights for property owners whose property may be acquired by governmental or private entities through the use of eminent domain authority.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. This Act may be cited as the Landowner's Bill of Rights Act.

SECTION 2. Subchapter B, Chapter 402, Government Code, is amended by adding Section 402.031 to read as follows:

Sec. 402.031. PREPARATION OF LANDOWNER'S BILL OF RIGHTS STATEMENT. (a) The attorney general shall prepare a written statement that includes a bill of rights for a property owner whose real property may be acquired by a governmental or private entity through the use of the entity's eminent domain authority under Chapter 21, Property Code.

(b) The landowner's bill of rights must notify each property owner that the property owner has the right to:

(1) notice of the proposed acquisition of the owner's property;

(2) a bona fide good faith effort to negotiate by the entity proposing to acquire the property;

(3) an assessment of damages to the owner that will result from the taking of the property;

(4) a hearing under Chapter 21, Property Code,

including a hearing on the assessment of damages; and

(5) an appeal of a judgment in a condemnation proceeding, including an appeal of an assessment of damages.

(c) The statement must include:

(1) the title, "Landowner's Bill of Rights"; and

(2) a description of:

(A) the condemnation procedure provided by Chapter 21, Property Code;

(B) the condemning entity's obligations to the property owner; and

(C) the property owner's options during a condemnation, including the property owner's right to object to and appeal an amount of damages awarded.

(d) The office of the attorney general shall:

(1) write the statement in plain language designed to be easily understood by the average property owner; and

(2) make the statement available on the attorney general's Internet website.

SECTION 3. Subchapter B, Chapter 21, Property Code, is amended by adding Section 21.0112 to read as follows:

Sec. 21.0112. PROVISION OF LANDOWNER'S BILL OF RIGHTS STATEMENT REQUIRED. (a) Before a governmental or private entity with eminent domain authority begins negotiating with a property owner to acquire real property, the entity must send by first-class mail or otherwise provide a landowner's bill of rights statement provided by Section 402.031, Government Code, to the last known address of the person in whose name the property is listed on the

most recent tax roll of any appropriate taxing unit authorized by law to levy property taxes against the property.

(b) The statement must be:

(1) printed in an easily readable font and type size; and

(2) if the entity is a governmental entity, made available on the Internet website of the entity if technologically feasible.

SECTION 4. Section 21.012(b), Property Code, is amended to read as follows:

(b) The petition must:

(1) describe the property to be condemned;

(2) state the purpose for which the entity intends to use the property;

(3) state the name of the owner of the property if the owner is known; [~~and~~]

(4) state that the entity and the property owner are unable to agree on the damages; and

(5) if applicable, state that the entity provided the property owner with the landowner's bill of rights statement in accordance with Section 21.0112.

SECTION 5. The office of the attorney general shall prepare the landowner's bill of rights statement required by Section 402.031, Government Code, as added by this Act, not later than January 31, 2008.

SECTION 6. The changes in law made by this Act apply only to a condemnation proceeding in which the petition is filed on or after

the effective date of this Act and to any property condemned through the proceeding. A condemnation proceeding in which the petition is filed before the effective date of this Act and any property condemned through the proceeding are governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

SECTION 7. This Act takes effect February 1, 2008.

President of the Senate

Speaker of the House

I certify that H.B. No. 1495 was passed by the House on May 3, 2007, by the following vote: Yeas 139, Nays 0, 2 present, not voting; and that the House concurred in Senate amendments to H.B. No. 1495 on May 25, 2007, by the following vote: Yeas 141, Nays 0, 1 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 1495 was passed by the Senate, with amendments, on May 22, 2007, by the following vote: Yeas 30, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

_____

Governor