

Senate Bill 18: The Necessity of a Taking

by Bill Peacock, Vice President of Research and Planning and Director, Center for Economic Freedom

According to the United States and Texas constitutions, eminent domain can only be used for a public use. Reflecting these constitutional provisions, SB 18 prohibits taking of private property unless the taking is for a public use.

While this is a good provision in SB 18, it falls short of accurately reflecting current takings law on public use.

A 2005 3rd Court of Appeals decision in *Whittington v. City of Austin* clearly explains the current requirement in law that a condemnation must be both 1) for a public use and 2) **necessary** to achieve that public use. Here is how, on p. 8, the court describes current law on this issue:

There are two aspects to the “public use” requirement. First, the condemnor must intend a use for the property that constitutes a “public use” under Texas law. Second, **the condemnation must actually be necessary to advance or achieve the ostensible public use.** A related concept is that a mere legislative declaration that a given use is a public use or is necessary does not control if the true intended use is a private use. **This second aspect of public use is commonly termed the “necessity” or “public necessity” requirement.**

This is repeated in a 2010 3rd Court of Appeals decision in the same case.

The *Whittington* case centers on this issue, since a jury “found that the condemnation [by Austin] (1) was not “necessary to advance or achieve a public use” and (2) was “arbitrary and capricious, made in bad faith, or fraudulent.”

In addition to case law, the necessity requirement is also in statute. Here are examples:

Section 251.001(a), Local Government Code: (a) When the governing body of a municipality **considers it necessary**, the municipality may exercise the right of emi-

nent domain for a public purpose to acquire public or private property, whether located inside or outside the municipality, for any of the following uses purposes:

Sec. 111.019, Natural Resources Code. RIGHT OF EMINENT DOMAIN. (a) Common carriers have the right and power of eminent domain. (b) In the exercise of the power of eminent domain granted under the provisions of Subsection (a) of this section, a common carrier may enter on and condemn the land, rights-of-way, easements, and property of any person or corporation **necessary** for the construction, maintenance, or operation of the common carrier pipeline.

Sec. 52j, Texas Constitution. SALE OF REAL PROPERTY ACQUIRED THROUGH EMINENT DOMAIN. A governmental entity may sell real property acquired through eminent domain to the person who owned the real property interest immediately before the governmental entity acquired the property interest, or to the person’s heirs, successors, or assigns, at the price the entity paid at the time of acquisition if: (1) the public use for which the property was acquired through eminent domain is canceled; (2) no actual progress is made toward the public use during a prescribed period of time; or (3) the property is **unnecessary** for the public use.

Since SB 18 does not include ‘necessary,’ it incompletely restates current law. This could set up a conflict that would have to be litigated, and could result in a weakening of the current standard that takings have to be both for a public use and necessary for that use.

Recommendation

SB 18 should accurately reflect law that a taking be necessary for a public use. This would be done on p. 2 of the engrossed version by inserting the word ‘necessary,’ as follows: **“(4) is not necessary for a public use.”** 