

## The Initial Use Requirement HB 1250 & SB 829

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### Findings

- Private property can only be taken through eminent domain if that property is necessary for a public use.
- Yet there is no requirement in law that private property, once taken, actually be used for the public use for which it was taken.
- Texas law should require that private property must be initially used for the public use for which the condemnor claimed it was necessary.

Neither the law nor the courts have left any doubt about the fact that private property can only be taken through eminent domain if that property is necessary for a public use. This requirement is one of the fundamental protections of private property, enshrined in both the U.S. and Texas constitutions.

Yet there is a big gap in this protection: there is no requirement that private property, once taken, actually be used for the public use for which it was taken.

HB 1250 and SB 829 seek to close this gap by requiring that private property is initially used for the public use for which the condemnor claimed it was necessary.

### The Public Use and Public Necessity Requirements

A 2005 3rd Court of Appeals decision in *Whittington v. City of Austin* clearly explains how current law requires that a condemnation must be both 1) for a public use and 2) necessary to achieve that public use:

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.

The case law on this did not come from nowhere; the necessity requirement begins in statute. Here are examples:

Section 251.001(a), Local Government Code: When the governing body of a municipality **considers it necessary**, the municipality may exercise the right of eminent domain for a public use to acquire public or private property, whether located inside or outside the municipality, for any of the following uses;

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.**

Additionally, a recent amendment to the Texas Constitution includes the concept of public use necessity:

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

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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*.

Both the public use and public necessity requirements are embodied in the legal documents adopted by condemnors and filed in courts. Here is an example from a city of Austin 2013 condemnation resolution:

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

That the City Attorney, or other authorized designee, is hereby authorized and directed to file, or cause to be filed, a suit in eminent domain on behalf of the City of Austin against the owner now having, or who may acquire, *an interest in the real property interests nec-*



Toyota truck manufacturing plant, San Antonio, Texas.

*essary to the City*, described and located below, for the public uses set out below, and to take whatever other action may be deemed appropriate to effect the necessary acquisitions.

**Public Use:** A permanent wastewater line easement described in Exhibit “A” for the purpose of installing, operating, maintaining, repairing, replacing, and upgrading permanent wastewater lines and appurtenances thereto, in order to increase and improve the City’s ability to provide sanitary sewer services to the public and to prevent leakage from wastewater lines to protect public health.

In fact, in resolutions and other legal documents in an eminent domain case condemnors are required to list the public use for which a property is being taken and state that the property is necessary for that public use.

### HB 1250 & SB 829: The Initial Public Use Requirement

Common sense would seem to dictate that if a condemnor is allowed only to take property that is necessary for a public use then the condemnor would be required to use that property for the public use for which it was taken. Yet in the absence of an outright prohibition of this in statute, the courts have declined to develop such a doctrine. The end result is that property, once taken, can be used for just about anything the condemnor chooses.

The most prominent example of this is the Applewhite Reservoir. Of course, there is no Applewhite Reservoir, but the San Antonio Water System did acquire approximately 2,500 acres under the threat of eminent domain for the construction of this reservoir. Voters twice refused to approve bonds for the project, so the reservoir was never built. Neither, however, was the project officially cancelled, which might have triggered the buy-back provision in law thus giving previous property owners the right to buy back the unused land. Today, much of the land acquired for the AppleWhite Reservoir is being used for a Toyota truck manufacturing plant, with other parcels being used for a land heritage preserve.

HB 1250 and SB 829 both seek to remedy this problem with current law. They simply add this requirement to Chapter 2206 of the Government Code:

A real property interest acquired through eminent domain must initially be used for the public use for which the property was acquired.

### What Will Happen if HB 1250 or SB 829 Becomes Law?

The initial use requirement is the logical extension of current law, and adds an extra layer of protection to help ensure that private property is taken by the government only when absolutely necessary. However, the question does arise; what if situations like Applewhite arise again where an entity condemns property then finds that it no longer needs the property for the public use for which it is taken?

The committee substitute to HB 1250 deals with this issue. It provides three ways that property might be repurposed, which can occur if:

- (1) the property is offered for sale to the original owner or the owner's heirs, successors, or assigns at the price for which the property was acquired and the property owner or the owner's heirs, successors, or assigns declines to purchase the property within 180 days after being given notice;
- (2) the entity that acquired the real property interest through eminent domain makes a good faith effort to locate and provide notice to the original owner of the property or the owner's heirs, successors, or assigns as prescribed but the owners or the owner's heirs, successors, or assigns cannot be located after one year; or
- (3) the entity that acquired the real property interest through eminent domain acquires a release from the original owner of the property or the owner's heirs, successors, or assigns allowing the property to be used for a use other than for which it was originally acquired. Compensation may be paid to obtain the release.

Some condemners have expressed concern that the initial use requirement may increase costs to the condemners. While any additional costs under this legislation are really the fault of the condemners who failed to properly condemn private property, the committee substitute addresses these concerns by providing a mechanism for dealing with the challenges that arise when property

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taken for a certain public use might be considered for another initial use.

### Questions and Answers

The following questions and answers are designed to address some concerns raised about the initial use requirement.

**Q:** Will the initial use requirement force cities to spend more money acquiring land for different purposes and increase the use of eminent domain?

**A:** Eminent domain involves taking land from a property owner. This should never be done except for a public use. The law already requires that the use for which property is taken must be specified. This legislation simply requires condemners to do what they should already be doing, and protects property owners from government using eminent domain to speculate on property for future unknown developments. It will not increase costs for cities that properly acquire properties in the first place, and neither will it increase the use of eminent domain.

**Q:** The Texas Legislature cannot begin to envision the changed local circumstances which can take place following land acquisition, sometime many decades after the acquisition. Why should it tie the hands of local government with this restriction?

**A:** This legislation does not interfere with local decisions on the use of a property. Current law already requires condemners to certify that condemned property is for a

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public use and necessary for that use. If the condemnor uses the property in the way it has already certified in legal documents it intends, the initial use requirement will have no impact on future uses. Once a property has been initially used for the public use for which it was taken, HB 1250 or SB 829 would have no effect on future uses. Local governments would be free to use the property as determined by the entity.

**Q:** If HB 1250 is passed, would it not be best for a condemnor to acquire land for very broad purposes, which would raise the cost to the taxpayers of the acquiring entity?

**A:** Condemnors are already required by law to specifically state the public use for which a property is being acquired. If an entity is unsure of why it is acquiring land, perhaps it should not acquire it in the first place, at least under the threat of eminent domain. Any increased cost to taxpayers would be based on a lack of due diligence or planning by a condemnor.

**Q:** What if land is purchased for a park, some or all of which was purchased through eminent domain. Then, years later, it is determined by the city council a portion of the park is needed for a library, fire station, or even a road. Would the initial use requirement block this change in use?

**A:** No. As long as a property is initially used for the use for which it was taken, there are no prohibitions or restrictions on the future use of the property.

**Q:** Will HB 1250 or SB 829: 1) interfere with the right of persons to contract with government entities to sell their property, 2) impair the title of property purchased from third parties by government entities, 3) cause waste by

discouraging government entities from repurposing excess property acquired for projects, or 4) lead to litigation between governments and sellers of property due to the vagueness of the remedies in the proposed subsection.

**A:** 1) This legislation only applies to properties acquired or taken through the eminent domain process. Though it is unclear how often such a contract would be entered into, any person could contract with a government entity outside the eminent domain process to sell their property; 2) The initial use doctrine will not impair the title of property purchased from third parties by government entities, unless a property is not initially used for the public use for which it was taken; 3) It is not wasteful to protect private property rights. Any waste under this scenario would be caused by poor execution of eminent domain by a condemnor. However, the remedies provided for under this legislation allow for the most efficient means of repurposing a property's use if the permission of the original property owner is obtained; and 4) Property owners acting under the threat of eminent domain are never voluntary sellers of property—they are forced to sell. The only time litigation might be considered here would be if the condemnor failed to live up to its certified statements in the condemnation proceedings. Though, again, the remedies provided under this legislation provide an efficient means for avoiding this problem as long as condemnors live up to their responsibilities under the law.

**Q:** Often, governments might acquire more property than they actually need to avoid an additional taking; for example, they might need to take 80 percent of a lot for a public use, which would leave the other 20 percent effectively undevelopable. In that case, they may pay for 100 percent of the lot, but we may use the remaining part for some other purpose. Would this legislation harm their ability to do this?

**A:** This would not be a problem. In circumstances such as this, there is no need to use the eminent domain process to take the unusable “remainder” property. In fact, it would be unconstitutional to do so. Therefore, none of the provisions of this legislation would apply to property acquired under this scenario.

**Q:** Was this issue settled last session in SB 18 with the changes to the buyback provision? Why amend the buyback provision again?

**A:** Neither HB 1250 or SB 829 amends the buyback process amended in SB 18. The buyback process is in the Property Code. HB 1250 and SB 829 amend the Government Code and do not change the buyback process; nor do they give property owners the right to buy back their property. They simply require condemners to initially use property for the same public use for which it was taken. The buyback provision does not deal with initial use, and does not impose this requirement on condemners. Additionally, the buyback provision is full of loopholes that will result in very few—if any—opportunities for property owners to repurchase their property.

**Q:** Current law already provides that easements acquired by pipeline companies terminate when the easement is no longer being used for the public use for which it was acquired. Why is this needed?

**A:** The initial use requirement would have little effect on the acquisition of easements, which should already be used in large part for the public use for which they are acquired. The greatest need for the initial use requirement is in the case where the title is acquired for a property. But it provides extra assurance for property owners that all instances of eminent domain are under the initial use requirement.

**Q:** The term public use is not defined in HB 1250 and SB 829. Could this uncertainty cause some hardship to pipeline operators seeking to acquire easements under this law?

**A:** No. The term public use is already well defined in statute and in case law. While a recent Texas Supreme Court decision in the Denbury case may change the procedures pipeline companies have to go through to prove that they are common carriers, it made no changes to the definitions of public use in the Natural Resources Code. In any case, the definition of public use is a separate issue from the initial use requirement.

**Q:** Pipeline easements can provide for more than one public use. For instance, an easement might allow the property to be used for an oil, gas, or hydrocarbon pipeline. Or a pipeline might even be classified as a gas utility. Will the initial use requirement harm these multiple uses under a pipeline easement?

## The initial use requirement simply requires condemners to do what they say they are already doing—use a property for the public use for which it is taken.

**A:** No. The initial use requirement would allow for multiple uses in a couple of scenarios. First, if all of the uses were included in the condemnation proceedings. Second, if the initial use of the easement is the use for which the property was condemned. In either case, there would be no adverse effect for any uses of the easement. This would also apply to easements acquired by other common carriers, such as operators of electric transmission and distribution lines.

**Q:** Will HB 1250 or SB 829 hinder the construction of necessary infrastructure to accommodate the state's growing economy?

**A:** Absolutely not. The initial use requirement simply requires condemners to do what they say they are already doing—use a property for the public use for which it is taken. A problem would occur only in a case where a pipeline operator, for instance, is using property for something other than it told the property owner and the courts it would use the property for. ★

## About the Authors



**Bill Peacock** is the vice president of research and director of the Texas Public Policy Foundation's Center for Economic Freedom. He has been with the Foundation since February 2005. Peacock has extensive experience in Texas government and policy on a variety of issues including, economic and regulatory policy, natural resources, public finance, and public education. His work has focused on identifying and reducing the harmful effects of regulations on the economy, businesses, and consumers.

Prior to joining the Foundation, Peacock served as the Deputy Commissioner for Coastal Resources for Commissioner Jerry Patterson at the Texas General Land Office. Before he worked at the GLO, he was a legislative and media consultant, working with groups like Citizens for a Sound Economy and Putting Children First. Peacock also served as the Deputy Assistant Commissioner for Intergovernmental Affairs for Commissioner Rick Perry at the Texas Department of Agriculture and as a legislative aide to Rep. John Culberson in the Texas House of Representatives.

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