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Case No. 17-0850

IN THE SUPREME COURT OF TEXAS

KMS RETAIL ROWLETT, LP F/K/A
KMS RETAIL HUNTSVILLE, LP,
Petitioner

v.

CITY OF ROWLETT, TEXAS,
Respondent.

On Appeal from the Fifth Court of Appeals, Dallas, Texas
(Cause No. 05-16-00402-CV)

BRIEF OF *AMICI CURIAE* TEXAS PUBLIC POLICY FOUNDATION AND MR. WILLIAM PEACOCK III

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Texas Public Policy Foundation (the "Foundation") is a non-profit, non-partisan research organization dedicated to promoting liberty, personal responsibility, and free enterprise through academically-sound research and outreach.

Since its inception in 1989, the Foundation has emphasized the importance of limited government, free market competition, private property rights, and freedom from regulation. In accordance with its central mission, the Foundation has hosted policy discussions, authored research, presented legislative testimony, and drafted model ordinances to reduce the burden of government on Texans. Historically, the Foundation has worked on property rights and reforming eminent domain law through its Center for Economic Prosperity.

Mr. William Peacock, an individual, resides in Austin, Texas, and serves as the Vice-President for Research at the Foundation. Mr. Peacock personally believes in the importance of limited government, free market competition, private property rights, and freedom from regulation.

It is with this background and experience that the Foundation and Mr. Peacock submit this Brief in support of Petitioner KMS Retail Rowlett, LP F/K/A KMS Retail Huntsville, LP. *Amici*'s Brief supplements Petitioner's legal arguments to expand on the constitutional prohibitions against the taking of private property for a public use. *Amici* request this Court uphold the Texas Constitution by striking

down the City of Rowlett's unconstitutional seizure of Petitioner's property for a non-public use.

Amici have paid all of the costs and fees incurred in the preparation of this brief.

SUMMARY OF ARGUMENT

The City of Rowlett's ("the City's") authority to size private property through eminent domain is strictly limited by the Texas Constitution and Texas law. Nevertheless, the City illegally condemned and seized a private driveway belonging to Petitioner KMS Retail Rowlett, LP F/K/A KMS Retail Huntsville, LP ("KMS") for the sole benefit of a private developer that sought easier access to its proposed commercial site. Such taking of private property for a non-public use violates the private property protections enshrined in the Texas Constitution and Texas statutes. The Appellate court's opinion to the contrary in this matter must be reversed.

ARGUMENT

I. THE CITY OF ROWLETT'S TAKING OF KMS' PROPERTY FOR THE PRIVATE USE OF BRIARWOOD VIOLATES CENTURIES OF PRIVATE PROPERTY PROTECTIONS ENSHRINED IN TEXAS LAW

The City of Rowlett, the district court, and the court of appeals all concluded that the City's taking of KMS' private driveway to improve access to—and the profitability of—the Briarwood tract was necessary for a public use and that the public use was not "merely a pretext to confer a private benefit on a particular private party." Tex. Gov't Code Ann. §2206.001(b)(2) (West 2016).

The facts of the case show otherwise. They do so despite the fact that Briarwood desired access across KMS' property to improve customer access for its tenant (Sprouts grocery store), that the City's condemnation of the driveway was initiated only after Briarwood came to the City following its failure to privately negotiate access across KMS' property, that "Briarwood engaged and paid its engineers to conduct the survey and prepare the exhibits for the City's condemnation petition" that Briarwood reduced its income from the city's grant to pay for "the condemnation costs incurred by the City", that if the city had not condemned KMS' property, Briarwood would have either lost its tenant or revenue from its lease with its tenant—or would have had to privately pay KMS more than the $31,662 in damages paid for the taking, and that the "public street" referred to by the Appellate court is a narrow access drive indistinguishable from the rest of the private access on KMS' property. *KMS Retail Rowlett, LP v. City of Rowlett*, 2017 WL 3048477 at *1, 6 (Tex. App.—Dallas July 19, 2017) (mem. op.).

Instead of enforcing the private property protections found in the Texas Constitution and Texas statute, the appellate court deferred to the erroneous findings of the trial court, including: "[s]o long as the use is open to all, however, it is irrelevant the number of citizens likely to avail themselves of the use …," and "determination by the condemnor that the taking is necessary for a public use is conclusive absent proof by the landowner …," etc. (Op., pp. 5-7).

In his dissent in *Kelo v. City of New London*, 545 U.S. 469 (2005), Justice Clarence Thomas quoted William Blackstone, who wrote that "'the law of the land

… postpone[s] even public necessity to the sacred and inviolable rights of private property.' Vol. 1—Commentaries on the Laws of England 134—135 (1765)." *Kelo,* 545 U.S. at 505. The Bill of Rights of the United States Constitution echoed Blackstone only a few years later, "nor shall any person …be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

Similar language in the Texas Constitution's Bill of Rights adopted in 1876 expressed Texans' determination to protect private property: "No person's 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 first made, or secured by deposit of money." T.X. Const. art. I, §17(1876).

Texans spoke again in 2009 in rectifying constitutional amendments to strengthen Texas' protections of private property in the Texas Constitution and give us the language we have today:

> (a) No person's 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 only if the taking, damage, or destruction is for:
>
> (1) the ownership, use, and enjoyment of the property, notwithstanding an incidental use, by:

(A) the State, a political subdivision of the State, or the public at large; or

(B) an entity granted the power of eminent domain under law; or

(2) the elimination of urban blight on a particular parcel of property.

(b) In this section, "public use" does not include the taking of property under Subsection (a) of this section for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues.

T.X. Const. art. I, §17(a)-(b).

Then, almost six years ago, this Court enshrined this protection of private property in its jurisprudence: "The Texas Constitution safeguards private property by declaring that eminent domain can only be exercised for 'public use.' Even when the Legislature grants certain private entities 'the right and power of eminent domain,' the overarching constitutional rule controls: no taking of property for private use." *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 194 (Tex. 2012).

Today, Texans wondering what happened to the centuries old commitment to protecting private property in this case might turn again to Justice Thomas. He noted that the *Kelo* majority's "deferential shift in phraseology enables the Court to hold, against all common sense, that a costly urban-renewal project whose stated

purpose is a vague promise of new jobs and increased tax revenue, but which is also suspiciously agreeable to the Pfizer Corporation, is for a 'public use.'" *Kelo*, 545 U.S. at 506 (Thomas, J., dissenting). Unfortunately, this "deferential shift" away from the "sacred and inviolable rights of private property" and its owners to the government is no longer confined to Washington, D.C., but is on full display deep in the heart of Texas in the actions of the City of Rowlett and in the holdings of the trial court and the court of appeals in this case.

II. THE CONSTITUTIONAL REQUIREMENT THAT PROPERTY MAY ONLY BE TAKEN FOR A PUBLIC USE STILL MEANS SOMETHING IN TEXAS

Shortly after *Kelo*, the Texas Municipal League said that *Kelo* offers no change to existing law and "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." Texas Municipal League, TML Online, http://www.tml.org, July 1, 2005.

The U.S. Supreme Court explained this in its claim that "our jurisprudence has recognized that the needs of society have … evolved over time in response to changed circumstances." *Kelo*, 545 U.S. at 482. This meant that in the context of property rights, the Supreme Court had allowed the meaning of "public use" in the U.S. Constitution to evolve over time.

Justice Thomas noted that throughout most of the 19th century, American eminent domain practice largely followed the most natural reading of the Public Use Clause, such that it authorized "takings for public use only if the government

or the public actually uses the property." *Kelo*, 545 U.S. at 514 (Thomas, J., dissenting). He contrasts this with the more modern "public purpose" interpretation used by the Court. *Id*.

Indeed, though the Supreme Court found "The city's proposed disposition of petitioners' property qualifies as a 'public use' within the meaning of the Takings Clause," it noted that "this 'Court long ago rejected any literal requirement that condemned property be put into use for the … public.' Rather, it has embraced the broader and more natural interpretation of public use as 'public purpose.'" *Id*. at 469 (internal citations omitted).

While the majority of the Supreme Court may have believed that the "natural" melding of use and purpose had taken place long before, Texans and the rest of the nation were shocked at this disclosure. It wasn't long thereafter that Texas policymakers were shocked once again when they discovered Texas courts had already made the same conflation, and that after *Kelo,* Texans no longer had any protections against the takings for a private use. Except, that is, for the Texas Constitution, which still required that takings be for a "public use [with] adequate compensation being made." T.X. Const. art. I, §17(a).

It was providential that the Texas Legislature was in special session dealing with public school finance when *Kelo* was decided. Members of the Legislature quickly took up the cause to remind the Texas courts of the continued importance of property rights and what the Texas Constitution's public use language actually

means. The result was Senate Bill 7, signed into law by the Governor on September 1, 2005, which read in part:

> (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 …

The Legislature clearly conveyed to the courts and to all Texans its understanding of "public use" in the Texas Constitution. It means public "ownership, use, and enjoyment of the property," not public purpose or "economic development purposes." T.X. Const. art. I, §17(b). The public use language in the Constitution also prohibits takings that "confer a private benefit particular private party" or are "for a public use that is merely a pretext to confer a private benefit on a particular private party." Tex. Gov't. Code §2206.001(b).

While federal jurisprudence continues to undermine constitutional protections of private property ownership, Texas jurisprudence and statute through this Court and the Legislature clearly align with the language of the Texas Constitution in affirming "the sacred and inviolable rights of private property." Vol. 1—Commentaries on the Laws of England 134—135 (1765).

III. THE CITY OF ROWLETT'S TAKING OF KMS' PROPERTY VIOLATES THE TEXAS CONSTITUTION'S REQUIREMENT THAT TAKINGS BE ONLY FOR A PUBLIC USE

The City of Rowlett condemned KMS' property only after it was approached by Briarwood, who had failed to privately negotiate access through the property. *KMS Retail*, 2017 WL 3048477 at *1. The City used Briarwood's engineers and exhibits to prepare its condemnation petition. *Id*. at *6. It used money due to Briarwood under its city grant to pay for the proceedings and damages to *KMS*. *Id*. Through traffic using *KMS*' condemned property is almost exclusively destined for Briarwood's property. All this increased Briarwood's income from its property and reduced the expenses it incurred in acquiring access across *KMS*' property. *Id.* at *3-4. Yet the City claims that its condemnation did not violate section 2206.001(b) of the Government Code which includes the prohibitions on takings that 1) confer a private benefit, 2) are for a public use that is merely a pretext for conferring a private benefit, 3) are for economic development purposes, or 4) are not for a public use.

Interestingly, the City never denies that its taking may have violated at least the first three of the prohibited purposes for condemnation. Instead, it denies the relevance of its violations of statute (and the Texas Constitution) to the deliberations of this court in two ways.

A. The City wrongly uses procedural claims to keep this court from looking at its violation of Article 1, Sec. 17, of the Texas Constitution.

The City's procedural claims include:

- "a legislative determination of public use creates a binding presumption on the courts unless the use is clearly and palpably of a private character." (Resp.'s Br. 5).
- the petitioner's "arguments [that the taking 'has the characteristics of a private, not public, use'] do not meet the elements of fraud in the condemnation context." *Id*. at 7.
- the "City Council's determinations of necessity and public use are legislative in nature and are conclusive absent allegations that the determinations were fraudulent, in bad faith, or arbitrary or capricious." *Id*.
- "Fraud, bad faith, and arbitrariness or capriciousness are affirmative defenses on which the Petitioner bore the burden of proof." *Id*. at 4.

In essence, the City argues that the burden of proof in condemnation cases falls on the property owner and that the standard of review is so high that this Court has no right to interfere with its determination of public use and necessity.

The City's argument ignores three things. First, it ignores Article 1, Sec. 17 of the Texas Constitution, which provides clear standards that must be met for a taking to occur. There are no procedural standards in the Texas Constitution that force landowners to bear the burden of proof or that deny courts the ability to review

legislative determinations such that the result would be a taking in violation of the constitution's factual standards.

Second, the City's argument ignores the holdings of this Court. "The Texas Constitution safeguards private property by declaring that eminent domain can only be exercised for 'public use.'" *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d at 194. Such safeguards would be worthless if procedural maneuvers or legislative determinations could circumvent them. This court acknowledged this when it said, "[u]nadorned assertions of public use are constitutionally insufficient" in determining whether a use will "in fact be public rather than private." *Id*.

This Court found that "Denbury Green's construction leads to a result that we cannot believe the Legislature intended, namely a gaming of the permitting process to allow a private carrier to wield the power of eminent domain." *Id*. at 202. Surely a gaming of the eminent domain process to acquire private land for another's private use—which was in fact allowed before Senate Bill 7—would be one result if the City's argument were to prevail. *See Western Seafood Co. v. United States*, 202 Fed.Appx. 670 (5th Cir. 2006).

Yet the City appears to be seeking just such a gaming when it claims, "The law in this state does not and has never required a "thorough independent judicial review" of a condemnor's determination of public use." (Resp. Br. 3). This Court has said otherwise many times: "Because 'the right to condemn property is constitutionally limited and turns in part on whether the use of the property is public

or private,' we recognize that 'the ultimate question of whether a particular use is a public use is a judicial question to be decided by the courts.' *Texas Rice Land Partners*, 363 S.W.3d at 198 (quoting *Maher v. Lasater*, 354 S.W.2d 923, 925 (Tex. 1962))." *Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd.*, 510 S.W.3d 909, 914 (Tex. 2017).

Third, the City ignores Section 2206.001(e), Tex. Government Code: "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." The Petitioner "raised disputed fact issues with respect to the four prohibited reasons to condemn land set forth in § 2206.001(b)." (Petr.'s Br. 10-11). The City's claim that its determination of public use and necessity is "nearly absolute" and that the "evidence established [public use and necessity] as a matter of law" (Resp.'s Br. 3) is a de facto rejection of the ability of this court to review the possibility that the City's condemnation involves any of the four prohibited reasons and thus also a de facto rejection of the plain language of statute on presumption. This Court has rejected this as a possible outcome: "The protection of property rights, central to the functioning of our society, should not—indeed, cannot—be charged to the same people who seek to take those rights away." *City of Dallas v. Stewart*, 361 S.W.3d 562, 580 (Tex. 2012).

B. The City wrongly uses statute to keep the court from looking at its violation of Article 1, Sec. 17, of the Texas Constitution.

After the initial public outcry over *Kelo's* stamp of approval on the federal government's redefining of the constitutional standard of 'public use' to mean 'public purpose,' one of the first things that Texas lawmakers became aware of in the aftermath of *Kelo* was that Texas—through both the courts and the legislature—had done the same thing. This was a major concern within the Texas Legislature. *See* Interim Committee to Study the Power of Eminent Domain, Report to the 80th Texas Legislature (Dec. 2006), *available at* http://www.lrl.state.tx.us/scanned/interim/79/Em47.pdf. A debate ensued over how to restore the original meaning of public use.

Representative Frank Corte noted the challenge on the House floor during the debate on Senate Bill 7, "There's been a big concern about the definitions of public use. … we've had a problem with this issue all along—the definitions of public use." (House Journal, 79th Texas Legislature, Second Called Session, p. 184). To get "something in place quickly that the governor could sign and would take immediate effect," the Legislature took a two-step approach. Broder, John M., *Public power for private benefit?*, NEW YORK TIMES, Feb. 21, 2006 (quoting Senator Kyle Janek). It would define immediately (in Senate Bill 7) what public use was not and would define later (in House Joint Resolution 14 – 2009) what public use was.

Thus in Tex. Gov't Code § 2206.001(b), the Texas Legislature enumerated four "Limitations on Purpose and Use of Property Acquired Through Eminent

Domain," i.e., it defined what public use was not under the Takings Clause in the Texas Constitution.

The City claims that these are "post-*Kelo* statutory limitation[s]" rather than a legislative declaration of what is not included in the constitutional standard of public use: "The effect of Texas' post-*Kelo* statutory limitation (viz., sec 2206.001 of the Tex. Government Code) is to prohibit condemnations that are for economic development and private benefit unless the condemnor's purpose fits within one or more categorical exceptions. Those exceptions include transportation projects …" (Resp.'s Br. 9).

However, the purposes and entities listed in Subsection (c) are not meant to and cannot be exempted from the constitutional requirements under the Takings Clause, including those listed under Subsection (b). "It has been so well established, and recognized by this court, as to be almost unnecessary for citation that courts, having and possessing no legislative powers, cannot enlarge or alter the plain meaning of statutory language." *See Goldman v. Torres*, 341 S.W.2d 154, 160 (1960); *Daniels Bldg. and Const., Inc. v. Silsbee Independent School Dist.*, 990 S.W.2d 947, 950 (Tex. App. 1999). As the courts "cannot enlarge or alter the plain meaning of statutory language," the Legislature cannot restrict or alter the plain meaning of constitutional language.

The Legislature listed the purposes and entities in subsection (c) of Section 2206.001 not to exempt them from the constitutional protections for property rights but to instruct the courts that it was not putting additional restrictions on certain

"entit[ies] authorized by law to take private property through the use of eminent domain" beyond those found in in the Takings Clause. This was needed because the nature of takings for these particular purposes and by these particular entities might have otherwise led the courts to interpret Subsection (b) as imposing statutory restrictions on them beyond those in the Takings Clause.

"Laws are seldom wiser than the experience of mankind. These great maxims [regarding property rights], which are but the reflection of that experience, may be better trusted to safeguard the interests of mankind than experimental doctrines whose inevitable end will be the subversion of all private right." *Spann v. City of Dallas*, 235 S.W. 513, 515 (Tex. 1921).

Statute cannot override or undermine constitutional protections—based on the great maxims of liberty—for private property ownership. This Court should not allow Subsection (c), any other statutes, or the holdings of Texas courts to reinterpret to the detriment of Texans the timeless protections of private property enshrined in the Texas Constitution.

CONCLUSION

For the foregoing reasons, the Foundation and Mr. Peacock respectfully request the Court reverse the holding of the Appellate court and strike down the

City of Rowlett's unconstitutional seizure of Petitioner's property for a non-public use.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this document complies with the typeface requirements of Tex. R. App. P. 9.4(e), because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes. This document also complies with the word-count limitations of Tex. R. App. P. 9.4(i), because it contains 3,608 words, excluding any parts exempted by Tex. R. App. P. 9.4(i)(1).

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CERTIFICATE OF SERVICE

On this 9th day of March, 2018, a true and correct copy of the foregoing brief has been served on the following counsel for Appellee via electronic service:

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