



Testimony

Eminent Domain Authority

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Since its inception, the Texas Public Policy Foundation has emphasized the importance of private property rights, not only as rampart of limited government, but also as the indispensable base of a free market economy as well as the financial success this state has witnessed, thanks to the Texas Model. To that end, the Foundation has conducted repeated inquiries as to quality of Texas' eminent domain laws, placing special significance on how the government can better thread the needle, which defines the precarious balance between public necessity and individual liberty. That research has reached on two chief observations:

1) Despite relatively recent reforms, the rules and procedures governing eminent domain in Texas permit, if not encourage, condemners to undercompensate residents for their seized real estate.

Eminent domain, by its very nature, forcefully takes private property from its owner. Whereas a property owner in a normal sale can rely on a troop of prospective investors to assess a property's characteristics, a condemnation employs at most a handful of half-interested appraisers to artificially reconstruct what the market does instinctually, using a methodology Texas courts frequently describe as "more art than science." The valuation process leaves a lot of room for honest disagreement.

At the same time, eminent domain removes the greatest leverage a property owner has in a typical sale—the right to withdraw from the transaction. Property owners walk into eminent domain negotiations with a sword dangling above them. It puts them at an immediate disadvantage because any concession secured arises, not from merit, but from the one-sided graciousness of the law and of the condemner. What results is an inherently unequal relationship; one which Texas' eminent domain laws aggravate.

For example, in *Hubenak v. San Jacinto Sag Transmission Company*, the Texas Supreme Court undercut the prerequisite that condemners tender a bona fide offer before initiating the proceeding. The Court held that "the dollar amount of the offer generally should not be scrutinized." In other words, the mere gesture of making an offer satisfied the requirement. Little or no attention was given to the appraisal's accuracy or the condemner's willingness to genuinely entertain a counteroffer. Form takes precedence over substance.

As another example, in the same case, the Texas Supreme Court ruled that condemning entities may include in their bona fide offers rights that are not subject to condemnation, such as surplus land or a right to assign the easement to another party. This is important because disagreement on any of these surplus requests is enough to push the proceeding into trial. Hence, the condemning entity can exert even more pressure than the act of eminent domain would otherwise allow.

2) Texas lacks an enforcement mechanism to ensure that existing protections inside the Texas Constitution and Texas Property Code are obeyed.

There are two ways to enforce legislation, namely direct supervision by a regulatory body and the judiciary. Neither works to their fullest effect with respect to eminent domain proceedings. According to the Texas Comptroller, thousands of entities claim the power to condemn private property for a public use. As many as 18 percent are private organizations outside of traditional chains of public accountability. The sheer size and complexity of the task makes it all but impossible for any single body to investigate all the condemnations across the state in order to ascertain whether the tendered offer was adequate for the property's characteristics, an attempt to exploit government power, or a simple miscalculation.

On the other hand, the courts are well designed for fact-sensitive inquiries that a compensation dispute demands, but the courts may only review the controversies brought before the bench. Compensation disputes run on average from three to five years and cost in the hundreds of thousands of dollars, neither of which is reimbursed. Most Texans cannot pay that money up front, and even if they could find representation on a contingency fee basis, that sum is deducted from their final award. Many Texans therefore find it the more rational option to defer to what they know is a low-ball offer in order to avoid the heartache incumbent to a protracted court battle, especially when they will never be made whole even in victory. The condemnor may persist in the taking safe in the understanding that their conduct will not be brought under inspection.

Conclusion

Human nature ensures that individuals and institutions with power will test their boundaries. When no resistance is met, they will take an additional step, only to repeat their foray. The problem with compensation in eminent domain proceedings in Texas is that entities with that authority do not confront sufficient pressure to respect the interests of property owners. Eminent domain creates an inherently unequal relationship, which Texas law thereby widens; there is no strong likelihood of censure of condemnors that misbehave from either the legislature or the courts. Until Texas law pushes back, the sanctity of property rights in Texas will remain uncertain. ★

About the Texas Public Policy Foundation

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