

**SUBJECT:** Revised standards for authority to use eminent domain power

**COMMITTEE:** Land and Resource Management — committee substitute recommended

**VOTE:** 7 ayes — Bonnen, Farrar, Alvarado, Hamilton, Homer, Paxton, Thibaut  
1 nay — Orr  
1 absent — Bolton

**SENATE VOTE:** On final passage, May 4 — 31-0

**WITNESSES:** No public hearing.

**BACKGROUND:** The Fifth Amendment to the U.S. Constitution prohibits the taking of private property for public use without just compensation and is commonly referred to as the “takings clause.” Texas Constitution, Art. 1, sec. 17 prohibits a person’s property from being taken, damaged, or destroyed without consent for public use without adequate compensation.

In June 2005, the U.S. Supreme Court ruled in *Kelo v. City of New London*, 545 U.S. 469 (2005), that the proposed use of property by the city of New London, Conn. for a development project qualified as a “public use” within the meaning of the U.S. Constitution’s takings clause.

Following the *Kelo* decision, the 79th Texas Legislature, in its second called session in 2005, enacted SB 7 by Janek, which prohibits governmental or private entities from using the power of eminent domain to take private property if the taking:

- confers a private benefit on a particular private party through the use of the property;
- is for a public use that merely is a pretext to confer a private benefit on a particular private party; or
- is for economic development purposes, unless economic development is a secondary purpose that results from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas.

Property Code, ch. 21, subch. C establishes the legitimate bases for assessing damages to a property owner resulting from a condemnation. For this determination, special commissioners are instructed to admit evidence on the value of the property being condemned, the injury to the property owner, the impact on the property owner's remaining property, and the use for which the property was condemned.

Property Code, ch. 21, subch. E provides an opportunity for property owners to repurchase land taken through eminent domain for a public use that was canceled before the 10th anniversary of the date of acquisition. The possessing governmental entity is required to offer to sell the property to the previous owner or the owner's heirs for the fair market value of the property at the time the public use was canceled. The repurchase provision does not apply to right of way held by municipalities, counties, or the Texas Department of Transportation (TxDOT).

The 80th Legislature in 2007 enacted HB 2006 by Woolley, which would have modified processes governing eminent domain proceedings, standards of evidence that could be considered by a court in the course of making decisions regarding damages, obligations placed upon condemning entities, and the rights of previous owners to repurchase taken property. The bill was vetoed by the governor, who cited potentially higher costs to governmental entities from requiring compensation to landowners for diminished access to roadways and for factors such as changes in traffic patterns and road visibility.

**DIGEST:**

CSSB 18 would modify processes and requirements governing eminent domain, standards of evidence to be considered by special commissioners in making decisions on damages, obligations of condemning entities, and the rights of previous owners to repurchase taken property.

The bill would prohibit a government or private entity from taking land that was not for a public use. It would revise existing law to prohibit a taking for economic development unless the development resulted from community development activities to eliminate blighted areas. It would require a governmental entity to authorize the initiation of condemnation proceedings at a public meeting by a record vote. It also would establish procedures for voting on specific properties and groups of properties.

**Bona fide offer.** An entity with eminent domain authority that wanted to acquire real property for a public use would have to make a bona fide offer

to acquire the property from the property owner voluntarily. An entity with eminent domain authority would have made a bona fide offer if:

- an initial offer and final offer were made in writing to a property owner;
- the final offer was made on or after 30 days of when the entity made a written initial offer to the property owner;
- the entity obtained a written appraisal from a certified appraiser of the value of the property being acquired and any damages to any remaining property before making a final offer;
- the final offer was equal to or greater than the amount of the written appraisal obtained by the entity;
- the offering party provided a copy of the written appraisal, a copy of the deed or other instrument conveying the sought-after property, and the Texas landowner's bill of rights document; and
- the entity provided the property owner with at least 14 days to respond to the final offer and the property owner did not agree to the terms of the final offer within that time.

If a court hearing a suit determined that a condemning authority did not make a bona fide offer, the court would order the condemning entity to pay costs currently authorized in law and reasonable attorney's fees incurred by the property owner directly related to the failure to make a bona fide offer.

**Right of repurchase.** An owner of property acquired through eminent domain could repurchase the property from any entity if the public use for which the property was acquired was canceled before the property was used for that purpose, if no "actual progress" was made toward the public use by 10 years after the taking, or if the property became unnecessary for the public use for which the property was acquired. "Actual progress" would be defined as meeting two of several conditions enumerated in the bill. Suits over the right of repurchase could be settled in a district court. The bill would make conforming changes to provisions governing requests for information about a condemned property.

The bill would modify the price at which previous owners could repurchase condemned property for which a public use was cancelled within 10 years of the acquisition. The repurchase price would be the lower of the price paid to the owner by the entity at the time the entity

acquired the property or the fair market value of the property at the time the public use was canceled.

**Assessments and damages.** In assessing damages to a property owner from condemnation, special commissioners would have to admit evidence on the whether the condemnation required relocation of a homestead or farm to another property that allowed the property owner to, without incurring debt, have a comparable standard of living or, if the land included a farm, to operate a comparable farm.

Special commissioners, in assessing actual damages to a property owner from a condemnation, would have to take into account a material impairment of direct access on or off the remaining property that affected the market value of the remaining property but could not consider the directness of travel and diversion of traffic that were common to many properties. Determinations of fair value of the state's interest in access rights to a highway right-of-way would be the same as standards used by the Texas Transportation Commission in acquiring access rights under provisions on acquisition of property and payment of damages related to access.

Special commissioners hearing an eminent domain case could not set a hearing to assess damages before the 20th day after being appointed.

**Slum and blight revisions.** CSSB 18 would strike references to "slums" from Local Government Code, chs. 373 and 374. For an area to be considered blighted, properties would have to meet four of the conditions listed in the bill for at least one year after the date on which a municipality provided initial notice to the owner.

A municipality could not exercise powers granted under the Texas Urban Renewal Law unless its governing body determined that each unit of property in an area met the definition of blight and the municipality provided a statement to this end as necessary. Before designating a blighted area, a municipality would have to give written notice to the property owner at the property owner's last known address, as well as the subject property's address, and would have to post notice on the property if the owner's address was unavailable. A property could be designated as blighted only if the owner took no reasonable measures to remedy the conditions, and if the determination was not solely for aesthetic reasons.

A blight designation would be valid for two years and would have to be redesignated as such at the end of that period. Contiguous properties owned by the same person could be jointly designated. The bill also would repeal sections authorizing a municipality to acquire and clear all buildings, structures, and other improvements for redevelopment and reuse in accordance with the urban renewal plan.

**Medical center condemning authorities.** The bill would prohibit certain medical centers established in Vernon's Texas Civil Statutes, Art. 3183b-1, from exercising the power of eminent domain to acquire property in a residential neighborhood or from condemning or purchasing property that had been diminished by an avoidable act or omission by a medical center intended to cause a substantial reduction of residential-use property values in a residential area.

On or before September 1, 2010, an affected medical center condemning entity that held property acquired in a residential neighborhood for future use would have to sell the property. Sold property would be restricted to require the property be restored to its former status as a single-family dwelling or reintegrated into its original deed-restricted subdivision, if applicable. The bill would define property acquired for a "future use." The bill would establish authority and procedures of and for a court ruling over an eminent domain case involving a medical center condemning authority.

**General provisions.** An entity seeking to acquire property could not include a confidentiality provision in an offer or agreement to acquire the property. Offers for property would have to be sent by certified mail and would have to include any appraisal reports produced or acquired in the 10 years preceding the offer. An entity not subject to open records but authorized to acquire property through eminent domain would be required to produce information related to condemnation proceedings requested by a property owner subject to eminent domain by the entity. A court could award a person who did not receive requested documents reasonable attorney's fees from an entity that refused to produce requested information.

Entities that were created or that acquired the power of eminent domain before December 31, 2010, would have to submit a letter to the comptroller acknowledging that the entity was authorized by the state to exercise the power of eminent domain and identifying the legal source for that authority. An entity that did not submit a letter by September 1, 2011,

would lose the authority to exercise eminent domain. The comptroller would submit to various parties a report with the name of each entity that submitted a letter and a corresponding list of provisions granting the identified authority. The Texas Legislative Council would prepare a nonsubstantive statutory revision as necessary to reflect any loss in authority from entities that did not submit a letter.

The bill would take effect September 1, 2009, and would apply to eminent domain proceedings prospectively.

**SUPPORTERS  
SAY:**

CSSB 18 would make critical amendments to existing statutes regulating eminent domain to ensure that individual property rights were appropriately balanced against legitimate public needs for acquisition. The bill would add fairness to state statutes governing the right of repurchase, restrict the use of eminent domain on the basis of slum and blight conditions, and expand the range of damages that could be considered in eminent domain proceedings to ensure just compensation to property owners subject to condemnation.

**Right of repurchase.** CSSB 18 would provide for the repurchase of condemned property at the price the entity paid at the time of acquisition. This change would implement authority granted by Art. 3, sec. 52j of the Texas Constitution, which was added in 2007 when Texas voters approved Proposition 7 (HJR 30 by Jackson). Permitting the repurchase price to be set at the original sale value, and not the current fair market value as currently required in the Property Code, would enable property owners to reclaim equity for appreciating property to which they were entitled. Property owners subject to takings that wrongfully result in cancelled, absent, or unnecessary public uses would be eligible only for restitution. The bill would not confer any special advantage upon an individual because it would permit only the redress of a taking that was not justly executed. There also is a distinct possibility that a property could depreciate over time following a condemnation. In that case, the property owner would be subject to losing value in the land by repurchasing. The bill under no conditions would guarantee the transfer of positive value to an individual.

The bill would create a strong disincentive against the speculative exercise of eminent domain authority by condemning authorities, including schools, municipal and county governments, state agencies, pipelines, and utilities. Condemning authorities would be strongly discouraged from

acquiring land through eminent domain for which there were no immediate plans. Takings completed on a speculative basis can deprive current owners of the future value of their property. CSSB 18 would curtail speculative condemnations and establish an important safeguard against the excessive and reckless use of eminent domain.

**Slum and blight provisions.** CSSB 18 would address an important vulnerability with regard to eminent domain power left unaddressed by SB 7 in 2005 — exceptions for areas designated as blighted or as slums. Under current statutory provisions, municipalities may take property for economic development purposes if the taking is a secondary purpose resulting from community development or urban renewal activities to eliminate existing harm on society from slums or blighted areas. Municipalities may use the blight exception to condemn and clear whole neighborhoods at a time as long as 50 percent of the affected properties are determined to be blighted.

This omission in current statutory provisions allows municipalities to seize the properties of honest, hardworking residents and businesspeople due to hazards that may exist in their neighborhood, effectively subverting individual property rights for an ill-defined notion of a common good. Existing statutory definitions of slum and blight are vague at best, leaving it to the judgment of municipal officials to decipher what constitutes hazardous conditions, greater welfare, and social and economic liabilities. The current statutory definition of blight would allow a taking in cases where a property's defect was minor — such as deteriorating improvements, or not caused by the property owner — such as inadequate infrastructure. A lack of safeguards for property owners in potentially blighted areas has given rise to a number of abusive and reckless eminent domain practices.

CSSB 18 would balance legitimate municipal interests in using eminent domain to mitigate public safety hazards with the rights of property owners who live in areas that possess the characteristics of blight. The bill would clarify definitions and procedures related to community development and urban renewal programs. References to the word slum would be stricken, since this term is ill-defined and not sufficiently distinguished from blight to salvage its usefulness. Property owners no longer would be subjected to condemnation due to the overall neighborhood conditions because each parcel would be reviewed and determined to be blighted independently. A one-year advance notice

would give owners of potentially blighted properties ample time to take corrective action. The renewal clause in the bill would prevent an area from remaining classified as blighted indefinitely, irrespective of changing area conditions.

The bill would not prohibit a municipality from declaring a blighted area, exercising the power of eminent domain on properties within it, or taking other steps to adopt and support an urban renewal plan. Protecting property rights of established owners who have been able to maintain their properties in distressed areas would allow those owners to actively partake in the revitalization of their own communities.

**Damages and assessments.** The bill would include relocation costs in an amount sufficient to return a property owner to a standard of living or operation comparable to what the owner had prior to condemnation and would allow for the consideration of a material impairment of direct access to a property. Expanding the range of plausible damages is critical to ensuring just compensation for property owners subject to condemnation. A common accusation is that providing property owners with an expanded range of damages leads to higher costs for condemning authorities. However, current statutes and the nature of power relations between property owners and the powerful entities endowed with eminent domain authority create an imbalance against the property owner, who often has little recourse and must go to great lengths just to receive a tolerable, let alone just, offer.

Expanding the range of damages would help to restore this imbalance by both leading to more reasonable judgments in court and by sending a message to condemning entities to consider the expanded range of damages in crafting their initial offers. Expanding legitimate damages would encourage condemning authorities to make fair offers upfront to avoid the possibility of paying a higher sum on appeal of the initial offer.

OPPONENTS  
SAY:

CSSB 18 would introduce more liabilities into eminent domain proceedings than it would resolve. The bill would significantly curtail municipalities' ability to operate under the Texas Urban Renewal Law, introduce certain standards of admission for evidence that could be costly and indefinite, and create unfair methods for calculating the resale of land to condemned property owners.

**Right of repurchase.** CSSB 18 would allow “double-recovery” for property owners who had undergone eminent domain proceedings and were eligible to repurchase their property. The bill would confer a windfall upon property owners who were compensated justly for the original taking. An owner who was eligible to repurchase at the price originally paid could accrue all the equity from appreciation without having to pay property taxes, maintenance expenses, and other costs normally incurred as part of property ownership. The bill would allow any appreciation that accrued in the property while it was in the custody of a government organization to be transferred to an individual in the form of equity.

The U.S. Constitution’s “takings clause” requires property owners to be justly compensated for any property transferred through eminent domain. Once this compensation is granted, the owner relinquishes any right to equity and other investments associated with the property. Allowing an individual to repurchase at the original price effectively could result in putting the state in a position of being used as an instrument of financial gain for that individual.

**Slum and blight provisions.** In recognition of the importance of economic development activities, including the potential use of eminent domain, SB 7 made an explicit exception for condemnations intended to address public safety hazards associated with slum and blight. Urban renewal is a long-accepted government function and critical to the long-term health of municipalities. Municipal governments use their powers of eminent domain to clear blighted areas for urban renewal as an absolute last resort. Such actions require expensive and long-term relocations, court proceedings, demolitions, and planning efforts. Municipalities seldom attempt to use their powers under the blight provisions unless they are left with no other options to correct rampant health and safety concerns that affect the quality of life of everyone living in the neighborhood.

CSSB 18 effectively would eliminate a municipality’s ability to designate a blighted area and use its eminent domain authority to promote urban renewal. The bill would increase the time and resources required to achieve designation as a blighted area to such an extent as to render such a task near impossible. Municipalities would have to make a blight determination on each property individually. The bill would add a one-year delay at the outset of the designation process by requiring that owners receive notice and receive one year to take corrective action. Blighted areas often are poorly platted, unsurveyed, and comprise unconventionally

shaped lots without proper documentation. Property owners in blighted areas can be extremely difficult to locate, and the bill would make no account for owners who had vacated, abandoned, or otherwise neglected property for long durations. The bill would curtail a municipality's ability to address structural safety hazards, inadequate infrastructure, and limited commercial opportunities. Removing an important and longstanding tool available to cities would diminish their ability to improve the quality of life of residents who need the most assistance.

**Damages and Assessments.** Provisions in CSSB 18 could impose unreasonable relocation costs on condemning authorities exercising eminent domain. The bill would include vague language about considering evidence regarding restoring a property owner to a comparable standard of living than before the condemnation took place. It would be extremely difficult to determine what constitutes a comparable standard of living. A condemning entity would have limited means of bringing evidence to prove or disprove a claim regarding a comparable standard of living. Allowing an undefined variety of evidence could create greater inconsistencies in the hearing process and reduce the overall equitability of damage claims across the state.

OTHER  
OPPONENTS  
SAY:

CSSB 18 contains provisions regarding bona fide offers that would not provide adequate protections to property owners. Language in HB 2006, enacted by the 80th Legislature and vetoed by the governor, would have broadly required a condemning authority to make a good faith offer. Language from that bill was permissive to allow the matter to be defined through court proceedings. CSSB 18 would provide specific conditions that, if met, would constitute a bona fide offer. The conditions in the bill are focused on small procedural matters, and in large measure reflect current practices, which have proven to decidedly favor condemning entities over property owners. Bona fide offer provisions in the bill would likely compel condemning entities to minimally satisfy the provisions on paper but would not guarantee a more fair process for property owners.

This bill would provide meager penalties for condemning authorities found to have violated bona fide offer requirements. The bill would allow property owners to be compensated for attorneys fees associated only with an offer placed in bad faith, which is often a small sum. Dishonest offers from condemning authorities cause a great deal of grief and hardship for property owners, and they deserve to be justly compensated.

NOTES:

The committee substitute added provisions revising the condemnation of properties characterized by slum and blight, certain provisions governing payment of relocation costs necessary due to condemnation, and added provisions regarding a medical center condemning authority.

The Legislative Budget Board (LBB) estimates the bill would have costs and negative overall impact to an entity with the power of eminent domain but that this would vary and as such would have an indeterminate fiscal impact on the state.