

EMINENT DOMAIN TRENDS IN THE TEXAS SUPREME COURT

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Overview and Background

In the past year, the Texas Supreme Court has issued five significant opinions that could be characterized as expanding landowner rights at the expense of condemnors – from declaring that landowners have right to challenge a city’s nuisance determination de novo in condemnation proceedings, to holding that landowners have a constitutionally compensable interest in groundwater, to making it easier to challenge the common carrier status of pipeline companies – the current Court is decidedly pro-landowner.

These opinions demonstrate a major shift in the Texas Supreme Court’s treatment of takings. Since the middle of the nineteenth century until last year, the Texas Supreme Court repeatedly and uniformly endorsed the taking of private land for the public benefit. Until recently, the Court recognized the need for the State’s power of eminent domain and that the right “grows out of necessity,” and without it, “society and government could not exist.” *Imperial Irrigation Co. v. Jayne*, 138 S.W. 575, 587 (Tex. 1911). In the past, the Court protected all condemnors, including private condemnors, because it recognized that delegation of the power of eminent domain to private entities such as railroads, pipelines, water, and mining companies was important to the State’s economy. *See, e.g., Borden v. Trespalacios Rice & Irrigation Co.*, 86 S.W. 11 (1905); *West v. Whitehead*, 238 S.W. 976 (Tex. Civ. App.—San Antonio 1922, writ ref’d).

It is too early to know what effect the Court’s new stance will have on the Texas economy or whether it will dramatically increase litigation over takings claims.

Case Summaries

***In re State of Texas*, 355 S.W.3d 611 (orig. proceeding) (Tex. 2011).**

Trial court erred by severing condemnation case into eight different proceedings when, after State sought to condemn property, landowners subdivided the property into eight separate parcels. State has the right to define the property being taken. However, landowners may present evidence of competing conceptions of the best economic unit by which the taken property should be valued.

After the State sought to condemn a tract of land, the owners subdivided the property into eight separate parcels. The trial court then severed the condemnation case into eight different proceedings. The State unsuccessfully sought mandamus relief from the court of appeals.

In an opinion by Chief Justice Jefferson, the supreme court granted mandamus relief. The Court explained that both sides should be permitted to offer evidence about the “ideal economic unit” for valuing the land. Thus, the State should have been entitled to offer testimony that the ideal economic unit is the entire tract of land. The trial court’s severance order prejudiced the State’s right to offer its valuation evidence and would also cause needless duplication of legal services and expert testimony, wasting the parties’ and the public’s resources.

The Court summed up by explaining: “Though the State has a right to define the property being taken, it does not have the power to constrain the owners’ evidence of competing conceptions of the best economic unit by which the taken property should be valued.”

City of Dallas v. Stewart, 361 S.W.3d 562 (Tex. 2011).

Landowner had right to trial de novo on administrative agency's nuisance determination because a nuisance finding generally precludes compensation for the government's destruction of property.

The Dallas Urban Rehabilitation Standards Board (“URSB”) found plaintiff’s house to be an urban nuisance and ordered its demolition. Plaintiff appealed the decision to district court, but the appeal did not stay the demolition order. After the demolition, the homeowner amended her complaint to include a due process claim and a claim for unconstitutional taking. The trial court reviewed the URSB’s decision under a substantial evidence standard and affirmed the URSB’s finding that the home was an urban nuisance. It severed the homeowner’s takings claim and tried it to a jury. The jury determined that the home was not a public nuisance and awarded the homeowner damages for the “taking.” The Dallas Court of Appeals affirmed.

In an opinion by Chief Justice Jefferson and joined by Justices Hecht, Medina, Willett, and Lehrmann, the supreme court affirmed. The Court explained that the government commits no taking when it abates a public nuisance. Nuisance determinations are thus generally dispositive in takings cases, but only when made by a court, not an administrative body. The same deference is not given to decisions of an administrative body because the inquiry requires a constitutional fact review and “unelected municipal agencies cannot be effective bulwarks against constitutional violations.” Therefore, the Court concluded that the URSB’s nuisance determination, and the trial court’s affirmance of that determination under a substantial evidence standard, were not entitled to preclusive effect in the homeowner’s takings case, and the trial court correctly considered the issue de novo.

Justice Johnson, joined by Justices Wainwright, Green, and Guzman, dissented. They argued that the URSB's finding that the property was a nuisance, when affirmed by the trial court, should have determined the nuisance question and precluded litigation. They would have held that the process provided to the homeowner by the URSB proceedings and appellate review of those proceedings and the URSB's order by the substantial evidence standard was sufficient.

Justice Guzman, joined by Justices Wainwright, Green, and Guzman, dissented and wrote separately to argue that the Court should have focused on whether the procedures created by the Legislature for abatement of urban nuisances violated the due process rights of property owners. She would have held that the procedures did not violate the due process rights of property owners and given preclusive effect over the property owner's takings claim to the URSB's finding that the house was a nuisance.

***The Edwards Aquifer Authority v. Day*, --- S.W.3d ----, No. 08-0964, 2012 WL 592729 (Tex. 2012).**

Landowners have an interest in groundwater that is compensable under the takings clause of the Texas Constitution.

Landowners applied for a permit to withdraw 700 acre-feet of water annually from an aquifer for irrigation. The aquifer authority denied the application and an administrative law judge decided that the landowners were entitled to a permit for 14 acre-feet of water. The landowners appealed to the state district court and also asserted a takings claim.

The trial court granted summary judgment to the aquifer authority on the takings claim. The San Antonio Court of Appeals disagreed with the dismissal of the takings claim because it held that landowners had ownership rights in groundwater that were entitled to constitutional protection.

In an opinion by Justice Hecht, the supreme court affirmed. The Court, as a matter of first impression, held that land ownership includes an interest in groundwater in place that cannot be taken for public use without adequate compensation guaranteed by the takings clause of the Texas Constitution.

The Court dispensed with the authority's warning that holding that groundwater regulation can result in a compensable taking would result in disastrous consequences and that the financial burden of such claims could make water regulation impossible. The Court pointed to the Takings Clause and declared that it "ensures that the problems of a limited public resource—the water supply—are shared by the public, not foisted on a few." The Court acknowledged that "[w]e cannot know, of course, the extent to which the Authority's fears will yet materialize, but the burden of the Takings Clause on government is no reason to exclude its applicability."

Severance v. Patterson, --- S.W.3d ----, No. 09-0387, 2012 WL 1059341 (Tex. 2012).

Landowner has right to exclude public from new dry beach created when an avulsive event moves the mean high tide line and vegetation line and causes the former dry beach to become part of the State-owned wet beach.

A landowner owned property on Galveston's West Beach. Hurricane Rita moved the line of vegetation landward such that the entirety of the house on landowner's property was seaward of the vegetation line. The State claimed that a portion of her property was located on a public beachfront easement and a portion of her house interfered with the public's use of the dry beach.

When the State sought to enforce an easement on her property, landowner brought action for declaratory and injunctive relief in federal court, alleging that Texas officials' enforcement of public's allegedly superior easement rights violated the takings clause. The federal district court

dismissed her complaint, holding that an easement on a parcel seaward of the property pre-existed the landowner's ownership of the property and that after an easement to private beachfront had been established between the mean high tide and vegetation lines, it "rolls" onto new parcels of realty according to natural changes to these boundaries. The landowner appealed and the Fifth Circuit certified the following questions to the Texas Supreme Court:

1. Does Texas recognize a "rolling" public beachfront access easement, i.e., an easement in favor of the public that allows access to and use of the beaches on the Gulf of Mexico, the boundary of which easement migrates solely according to naturally caused changes in the location of the vegetation line, without proof of prescription, dedication or customary rights in the property so occupied?
2. If Texas recognizes such an easement, is it derived from common law doctrines of from a construction of the [Open Beaches Act]?
3. To what extent, if any, would a landowner be entitled to receive compensation (other than the amount already offered for removal of the houses) under Texas's law or Constitution for the limitations on use of her property effected by the landward migration of a rolling easement onto property on which no public easement has been found by dedication, prescription, or custom?

In an opinion by Justice Wainwright, the supreme court, as a matter of first impression, held that an avulsive event that moves the mean high tide line and vegetation line suddenly does not automatically deprive a landowner, through "rolling easement," of her right to exclude the public from the new dry beach.

While mentioning in passing the history in Texas of public use of Gulf-front beaches, the public right to beach access was, in the Court's view, trumped by the landowner's "right to exclude

others from privately owned realty,” which the Court characterized as “among the most valuable and fundamental of rights possessed by private property owners.”

***Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 912 (Tex. 2012).**

Landowner has right to challenge common carrier status and force pipeline company to show how unbuilt pipeline will be used.

The Railroad Commission granted a permit to a pipeline company to operate a common carrier pipeline for the transportation of CO₂. When the pipeline company attempted to survey Texas Rice’s land, they refused entry. The pipeline company sued Texas Rice for an injunction allowing access to the property. On cross-motions for summary judgment, the trial court rendered judgment for the pipeline company and found that the pipeline was a “common carrier” pursuant to Section 111.002(6) of the Texas Natural Resources Code with the accompanying power of eminent domain. The trial court permanently enjoined Texas Rice from interfering with the pipeline company’s right to survey. The court of appeals affirmed, concluding that Denbury Green had established its common carrier status as a matter of law.

In an opinion by Justice Willett, the supreme court reversed and remanded. The Court held that the common carrier permit did not conclusively establish the pipeline company’s status as a common carrier and confer the power of eminent domain. The Court then held that to qualify as a common carrier pipeline, a “reasonable probability must exist that the pipeline will serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier.” The Court explained that the evidence before the trial court did not establish common-carrier status as a matter of law and remanded for further proceedings.

In the opinion's conclusion, Justice Willett made it clear that, in his view, property rights trumped the State's energy needs:

“Pipeline development is indisputably important given our State's fast-growing energy needs, but economic dynamism—and more fundamentally, freedom itself—also demand strong protections for individual property rights. Locke deemed the preservation of property rights ‘the great and chief end’ of government, a view this Court echoed almost 300 years later, calling it ‘one of the most important purposes of government.’”

The pipeline company's second motion for rehearing is currently pending.