

**Interim Committee to Study the Power of  
Eminent Domain**



**Report to the 80th Texas Legislature**

**December 2006**



# Interim Committee to Study the Power of Eminent Domain

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December 1, 2006

Senator Kyle Janek  
Co-Chair  
Representative Beverly Woolley  
Co-Chair

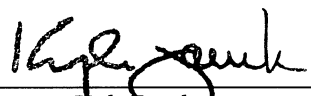
The Honorable David Dewhurst  
Lieutenant Governor  
Capitol Building, Room 2E.13

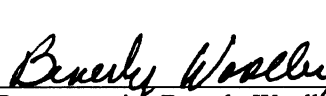
Dear Governor Dewhurst:

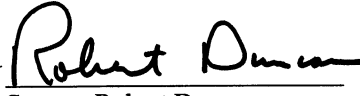
The Interim Committee to Study the Power of Eminent Domain submits this report in response to the interim charges assigned to this committee. The committee held a public hearing on October 25, 2006 to consider public and invited testimony from affected property owners, condemning entities, agency personnel and others. This report contains a review of many issues brought up both at the public hearing, as well as issues individual committee members identified themselves.

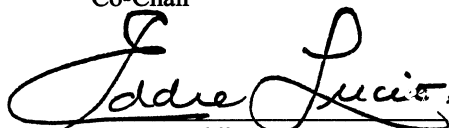
The Committee has carefully considered all of the testimony received on its charges in order to provide you with this report. We appreciate your leadership, and we trust that the recommendations offered in this report will serve to improve private property rights in Texas.

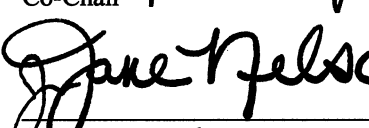
Respectfully submitted,

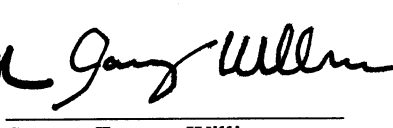
  
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Senator Kyle Janek  
Co-Chair

  
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Representative Beverly Woolley  
Co-Chair


  
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Senator Robert Duncan


  
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Senator Eddie Lucio, Jr.

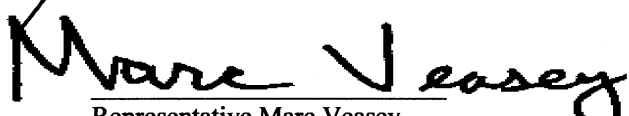
  
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Senator Jane Nelson

  
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Senator Tommy Williams

  
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Representative Frank Cortez

  
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Representative Phil King

  
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Representative Aaron Peña

  
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Representative Marc Veasey

## Introduction

*Texas has a historic opportunity to secure its place as the national leader in promoting the economic freedom of all of its citizens by adopting reforms that restore the centrality of private property rights that existed when our nation and our state were founded.*<sup>1</sup>

During the Second Called Special Session of the 79th Legislature, Senator Kyle Janek authored Senate Bill 7, relating to the limits of use of the power of eminent domain in response to the *Kelo v New London* Supreme Court decision. Senate Bill 7 called on the Lieutenant Governor and the Speaker of the House of Representatives to appoint five members each to an interim committee to study the power of eminent domain. The Lieutenant Governor appointed Senator Kyle Janek, Co-Chair, Senators Robert Duncan, Eddie Lucio, Jr., Jane Nelson and Tommy Williams. The Speaker of the House appointed Representative Beverly Woolley, Co-Chair, as well as Representatives Frank Corte, Phil King, Aaron Pena and Marc Veasey.

Senate Bill 7 directed the Committee to study the power of eminent domain, including the use of the power of eminent domain for economic development purposes and the issue of what constitutes adequate compensation for property taken through the use of eminent domain; and prepare a report of the committee's study for the 80th Legislature.

The Committee held one public hearing on October 25, 2006 at which invited and public testimony was heard. The invited testimony consisted of four panels divided by subject area covering public use and public purpose, policy considerations regarding eminent domain and the issue of adequate compensation from the perspective of the property owner and the condemning entity. The members would like to thank the following people for their participation in the hearing;

Jenifer Zeigler, JD, Legislative Affairs, Castle Coalition of the Institute for Justice  
Bill Peacock, Director Center for Economic Freedom, Texas Public Policy Foundation

Scott Houston, Director of Legal, Texas Municipal League

Michael Behrens, Executive Director, TxDOT

Lester Allison, Allison Company

John Colyondro, Executive Director, Texas Conservative Coalition

Glen Sodd, Dawson & Sodd, P.C.

Dan Dierschke, Texas Farm Bureau

Wright Gore, Western Seafood

Jay Doegey, Attorney, City of Arlington

James Mann, Clark, Thomas and Winters, P.C.

Jeff Meyerson, Centerpoint Energy

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<sup>1</sup> Bill Peacock, TEXAS PUBLIC POLICY FOUNDATION, *Private Property or Public Use: Restoring Constitutional Distinctions*, Oct. 2006 at 5.

*An ACT of the Legislature (for I cannot call it law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority...A few instances will suffice to explain what I mean... A law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.*<sup>2</sup>

In 2005, the United States Supreme Court decision in *Kelo v. City of New London* allowed government sweeping new powers of eminent domain. In the words of Justice Sandra Day O'Connor: "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz Carlton, any home with a shopping center, or any farm with a factory."<sup>3</sup>

The *Kelo* decision means "citizens are safe from the government in their homes, but their homes themselves are not."<sup>4</sup> Fortunately the Supreme Court ruled the States have the power to impose restrictions on the exercise of eminent domain. With Senate Bill 7, the Texas Legislature became the second state legislature in the nation to pass legislation to restrict the use of eminent domain for economic development.

## **Public Use**

Although the United States Supreme Court called eminent domain the "despotic power" in the 1700s, it recognized such power is necessary for government to subsist. Government has been traditionally allowed to use the power of eminent domain only for public use projects where a clear public necessity has been demonstrated. Therefore public use meant just that: used, or able to be used by the public.

Beginning in the 1950s, the urban renewal movement began the expansion of the public use doctrine. A succession of courts ruled that eminent domain authority was allowable in order to renew "slum" neighborhoods. In *Berman v. Parker*, the Supreme Court ruled that removal of blight was a "public purpose"<sup>5</sup> and was therefore acceptable justification for a taking, even though "public purpose" is not mentioned in the Takings Clause of the United States Constitution.<sup>6</sup>

Not only did the *Berman* decision change the standard of "public use" to "public purpose", it contracted judicial scrutiny of what constitutes public use by stating: "once the object is within the authority of Congress, the right to realize it through the exercise

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<sup>2</sup> *Calder v. Bull*, 3 U.S. 386, 388 (1798).

<sup>3</sup> *Kelo, et.al. v. City of New London, Connecticut* 545 U.S. 4, 108 (2005).

<sup>4</sup> *Id.* at 114.

<sup>5</sup> *Berman v. Parker*, 348 U.S. 33 (1954).

<sup>6</sup> U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

of eminent domain is clear."<sup>7</sup> What this essentially means is that a governmental entity can exercise eminent domain in order to carry out *any* power within its authority.

The *Kelo* decision completed the erosion of the strictest interpretation of the "public use" doctrine by permitting the government to take property and transfer it to a private developer for any more economically beneficial purpose, regardless of whether the area is blighted. The court reasoned that "economic development is a traditional and long accepted function of government...[and there is] no principled way of distinguishing economic development from the other public purposes [it has] recognized."<sup>8</sup>

In her dissent, Justice Sandra Day O'Connor defined the scope of prior eminent domain decisions into three categories: (1) transfer of property to public ownership; (2) transfer of private property to private parties, such as common carriers or a similar public infrastructure; and (3) transfer of private property to remedy an identifiable public harm. The Justice pointed out that "economic development" does not fit into any of these categories. Justice Clarence Thomas expressed in his dissent that "today's decision is simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning."<sup>9</sup>

So there are two schools of thought with different definitions of "public use." The original school believes that public use means the property acquired by eminent domain must actually be used by the public or that the public must have the opportunity to use the property. The newer view involves a more expansive concept of public use—equating public use with any public advantage as perceived by the condemning authority.

Steve Lopez was speaking sarcastically in a 1997 commentary in Time magazine when he remarked "Eminent Domain" is "a legal term meaning 'we can do anything we want.'"<sup>10</sup> With the *Kelo* decision's expanded interpretation of public use, his sarcastic comment is now closer to reality.

### **Blight and Community Development Exception**

Senate Bill 7 allows the use of eminent domain in cases where "the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas..."<sup>11</sup>

A blighted area is:

An area that is not a slum area, but that, because of deteriorating buildings, structures, or other improvements; defective or inadequate streets, street layout, or accessibility; unsanitary conditions; or other hazardous

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<sup>7</sup> *Berman v. Parker*, 348 U.S. 33 (1954).

<sup>8</sup> *Kelo*, 545 U.S. at 108 (2005).

<sup>9</sup> *Id.*

<sup>10</sup> Steve Lopez, *In the Name of Her Father*, TIME, July 14, 1997, at 4.

<sup>11</sup> S.B. 7, 79th Leg., 2d Spec. Sess.

conditions, adversely affects the public health, safety, morals, or welfare of the municipality and its residents, substantially retards the provision or a sound and healthful housing environment, or results in an economic or social liability to the municipality.<sup>12</sup>

The current statutory definition of blight would allow a taking in cases where a property's defect is either minor (deteriorating improvements) or not caused by the property owner (inadequate streets or street layout). Municipalities currently have authority to condemn buildings for offenses that endanger the public health and welfare.

Blight designations are made by area, instead of property-by-property. For example: a municipality could declare an entire neighborhood blighted based on the deficiencies of only a few property owners. In such a case, the penalty for the actions of a few property owners would be borne by every single property owner in the area designated as blighted.

Finally, an area that a municipality designates as blighted remains blighted indefinitely. Even if the conditions that caused the blight designation were rectified, an area would still be eligible for a taking under the blight exemption so long as the municipality has not removed the blight designation from that area. In this situation, a taking could occur in a blighted area without any actual blight.

### **Accountability**

Another issue brought up at the October 25 hearing was that of accountability. Many jurisdictions the Legislature has granted condemnation authority do not have elected governing boards. For example, the governing board of a Tax Increment Reinvestment Zone is appointed, thereby making it more difficult for voters to hold accountable those who initiate an eminent domain taking.<sup>13</sup>

Some entities have exercised authority to condemn property outside the jurisdiction of that entity. For example, a municipal utility district is currently able to begin condemnation proceedings on land located outside that district. In such a case, even though the governing board members are elected, they are not elected by the people whose property is in jeopardy of being taken.<sup>14</sup>

### **Constitutional Compensation Requirements**

After determining that the public use constraints on eminent domain established by the Fifth Amendment to the United States Constitution have been met, the Constitution further requires that affected property owners receive just compensation for their

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<sup>12</sup> TEX. LOC. GOV'T CODE ANN § 374.003(3) (Vernon 2005).

<sup>13</sup> Joint Interim Committee to Study the Power of Eminent Domain, Oct. 25, 2006 Public Hearing, available at <http://www.senate.state.tx.us/bin/live.php>.

<sup>14</sup> <sup>14</sup> Bill Peacock, TEXAS PUBLIC POLICY FOUNDATION, *Private Property for Public Use: Restoring Constitutional Distinctions*, Oct. 2006 at 13.

property.<sup>15</sup> Historical support for compensating property owners affected by eminent domain dates to the Magna Carta, the Declaration of Independence, and are vetted in Federalist Number 10. In Federalist Number 10 James Madison wrote:

The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to an uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of respective proprietors, ensues a division of society into different interests and parties.<sup>16</sup>

Protecting property rights is an integral thread in the fabric of our democracy. The protection of a property owner's right to receive just compensation for his property must be balanced with the legitimate public needs and limited resources of government.

Most often eminent domain is utilized by governmental entities for public uses and the property owner receives just compensation in exchange for his property. This compensation is paid from the coffers of the governmental entity and consists primarily of tax and fee revenue. As such, property owners are receiving public dollars in exchange for their property being put to a public use. A governmental entity exercising eminent domain must not only act responsibly and exercise caution when taking property for a public use, but also must do so when expending public funds in the name of a public use. The need to balance the competing interests of property owners with the interests of governmental entities does not cease when issues of public use have been resolved and property has been taken by eminent domain. The final step in ensuring that property rights are protected and that public funds are expended in a prudent manner is meeting the requirements of adequate or just compensation.

Texas law permits certain private entities to exercise the power of eminent domain. For instance, a private entity that is a common carrier is granted the power of eminent domain.<sup>17</sup> Most often these private entities are exercising eminent domain in a manner wholly consistent with traditional public uses, such as supplying a city with electricity. However, when the power of eminent domain is exercised by a private entity, whether by acquiring property or an easement on property, the funds which are used to compensate property owners are private funds and not public funds. The competing interests in this scenario are the rights of a property owner to securely hold his property and the need to provide the public with necessary and public uses of the land acquired by eminent domain. Regardless of whether the funds expended when property is obtained through eminent domain are public or private funds, the property owner is entitled to just and adequate compensation.

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<sup>15</sup> U.S. CONST. *supra* note 6, at amend. V.

<sup>16</sup> ROBERT SCIGLIANO, THE FEDERALIST: A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES BY ALEXANDER HAMILTON, JOHN JAY, AND JAMES MADISON (2000).

<sup>17</sup> TEX. NAT. RES. CODE §111.019(a) (Vernon 2001 and Supp. 2006).

Unlike the United States Constitution which requires that a property owner receives just compensation,<sup>18</sup> the Texas Constitution requires that a property owner receives adequate compensation when his property is taken in whole or in part or is damaged in whole or in part.<sup>19</sup> A property owner is compensated under the Texas Constitution only after his property is damaged or taken, and the value assessed as of the day of the taking.<sup>20</sup> The Texas Supreme Court has considered whether a property owner should be compensated prior to a formal taking, and espoused that a property owner may not recover for pre-condemnation actions by stating:

Competing interests must be considered: on the one hand, the interest of the landowner in not having the cloud of condemnation hanging over his property, and on the other, the need for thorough public debate, environmental review and consideration of project alternatives. If the government were subject to liability for "unreasonable" delay, however, its consideration of these competing interests would be skewed. Officials would be pressured to expedite property acquisition to avoid immediate liability to a particular landowner, regardless of the long-term social costs. Public policy dictates that the government be free to make this type of planning decision in the public interest, without threat of civil liability to a particular landowner. In the absence of clear constitutional or statutory authority, we decline to recognize a liability rule that would so skew governmental decision-making.<sup>21</sup>

In contrast to the Texas requirement that compensation occur at the time of the condemnation, other states permit property owners to be compensated before a physical taking occurs. In these other jurisdictions, certain property owners are compensated when their land is entered during the planning for a possible eminent domain proceeding under the theory that the property owner's ability to fully use and enjoy his land is compromised during the planning for eminent domain.<sup>22</sup> Compensating a property owner during the pre-condemnation process could reasonably result in the compensation of a property owner for property which is never taken by a condemning authority, and thus is speculative compensation at best.

The sole exception to a property owner receiving adequate compensation in exchange for the taking of his property is when a property owner waives his right to adequate compensation. By waiving his right to compensation, the property owner effectively consents to his property being taken without compensation.<sup>23</sup>

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<sup>18</sup> U.S. CONST. *supra* note 6, at amend. V.

<sup>19</sup> T. X. CONST. art. I, §17.

<sup>20</sup> *Id.*

<sup>21</sup> *Westgate, Ltd. v. State*, 843 S.W.2d 448, 454 (Tex. 1992).

<sup>22</sup> 32 Tex Jur 3d, Eminent Domain §140 quoting 26 Am Jur 2d, Eminent Domain §155

<sup>23</sup> *Hale v. Lavaca County Flood Control District*, 344 S.W.2d 245 (1966).



## Determination of Adequate Compensation

Determining what meets the standard of adequate compensation has been and is heavily litigated. Texas Courts have long reasoned that adequate compensation is " the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying." <sup>24</sup> Under this standard, adequate compensation is thus the fair market value of the property as reflected by the price conceived by a willing buyer and willing seller.

Whether a willing buyer and a willing seller model is appropriate to determine adequate compensation in eminent domain proceedings is contentious in that there are instances when sellers who face eminent domain are not willing sellers.<sup>25</sup> A willing seller would voluntarily offer his property for sale. However, in the exercise of eminent domain it is often the buyer, the condemning authority, which initiates the purchase as the willing buyer of property from a property owner, who most often would prefer not to sell his property. Thus, property acquired through eminent domain may reflect a purchase by a willing buyer, but often reflects a sale by an unwilling seller.

In an attempt to most appropriately and effectively determine the market value of property, a variety of methods and factors are considered when determining what constitutes fair market value. Market value is traditionally determined using either the comparable sales method, the cost method, or the income method. <sup>26</sup>

The comparable sales method utilizes prices paid by willing buyers and sellers in a similar market. "Under a comparable sales analysis, the appraiser finds data for sales of similar property, then makes upward or downward adjustments to these sales prices based on differences in the subject property." <sup>27</sup>

"When comparable sales figures are lacking or the method is otherwise inadequate as a measure of fair market value, courts have accepted testimony based on the cost approach and the income approach. The cost approach, which looks to the cost of replacing condemned property, is best suited for valuing improved property that is unique in character and not frequently exchanged on the market place."<sup>28</sup> The cost approach to determine fair market value is considered to set the upper limit of market value.<sup>29</sup> The final method to determine fair market value is the income method. This method analyzes the income which the property currently generates.<sup>30</sup> Regardless of the method of

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<sup>24</sup> *Accord Kirby Forest Industries, Inc., v. United States*, 467, U.S. 1, 10 (1984); *State v. Carpenter*, 126 Tex. 604, 89 S.W.2d 194, *modifying* 126 Tex. 604, 89 S.W.2d 194, 202 (1936).

<sup>25</sup> See Geoffrey Gagnon, *A Property Owner's Nightmare*, BESTLIFE (Nov. 2006) at 82-85.

<sup>26</sup> *City of Harlingen v. Estate of Sharboneau* 48 S.W. 3d 177, 182 (Tex. 2001) (citing *Religious of the Sacred Heart v. City of Houston*, 836 S.W. 2d 606, 615-617 & n. 14 (Tex. 1992)).

<sup>27</sup> *Id.* at 182.

<sup>28</sup> *Id.* at 183 (citing *Religious of the Sacred Heart v. City of Houston*, 836 S.W. 2d at 616 (Tex. 1992)) (citing American Institute of Real Estate Appraisers, *the Appraisal of Real Estate* 62, 349 (9th Ed. 1987)).

<sup>29</sup> *Id.* at 183 (citing *Polk City v. Tenneco, Inc.*, 554 S.W. 2d 918, 921 (1977)).

<sup>30</sup> *Id.*

calculation, courts have used fair market value as a means of determining adequate compensation.

The aforementioned methods for determining fair market value could consider a variety of factors such as, but not limited to, anticipated rentals of the property,<sup>31</sup> value of improvements on the property,<sup>32</sup> reasonable and foreseeable fear to future buyers,<sup>33</sup> evidence of business sales volume,<sup>34</sup> and all factors that buyers and sellers would consider in arriving at a sales price.<sup>35</sup>

Further, the aforementioned methods of valuation do not or may not reflect factors such as business goodwill and the cost of replacing a residence with a similar residence.<sup>36</sup> A business establishes goodwill with its customers, other businesses, and the community as a result of its location, reputation, skill, and quality. This results in a business' ability to generate income in excess of an average rate for a similar business.<sup>37</sup> A residential property owner may also have a unique connection to his property whether the home has been in the family for generations or whether it would be extremely difficult to find a similar home in the same general vicinity. Whether the property at issue is residential or commercial, the property owners are likely to assert and be affected by circumstances unique to their property.

Arguments for not considering factors such as business goodwill and replacement costs focus on the speculative and uncertain nature of these factors.<sup>38</sup> Other arguments in opposition to including these factors in compensation analysis are that there exists an inherent need for certain condemnations that serve a necessary and public use. The Texas Supreme Court explains the potential utilitarian need for eminent domain and resulting non-compensable damages as:

The benefits which come and go from the changing currents of travel are not matters in respect to which any individual has any vested right against the judgment of the public authorities.<sup>39</sup> If the public authorities could never change a street or highway without paying all persons along such thoroughfares for their loss of business, the cost would be prohibitive. The highways primarily are for the benefit of the traveling public, and are

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<sup>31</sup> *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978).

<sup>32</sup> *Carpenter*, 89 S.W.2d at 198.

<sup>33</sup> *All American Pipeline Co v. Ammerman*, 814 S.W.2d 249, 253 (Tex. App. - Austin 1991) (referencing *Heddin v. Delhi Gas Pipeline Company* 522 S.W.2d 886, 888 (Tex. 1975)).

<sup>34</sup> *State v. Ralph Watson Oil co., Inc.*, 738 S.W. 2d 25, 28 (Tex.App.- Texarkana 1987); quoting *State v. Zaruba*, 418 S.W.2d 499 (1967) (referencing *City of Dallas v. Priolo*, 150 Tex. 423, 242 S.W.2d 176 (1951)).

<sup>35</sup> *City of Harlingen v. Estate of Sharboneau*, 48 S.W. 3d at 185.

<sup>36</sup> *State v. Schaefer*, 530 S.W.2d. 813, 816 (1975) (citing *State v. Carpenter*, 89 S.W.2d 194).

<sup>37</sup> Black, Henry Campbell (1990) *Black's Law Dictionary 6th Edition*, St. Paul, MN: West Publishing Co. and see California Civ. Pro. Code §1263.510 (2005).

<sup>38</sup> *State v. Schmidt*, 867 S.W.2d 769, 773 (1993).

<sup>39</sup> *Id.* (quoting *State Highway Commission v. Humphreys*, 58 S.W.2d 144 (Tex. Civ. App. San Antonio 1933, writ ref'd) (citing *Heller v. Atchison, T. & S.F. Ry.*, 28 Kan 625 (1882)).

only incidentally for the benefit of those engaged in business along its way. They build up businesses knowing that new roads may be built that will largely take away the traveling public. This is a risk they must necessarily assume.<sup>40</sup>

### **The Impact of Current Adequate Compensation Measures on Property Owners**

There are an infinite number of combinations and permutations of property characteristics related to each parcel of land for which a property owner could seek compensation.

For instance, a business property owner could take into account his business' needs such as his business' profits, accessibility to customers, accessibility for business equipment, loss of income due to disruption to the business, cost of relocation, and goodwill when determining the value of his business property to him.

Likewise, an agricultural property owner could consider other factors important to the value of his property such as the accessibility to a creek for his cattle or accessibility to water ways for his fishing industry; whereas a residential property owner could take into account the ability to purchase a similar home in the same school district to best further the uninterrupted education of his children.

The perspective of each property owner as to the value of his property is unique and property owners are entitled to adequate compensation under the Texas Constitution.<sup>41</sup>

### **Alternative Approaches to Determining Market Value**

An additional approach to determine a property's fair market value is the before and after approach. The Texas Bar Journal article entitled "Adequate Compensation- the Trial from the Buffalo Bayou" by Vaughan E. Waters analyzes the before and after approach as a method to determine adequate compensation with the following example:

Say that Smith and Jones are adjacent landowners. Smith owns a four-acre rectangular tract 1,000 feet wide, with 1,000 feet fronting a highway; Jones owns a deeper rectangular 20-acre tract, likewise with 1,000 feet of frontage on the same highway. The front four acres of Jones' tract is adjacent and comparable in all respects to Smith's rectangular tract. Assume that the state condemns the entirety of Smith's tract, and condemns the identical four acres of Jones' adjacent frontage, for use in the same highway widening project. Assume further that there is no damage to Jones' remainder, or that Jones waives damages. *Jones might nonetheless receive less compensation than Smith if the "before and after"*

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<sup>40</sup> *Id.* at 145.

<sup>41</sup> T.X. Const. art. I, §17.

*rule is applied.* This is so because large tracts quite often sell for less money per square foot than small tracts; the difference between the pre- and post-condemnation values of Jones' tract is thus less than the value of Smith's tract, and so Jones is said to have been "damaged" to a lesser extent than Smith- *even though the values of the respective four acre parcels are the same.*<sup>42</sup>

Unlike the example above, the rule in Texas requires that a homeowner be fully compensated for the value of the land taken. As the article notes, it is possible that the before and after approach does not make all property owners whole.

No eminent domain compensation mechanism is absolutely fair to all property owners and none is absolutely fair to all condemning authorities. As Glenn Sodd, a Texas attorney who represents property owners in condemnation litigation, noted during this Committee's October 25, 2006 public hearing, "adequate compensation and market value are not the same thing."<sup>43</sup> On the contrary, during the same public hearing it was noted by James Mann, a Texas attorney who testified before this Committee on behalf of the Texas Pipeline Association, "market value is an objective manner of determining [damages]."<sup>44</sup>

#### *Replacement Cost as a Measure of Adequate Compensation*

Property rights advocates suggest that there is an inherent unfairness to property owners by using a fair market value standard. They argue that a fair market value standard punishes property owners as many property owners are unable to obtain like property with the amount of compensation received from the taking of their property. As such, it is suggested that for property owners a more appropriate measure of adequate compensation is replacement costs.

Proponents of replacement costs argue that this method would have the greatest potential to make property owners whole, because the property owner would be able to purchase similar property to replace the property he gave up for the public good. However, utilizing replacement costs to meet the standard of adequate compensation has been rejected by Texas courts. It has been noted that "replacement cost is not a proper basis for the valuation of property where said property has a market value."<sup>45</sup> Whether replacement costs is a proper measure of adequate compensation hinges on whether replacement costs are quantifiable or speculative in nature.

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<sup>42</sup> Vaughan E. Waters, *Adequate Compensation- The Trail from Buffalo Bayou*, 55 TEXAS BAR JOURNAL (Mar. 1992).

<sup>43</sup> Joint Interim Committee to Study the Power of Eminent Domain, Oct. 25, 2006 Public Hearing, available at <http://www.senate.state.tx.us/bin/live.php>.

<sup>44</sup> *Id.*

<sup>45</sup> *State v. Bryan*, 518 S.W.2d 928, 932 (Tex.Civ.App.--Houston [1st Dist.] 1975, no writ) (citing *State v. Zaruba*, 418 S.W.2d 499 (1967)).

Certain transportation projects under the purview of the Texas Department of Transportation provide for relocation costs if the service is compatible with the Federal Uniform Relocation Assistance Advisory Program.<sup>46</sup> Michigan addressed the notion of replacement costs by requiring that the taking of a property owner's residence must be compensated at a rate of 125% of the property's fair market value.<sup>47</sup> The compensation a property owner receives beyond fair market value is theorized to account for the additional costs of relocating.

California compensates property owners and displaced residents under certain circumstances when property is taken by eminent domain for a public use.<sup>48</sup> Relocation costs afforded to small business owners, farmers, and non-profit organizations that are displaced may include, if the public entity determines the costs to be reasonable and necessary: actual and reasonable moving expenses; actual direct losses of tangible personal property; actual and reasonable costs for searching for a replacement business or farm not to exceed \$1000; and actual and reasonable expenses necessary to reestablish a small business not to exceed \$10,000.<sup>49</sup> Similarly, California affords certain property owners, who have lived in a dwelling on the property for not less than 180 days prior to the initiation of negotiations, eligibility to receive up to \$22,500 for replacement costs when his property is taken for a public use.<sup>50</sup>

#### *Future Use & Income as a Measure of Adequate Compensation*

In addition to replacement costs, some property owners argue that they should receive a portion of the future income generated by their property. This position is supported by the notion that if a property owner is to sacrifice his property, then he should be able to share in the profits garnered by the new public use of his property.

In 2002 the Texas Supreme Court explained that to compensate a property owner based on the value of the condemnation project would put the property owner in a better position than had there been no condemnation.<sup>51</sup> The goal of adequate compensation is to make the property owner whole, not to place the property owner in a better position.<sup>52</sup>

#### *Business Goodwill as a Measure of Adequate Compensation*

Finally, some business property owners argue that they should receive compensation for business related expenses such as a loss of business goodwill. Unlike Texas, which prohibits a business from receiving compensation based on lost goodwill, California law permits a business owner to be compensated for lost goodwill under certain

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<sup>46</sup> TEX. PROP. CODE § 21.046 (Vernon 2000 and Supp. 2006).

<sup>47</sup> MI Proposal 2006-04 Eminent Domain; [http://www.michigan.gov/documents/06-4\\_170158\\_7.pdf](http://www.michigan.gov/documents/06-4_170158_7.pdf).

<sup>48</sup> CAL. GOV. CODE §7260- 7277 (2005).

<sup>49</sup> CAL. GOV. CODE §7262 (2005).

<sup>50</sup> CAL. GOV. CODE §7263 (2005).

<sup>51</sup> *Exxon Pipeline Co. v. Zwahr*, 88 S.W. 3d 623, 628 (citing *City of Ft. Worth v. Corbin*, 504 S.W. 2d 828, 831 (1974)).

<sup>52</sup> *Id.*

circumstances.<sup>53</sup> Before a business owner can recover for lost goodwill, the business owner must prove, in part, that the loss of goodwill is caused by the taking; and that the loss of goodwill cannot be prevented by relocation or by taking reasonably prudent steps to preserve goodwill.<sup>54</sup>

### **Adequate Compensation for Partial Takings**

Determining what constitutes adequate compensation is further complicated when only a portion of a tract of land is taken. If the taking is a partial taking, the value of the part taken must be considered as if that land stands severed from the larger tract. Therefore, one must look to the fair market value of that tract alone taking into account the measures and factors related to fair market value analysis previously noted.

Adequate compensation also requires compensation for the damage to the remaining tract of land.<sup>55</sup> The damage to the remainder is valued by the value of the land to a willing buyer and a willing seller.<sup>56</sup> If the remaining tract of land benefits from the taking of the partial tract, then that benefit may offset the cost of the partial tract.<sup>57</sup>

The damage to the remainder is only compensable to the property owner when the damage is special and unique to the land owner. Damage which would be universal to all property owners in the area is not compensable to a property owner.<sup>58</sup> The Texas Supreme Court in *Schmidt* explained this standard as "[i]t is the nature of the injury rather than its location that is critical in determining whether it is community [damage]."<sup>59</sup>

### **Summation**

Senate Bill 7 provided a good beginning for eminent domain reform in Texas. The diligent work of interim committee members and other parties has provided a solid foundation for comprehensive eminent domain legislation in the 80th Legislature.

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<sup>53</sup> CAL. CIV. PROC. CODE §1263.510 (2005).

<sup>54</sup> *Id.*

<sup>55</sup> *State v. Schmidt*, 867 S.W.2d 769, 772 (1993) (citing *Buffalo B., B. & Colo. R.R. v. Ferris*, 26 Tex. 588, 603 (1863)).

<sup>56</sup> *State v. Carpenter*, 126 Tex. 604, 89 S.W.2d 194, 201 (1936).

<sup>57</sup> *Schmidt*, 867 S.W.2d at 773.

<sup>58</sup> *Id.* at 779.

<sup>59</sup> *Interstate Northborough Partnership v. State*, 66 S.W. 3d 213, 219 (2001) (quoting *State v. Schmidt*, 867 S.W.2d 769, 781 (1993)).