

**DEFENSES TO CONDEMNATION:
Rising to the Challenge of the
Right to Take:**

IRWA Fall Seminar

Virtual Meeting

September 9, 2022

New Braunfels, Texas

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Overview

- Does Condemnor have Eminent Domain Power?
- How Condemnor can Lose Jurisdiction
- Economic Development
- Affirmative Defenses to Condemnation
- Consequences of Losing Jurisdiction
- Conclusion

Terminology

- “Eminent Domain”
- “Condemnation”
- “Jurisdiction”
- “Right to Take”

Source of Eminent Domain Powers

- Inherent Right of the Sovereign
 - U.S. and all States have the power
 - No statute “gives” the power to the government – it is inherent
 - It is **delegable to local government entities, utilities, and private common carriers**
 - It is limited by the U.S. and Texas Constitutions

Constitutional Law

- The Takings Clause of the Fifth Amendment to the United States Constitution reads as follows:
 - **“Nor shall private property be taken for public use, without just compensation.”**

Constitutional Law

- Article I, section 17 of the Texas Constitution provides:
 - “No person’s property shall be **taken, damaged or destroyed** for or applied to public use without adequate compensation being made.”

Do they have the Power?

- As part of SB 18 (2011), Government Code Section 2206.101 required all entities, whether they be governmental or private, which possessed the power of eminent domain, to identify each provision of law that granted such power in a letter to the State Comptroller (“Sunset Legislation”).
- The letter must have been submitted by December 31, 2012. Failure to submit the required letter in time resulted in the expiration of that entity’s condemnation power.
- Comptroller’s Online Eminent Domain Database (COEDD):
<https://coedd.comptroller.texas.gov/>
- E.g., South Comal Water Supply Corp.

Losing Condemnation Jurisdiction

- Failure of Good Faith Negotiations
 - *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 183-84 (Tex. 2004).
- Filing in wrong court
- Failure to follow Chapter 21 Prerequisites
- Failure to prove common carrier status
 - *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline–Texas, LLC*, 363 S.W.3d 192 (Tex. 2012)

Losing Condemnation Jurisdiction

- Faulty public necessity ordinance
 - Craig Austin
 - CoEP case
- No certificate of convenience and necessity from PUC
- Faulty survey/property description
- Amending the Petition to enlarge the taking
 - More land area or more rights for condemnor or less rights for condemnee
 - Nix Trust, CoEP, SW Gulf RR, En Seguido

Sword of Damocles



Economic Development

- *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005).
- Held that the public-use requirement imposed by the Fifth Amendment to the United States Constitution was not violated – under Connecticut law - when a city condemned a private home as part of an **economic-redevelopment** plan that would turn the land over to a private developer and increase tax base.

Economic Development

- Illegal in Texas and most states since *Kelo*
- Can be a secondary purpose of ED
 - Kerrville case
 - Windcrest case
 - Developer funded projects

Public Use in Texas

- Public use and public necessity are required to take private property
- **Public Use:** *When there results to the public some definite right or use in the business or undertaking to which the property is devoted*
- **Examples:** roads, railroads, utilities, schools, government buildings, flood control, parks, **slum control**, etc.

Public Necessity in Texas

- **Public Necessity:** The condemnation must actually be necessary to advance or achieve the ostensible public use, which is commonly termed the “necessity” or “public necessity”.
- *City of Austin v. Whittington*, 384 S.W.3d 766, 772 (Tex. 2012).
 - Not to simply confer a benefit on a private party; e.g., developer or a single property
 - In Texas, not simply to increase tax base

Affirmative Defenses to Condemnation

- **Fraud:** taking is "clearly and palpably" private
- **Bad Faith:** taking with "intent to injure, or some other improper motive."
- **Arbitrary and Capricious:** taking "decision not done according to reason or judgment and is a willful and unreasoning action, action without consideration and in disregard of the facts and circumstances that existed at the time of the condemnation was decided upon.").
- *See City of Austin v. Whittington*, 384 S.W.3d 766, 777-78 (Tex. 2012)

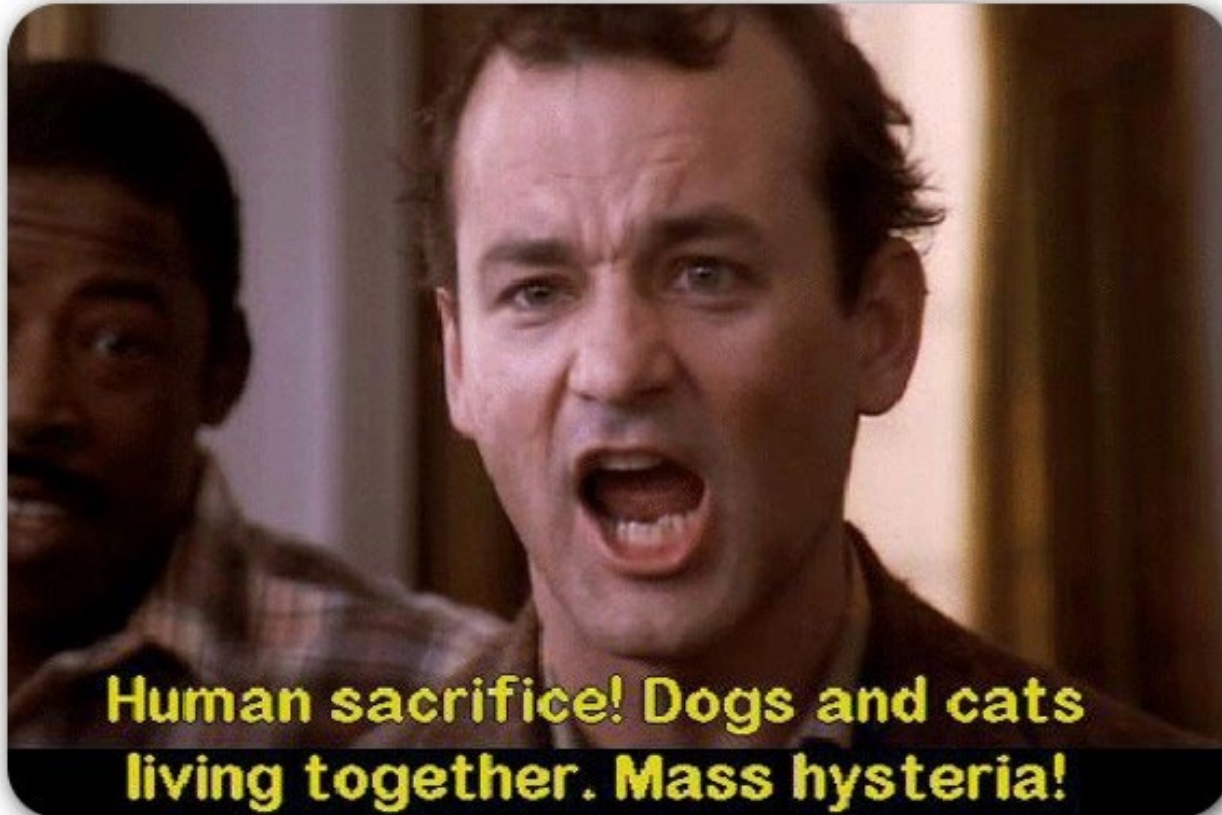
Arbitrary and Capricious

- *Houston Lighting and Power Co. v. Klein ISD*; 739 S.W.2d 508 (Tex.App.-Houston [14th Dist.] 1987, writ denied).
- The school argued that the decision was arbitrary and capricious because of the potential health risks to the students resulting from the 345 kV power line's magnetic fields. The court of appeals held that the jury could have found that the utility failed to take these concerns into consideration, which could be an action “not done according to reason or judgment.”

If Lose Right to Take

- If the condemnor loses on jurisdiction, the sky falls and all hell breaks loose per the Texas Property Code:
 - Land is returned to condemnee
 - All attorney's and expert fees and all costs reimbursed
 - Damages for temporary possession/trespass
 - Project, if constructed, must be removed
 - If refile to fix error(s), will pay treble damages

If Lose Right to Take



**Human sacrifice! Dogs and cats
living together. Mass hysteria!**

HP&L vs. Klein ISD



HP&L vs. Klein ISD



Judicial Interpretation

- Proceedings to condemn land are special in character, and the party attempting to establish its right to condemn must show strict compliance with the law authorizing private property to be taken for public use. *State v. Bristol Hotel Asset Co.*, 65 S.W.3d 638, 640 (Tex. 2001).
- In condemnation proceedings, the property owner is given a single opportunity to recover damages for the taking of his property for public use. *Coastal Indus. Water Auth. v. Celanese Corp. of Am.*, 592 S.W.2d 597, 599 (Tex.1979).
- Therefore, the protections of the statutory condemnation procedures must be liberally construed for the benefit of the landowner. *John v. State*, 826 S.W.2d 138, 140 (Tex.1992).



Questions?

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