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## Texas Eminent Domain Laws Get a Makeover – A Primer on Senate Bill 18

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*The Texas Legislature has enacted Senate Bill 18, a law that substantially changes eminent domain practices for both public and private entities. The new rules will most certainly make condemnations more time-consuming and costly. Depending on how courts react to the new focus on takings being solely for a public use, condemning authorities may find themselves having to defend a taking more vigorously than ever before.*

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In *Kelo v. City of New London*, 545 U.S. 469 (2005), the U.S. Supreme Court approved the government's use of eminent domain, in furtherance of urban "economic redevelopment" goals, to effectively transfer land from one private owner to another. The case arose from the City of New London, Connecticut's condemnation of privately owned real property so that the City could use it as part of a privately financed, comprehensive redevelopment plan. Unlike historical projects that sought to condemn "blighted" urban areas, the New London project was designed to achieve economic redevelopment of a depressed part of the City, promising new jobs and higher local tax revenues.

The Supreme Court's 5–4 decision in *Kelo* held that the general benefits a community enjoyed from economic improvement qualified such public-private plans as a permissible "public use" under the takings clause of the Fifth Amendment to the United States Constitution. The Fifth Amendment prohibits the taking of private property for public use without just compensation. *Kelo* stands for the proposition that governmentally authorized takings of private property—so that the property can be redeveloped by private commercial developers—is an acceptable "public use" of that property so long as the taking has a primarily public *purpose*, in this case improved economic prosperity in the area of redevelopment and enhancement of the local tax base.

The *Kelo* decision was widely criticized by private property rights advocates who viewed the outcome as a violation of property rights and as a misinterpretation of the Fifth Amendment, the consequence of which would be the use of governmental power to benefit private corporations at the expense of individual homeowners and local communities. In the wake of *Kelo*, many states, including Texas, sought to restrict their states' eminent domain laws.

The Texas Legislature, having failed to pass eminent domain reform legislation during its 2009 session, has now addressed *Kelo*, taking advantage of wide conservative majorities in both houses of the Texas Legislature and the designation of the issue for "emergency" legislative action by Texas Governor Rick Perry in January, 2011. *Texas Senate Bill (SB) 18*, enacted into law by the Texas Legislature in May 2011, will significantly alter the law of eminent domain in Texas when it takes effect on September 1, 2011. In general, the new law applies to condemnation proceedings initiated on or after September 1, 2011 to take private property, either in whole or in part.

The new law alters several provisions of the Texas Education, Government, Local Government, Property, Transportation and Water Codes. A special section of the law removes eminent domain authority from the Texas Medical Center (TMC), a charitable corporation that performs certain real estate functions for the joint benefit of the 49 non-profit medical-related institutions that occupy over 1,000 acres of land near downtown Houston. The new law prevents the TMC from condemning single-family properties and small apartment sites, actions that would allow TMC to encroach on residential neighborhoods that now surround the complex.

A brief summary of the new legislation's general provisions is set out below:

### New Focus on a *Public Use* for Governmentally Condemned Land

In essence, *SB 18* seeks to reduce the effect of the *Kelo* decision on Texas eminent domain practices. The new law expressly authorizes government agencies to exercise eminent domain powers (through condemnation proceedings) only to effectuate a *public use*. *SB 18* replaces references to public purpose(s) in eminent domain laws with references to public use(s). The term *public use* is not defined by the statute, as the definition of that term has traditionally been left to Texas courts. However, private property rights advocates believed that, after *Kelo*, a public purpose was too broad and would allow for takings where no public use was apparent. This change promises future litigation over whether eminent domain powers exercised by government entities are indeed being used to effectuate a bona fide **public** function, as opposed to providing private gain for well-connected insiders or otherwise falling outside the proper role of government. Not only has the law replaced the word "purpose" with "use," but it specifically added a *public use* criterion to the eminent domain power of independent school districts, state government agencies, municipalities and county governments. Further, the use of eminent domain by municipalities for specified types of public facilities now requires that those facilities be "municipally owned."

### Roads Above Pipeline Easements

In Texas, as in most states, certain private entities, primarily utility-based private corporations, are authorized by state law to exercise eminent domain powers where the absence of such authority would frustrate important societal infrastructure needs such as pipeline, power, communications and water services. This authority inevitably invites tension between these private companies and individual landowners. One particular area of tension in Texas has been between oil and gas pipeline companies and the owners of the surface estate below which the pipeline is placed. The easements held by the pipeline companies generally prohibit the surface estate owner's use of the surface in ways that could interfere with pipeline operations. Roadway construction has been a particular bone of contention.

Under *SB 18*, landowners whose property is subjected to an *oil or gas exploration or production pipeline easement* that is taken through a condemnation proceeding initiated after September 1, 2011 will be allowed to construct roads of up to 40 feet in width at any location above (and perpendicular) to the pipeline easement so long as the road does not violate a pipeline regulation or interfere with operation and

maintenance of any pipeline. The landowner must provide at least 30 days' advance notice to the easement holder before beginning construction of such a road. Easement and property owners may mutually agree to alternative arrangements, but in the absence of such an agreement landowners will retain this road-building right.

### New Rights for Landowners Subject to Condemnation

Government bodies or authorized private corporations usually attempt to acquire land through voluntary purchase and sale arrangements at "fair market value" before resorting to condemnation. However, affected landowners often feel at a disadvantage in such negotiations and many are intimidated by the power of governmental purchasers. *SB 18* seeks to address this imbalance with more demanding procedural requirements, including *public notice and hearing requirements and explicit voting mandates by authorizing official bodies*. *These procedures are now a pre-condition to the use of eminent domain power by governmental entities*, ensuring that potentially affected property owners have an opportunity to be advised of the impending use of eminent domain authority to acquire their property.

At present, there is no formal list of public and private entities that hold eminent domain authority in Texas. *SB 18* requires any **public or private** entity claiming authorization to exercise the power of eminent domain in Texas to submit a letter to the state comptroller, by no later than December 31, 2012, explaining the legal basis for its assertion of such authority. These letters will be compiled for review by the Legislature for possible further revisions of Texas eminent domain law in 2013. Failure of an entity to submit such a letter will result in a loss of its eminent domain power as of September 1, 2013.

The new law amends the Texas Property Code to subject **private entities** with eminent domain authority to limitations that now apply to government, requiring both types of entities to *provide certain appraisal reports to property owners* whose land the entity proposes to purchase. Further, these provisions will apply to offers to *lease* land, not just *purchase* offers. Also, such offers can no longer include standard confidentiality provisions that prohibit the offeree from discussing the offer with others.

The new law spells out the details of *bona fide acquisition offers* that must now precede the use of eminent domain power by **public or private** entities that claim they have been unable to come to a mutually acceptable purchase agreement with the property owner. Current law requires only that a final valuation offer precede the use of eminent domain power, but such an offer could be made just 10 days before a special commissioners' hearing. A key element of the new *bona fide offer* requirement is the inclusion of a written initial offer for the property, which must be made 30 days before a final offer is made. Further, the new law requires that a certified appraisal accompany a final offer, that the final offer be equal to or greater than the amount of the written appraisal, and that the landowner has 14 days to respond to the final offer. The new law also empowers targeted landowners to demand relevant and available information from prospective purchasing entities in an eminent domain acquisition. Taken together, these are significant changes in the law that will have a material practical effect on the exercise of eminent domain powers in Texas.

Under current law, compensation is not expressly required when a forced taking of a portion of property restricts access to the remaining property and lessens its value. Partial takings are most common for roadway projects. The new law specifies that estimates of *compensable property injury* in such partial condemnation proceedings must now include any material *impairment of "direct access" on or off the remaining property* that affects the market value of the *remaining property*.

Finally, the new law substantially alters the statutory right to repurchase property taken by a **governmental or private** entity. This right is held by the original property owner or that property owner's heirs, successors or assigns. Before *SB 18*, an owner had the right to repurchase the property from a governmental entity if the public use was canceled before the 10th anniversary of the acquisition, but the original landowner had to pay the fair market value of the property at the time of the cancellation. Now, the repurchase right comes into play under one of three circumstances: if the public use for which the acquisition was made is: 1) *canceled* before the property has been used for that specified public use; 2) the property has become *unnecessary* for the originally specified public use or a substantially similar public use; or 3) "*no actual progress*" is made toward the public use within 10 years. In addition, *SB 18* makes the repurchase price the price *originally paid by the condemning entity*. "Actual progress" is defined by the new law as six actions, of which the acquiring entity must complete at least two, and a seventh action (the adoption of a development plan for the property) for governmental entities. *SB 18* did not change the provisions that require notice to qualified owners (or successors) within 180 days after these repurchase rights are triggered.

In summary, *SB 18* is important legislation for Texas. It will affect all parties in Texas that own land or that exercise the power of eminent domain.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors of this alert.

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