HOUSE COMMITTEE ON LAND AND RESOURCE MANAGEMENT
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2008

A REPORT TO THE
HOUSE OF REPRESENTATIVES
81ST TEXAS LEGISLATURE

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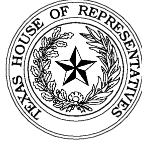

House Committee On
Land and Resource Management

November 15, 2008

Rob Orr
Chairman

P.O. Box 2910
Austin, Texas 78768-2910

The Honorable Tom Craddick
Speaker, Texas House of Representatives
Members of the Texas House of Representatives
Texas State Capitol, Rm. 2W.13
Austin, Texas 78701

Dear Mr. Speaker and Fellow Members:

The Committee on Land and Resource Management of the Eightieth Texas Legislature hereby submits its Interim Report including recommendations for consideration by the Eighty-First Texas Legislature.

Respectfully submitted,

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Dan Barrett

William "Bill" Callegari

Robert "Robby" Cook

Yvonne Davis

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INTRODUCTION

On January 26, 2007, the Honorable Tom Craddick, Speaker of the Texas House of Representatives, appointed the following nine members to serve the Eightieth Texas Legislature as members of the House Committee on Land and Resource Management: Chairman Anna Mowery, Vice Chairman Rob Orr, William "Bill" Callegari, Robby Cook, Yvonne Davis, Charlie Geren, Joe Pickett, Allan Ritter, and John Zerwas.

Following the end of the Eightieth Regular Texas Legislative Session, Representative Anna Mowery announced her retirement from the Texas House of Representatives following nineteen years of public service. On August 23, 2007, Speaker Craddick appointed Representative Rob Orr to replace Anna Mowery as the Chairman of the Committee. On January 9, 2008, Speaker Craddick appointed the newly elected Representative Dan Barrett to fill the vacant seat on the Committee.

On November 30, 2007, Speaker Tom Craddick issued seven interim charges to the House Committee on Land and Resource Management. The Committee heard testimony on each of these seven charges during three days of public hearings in 2008. This Interim Report is based on this testimony and the research of the Committee. Every effort has been made to ensure that the information presented in this Interim Report is accurate as of October 1, 2008.

Finally, the Committee would like to thank those officials, employees of state agencies, and witnesses who testified before the Committee for supplying much of the information that made this report possible.

INTERIM STUDY CHARGES

CHARGE ONE: Examine the authority of the General Land Office, the School Land Board, and similar state agencies to engage in various types of real estate transactions, and determine the appropriateness of this authority.

CHARGE TWO: Observe and study ongoing litigation and actions by condemning authorities in light of the *Kelo* decision and make recommendations for changes in eminent domain law needed to protect private property rights. Specifically, examine the body of law used to determine the amount of compensation property owners receive when their land is condemned, in whole or part, and determine the appropriateness of this scheme as compared to others.

CHARGE THREE: Research annexation practices in the state to determine whether municipalities are abiding by both the spirit and the letter of the state's annexation laws, thereby maintaining a proper balance between municipal governments and individual residents.

CHARGE FOUR: Examine the effectiveness of the Private Real Property Rights Preservation Act (Chapter 2007, Government Code).

CHARGE FIVE: Study and evaluate policies held by other states in relation to how they treat wind resources as a property right.

CHARGE SIX: Examine recent attempts by municipalities to exert regulatory authority beyond city limits and extraterritorial jurisdiction. Evaluate the current relationship between and possible conflicts related to regulatory authority expressly given to state agencies by the legislature and regulatory authority delegated to home-rule municipalities. (Joint Interim Charge with the House Committee on County Affairs)

CHARGE SEVEN: Monitor the agencies and programs under the committee's jurisdiction.

INTERIM CHARGE ONE

State Real Estate Transactions

Examine the authority of the General Land Office, the School Land Board, and similar state agencies to engage in various types of real estate transactions, and determine the appropriateness of this authority.

STATE REAL ESTATE TRANSACTIONS

INTERIM CHARGE

"Examine the authority of the General Land Office, the School Land Board, and similar state agencies to engage in various types of real estate transactions, and determine the appropriateness of this authority."[1]

SCOPE OF REPORT

This section of the Interim Report is limited to those issues surrounding the authority of the School Land Board (SLB) and the Texas General Land Office (GLO) to use Permanent School Fund (PSF) assets to engage in a variety of real estate transactions for the benefit of the PSF. Specifically, this report examines the expansion of this authority in recent years, the use of this authority by the SLB and the GLO, and the propriety of such actions given the volatility of the real estate market and the inevitability of state competition with the private sector. A proper evaluation of the appropriateness of such actions involves a review of the costs and benefits of these agencies' involvement in the real estate market.

SUMMARY OF COMMITTEE ACTION

Committee Hearing

The House Committee on Land and Resource Management (Committee) met in a posted public hearing on May 5, 2008, in Austin, Texas. The Committee heard the testimony of nine invited witnesses. Those who testified were:

Jerry Patterson (Commissioner, Texas General Land Office)
Hal Croft (Texas General Land Office)
Eddie Fisher (Texas General Land Office)
Rusty Martin (Texas General Land Office)
Jimmy Sylvia (County Judge, Chambers County)
Will Allison (Integra Realty Resources)
Mark Lehman (Texas Association of Realtors)
Luke Metzger (Environment Texas)
Holland Timmins (Texas Education Agency)

[1] Rule 3, Section 25(5), of the Rules of The Texas House, grants jurisdiction to the House Committee on Land and Resource Management "over all matters pertaining to . . . the School Land Board, the Board for Lease of University Lands, the Coastal Coordination Council, and the General Land Office."

Summary of Testimony

Texas General Land Office (GLO) Commissioner Jerry Patterson, along with his staff, explained to the Committee that the decisions and actions of the School Land Board (SLB) and the GLO regarding these agencies' involvement in the real estate market have and continue to be appropriate, especially given the decline in oil and gas revenues and the fiduciary duty that the SLB and the Land Commissioner have to the Permanent School Fund (PSF). The Land Commissioner told the members that he believes that the agencies are doing a good job investing PSF assets, as reflected by the high rates of return from these investments. While admitting that the state does have certain advantages over the private sector in real estate transactions, the Land Commissioner argued that his fiduciary duty to the PSF nevertheless requires such actions.

Rusty Martin, the Deputy Commissioner for Funds Management with the GLO, provided the Committee with detailed information regarding the PSF's real estate portfolio. He explained to the members that this portfolio is comprised of the Internal Discretionary Portfolio and the External Portfolio, and has an average annual return over a five year period of 18.85%, calculated on a net basis. Currently, the PSF's real estate portfolio is valued at approximately $1.5 billion, with ⅓ invested in the Internal Discretionary Portfolio, ⅓ in the External Portfolio, and ⅓ in cash.

Mark Lehman, the Vice President for Governmental Affairs for the Texas Association of Realtors, informed the Committee that the private sector can not compete with the state in such transactions because of the advantages that the state has in such deals (can pay cash immediately, has no holding costs such as debt servicing, and pays no taxes).

Judge Jimmy Sylvia, the County Judge for Chambers County, explained to the Committee that he approves of the real estate investment activity of the SLB and GLO in his county, pointing specifically to the positive effects resulting from the state's partnership with Wal-Mart in bringing a new distribution center to the area.[2] Specifically, Judge Sylvia told the members that the county alone is now receiving $1.2 million per year in inventory and personal property taxes, as compared with only $2,900 in *ad valorem* property tax collected prior to the deal. In addition, 750 permanent jobs have been created to operate the facility, and many other jobs and business have been created as a result of the new income being generated in the area.

Will Allison of Integra Realty Resources testified that the real estate market is generally an excellent investment vehicle and that the SLB and GLO have adequate measures in place to protect the PSF against the uncertainty of the market.

Luke Metzger, the Executive Director of Environment Texas, argued to the Committee that the SLB and the GLO should try not to be involved in real estate transactions that involve environmentally sensitive land that might have unique ecological values.

Holland Timmins, the Chief Investment Officer for the Texas Education Agency, provided the Committee with generalized background information regarding the PSF and the activities of the

[2] The Wal-Mart Distribution Center transaction is discussed in greater detail on page 12 of this report.

State Board of Education and the Texas Education Agency in the management of the PSF.

BACKGROUND

Texas General Land Office[3]

The Texas General Land Office (GLO) was established on December 22, 1836, by the First Congress of the Republic of Texas. The GLO was originally responsible for collecting and keeping land records, providing maps and surveys, and issuing land titles. On entering the Union in 1845, the Texas Constitution charged the GLO with the supervision and management of the state's millions of acres of public lands. Since that time the GLO's duties have evolved, but its core mission remains managing the state's lands and mineral-right properties.

The state land and mineral-right properties managed by the GLO and the School Land Board include institutional acreage, grazing lands in West Texas, timberlands in East Texas, and commercial sites throughout the state, as well as the beaches, bays, estuaries, and other submerged lands out to 10.3 miles in the Gulf of Mexico.[4] The proceeds from the sale and lease of these properties remain part of the Permanent School Fund (PSF) and are ultimately used to help fund public education in the state.

Unlike many executive branch agencies that are headed by appointed officials, the GLO is run by the Land Commissioner, an elected official who must stand for office every four years.[5] The Land Commissioner has many duties, among which are overseeing the activities of the GLO and serving as the chairman of the School Land Board,[6] the Coastal Coordination Council,[7] the Board for Lease of University Lands,[8] and the Veteran's Land Board.[9]

School Land Board[10]

The School Land Board (SLB) was created by legislative enactment in 1939 when the Texas Legislature set apart and dedicated to the PSF the mineral estate in the state's riverbeds and channels, and the areas within the tidewater limits of the state (including islands, lakes, bays, and

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[3] For a brief history of the GLO, *see*, *Handbook of Texas Online*, s.v. "General Land Office", http://www.tshaonline.org/handbook/online/articles/GG/mcg1.html (accessed February 12, 2008).

[4] In 1953 the United States Congress passed the *Submerged Lands Act* that relinquished to coastal states all rights of the United States to the navigable waters of these coastal states. Following prolonged litigation, the United States Supreme Court in 1960 affirmed Texas' historic three marine leagues (10.35 miles) seaward boundary. The lands lying within this area are now part of the corpus of the PSF.

[5] *See*, TEX. CONST., art IV, §§ 1, 2, 23.

[6] TEX. NAT. RES. CODE, § 32.014.

[7] *Id.*, § 33.204(b).

[8] TEX. EDUC. CODE, § 66.62(c).

[9] TEX. NAT. RES. CODE, § 162.062.

[10] For a brief history of the SLB, *see*, *Handbook of Texas Online*, s.v. "School Land Board", http://www.tshaonline.org/handbook/online/articles/SS/mds4.html (accessed May 23, 2008).

the bed of the sea).[11] The SLB is chaired by the Land Commissioner and has one member appointed by the governor and one appointed by the Texas Attorney General.[12] The Asset Management Division of the GLO (AMD) is responsible for administering the management, leasing, and sale of PSF properties, subject to the supervision of the Land Commissioner and the approval of the SLB.

The primary duty of the SLB is to manage and control a broad range of PSF real property assets. Specifically, the legislature has granted to the SLB and to the Land Commissioner the "sole and exclusive management and control" of:

> Any land, mineral or royalty interest, real estate investment, or other interest, including revenue received from those sources, that is set apart to the permanent school fund under the constitution and laws of this state together with the mineral estate in riverbeds, channels, and the tidelands, including islands . . . .[13]

The legislature has granted broad authority to the SLB to manage these properties and interests, specifically to:

> [A]cquire, sell, lease, trade, improve, maintain, protect, or otherwise manage, control, or use land, mineral and royalty interests, real estate investments, or other interests, including revenue received from those sources, that are set apart to the permanent school fund in any manner, at such prices, and under such terms and conditions as the board finds to be in the best interest of the fund.[14]

In recent years the legislature has expanded both the funding sources and the authority needed for the SLB to significantly enlarge the real estate holdings of the PSF. This is evidenced by the fact that during the 2000 fiscal year, only $1.6 million in PSF assets were expended by the SLB to acquire interests in real property, compared with approximately $381 million in 2007.

Permanent School Fund[15]

The Permanent School Fund (PSF) is a perpetual endowment for the benefit of the public schools in Texas.[16] The PSF was created with a $2 million appropriation by the Texas Legislature in 1854, expressly for the benefit of the public schools.[17] Additional real property and investment assets have been added to the corpus of the PSF over the years and the fund is now valued at

[11] *See,* TEX. NAT. RES. CODE, § 11.041.
[12] *See*, *Id.*, § 32.012(a).
[13] *Id.*, § 51.011(a).
[14] *Id.*, § 51.011(a-1).
[15] For a brief history of the PSF, *see*, *Handbook of Texas Online*, s.v. "Permanent School Fund", http://www.tshaonline.org/handbook/online/articles/PP/khp1.html (accessed May 23, 2008).
[16] *See,* TEX. CONST., art VII, § 2; TEX. EDUC. CODE, § 43.001.
[17] These funds were available as a result of a $10 million payment from the United States government in exchange for giving up claims to western lands claimed by the former Republic of Texas.

approximately $26.8 billion.[18] The SLB and the GLO control and manage the real property interests held by the PSF,[19] while the State Board of Education is responsible for, among other things, managing the investment assets of the PSF.[20]

Permanent School Fund's Real Estate Portfolio

The real estate portfolio of the PSF (Real Estate Portfolio) is administered by the AMD, under the supervision and control of the Land Commissioner and the SLB. According to the GLO, the current real estate investment strategy for these assets is to achieve portfolio diversification through the utilization of external fund managers (an authority that was granted to them in 2005).[21] Currently, the Real Estate Portfolio is split between the Internal Discretionary Portfolio and the External Portfolio. The Real Estate Portfolio is valued at approximately $1.5 billion, with ⅓ invested in the Internal Discretionary Portfolio, ⅓ in the External Portfolio, and ⅓ held in cash for pending transactions. As of December 31, 2007, approximately eight percent of the assets that comprise the PSF were within its Real Estate Portfolio.[22] This percentage is in line with the SLB's policy of having eight percent, plus or minus two percent, of the PSF invested in real estate.[23]

In 2007, the 80th Texas Legislature authorized the SLB to hire investment consultants and advisors to assist the SLB with investing PSF assets.[24] The investment consultant is required to perform various services that assist the SLB in the overall management of the Real Estate Portfolio. These services include such things as preparing and reviewing investment policies and plans, reviewing each investment proposal, and preparing a quarterly performance measures report, just to name just a few.[25]

The current real estate investment advisor to the SLB is The Townsend Group of Cleveland, Ohio (Townsend).[26] Townsend provides global property investment counsel to public pension funds (such as the Texas Teachers Retirement System), corporations, foundations, endowments, and various other financial institutions. Townsend represents in excess of $80 billion in real estate allocations made by its clients. Townsend will be paid $337,500 by the PSF for its advisory services during the 2008 fiscal year.

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[18] *See, e.g.*, TEX. CONST., art VII, §§ 2, 4, 5; TEX. EDUC. CODE, § 43.001(a); *See also*, Texas Education Agency, "Annual Report, Fiscal Year Ending August 31, 2007: Texas Permanent School Fund," publication number FS08 110 01, p. 4 (2008) (estimating the fund balance to be $26.8 billion).

[19] TEX. CONST., art VII, § 4; TEX. NAT. RES. CODE, § 51.011.

[20] TEX. CONST., art VII, § 5; TEX. EDUC. CODE, § 43.003.

[21] *See*, House Bill 2217 (McCall, 79th Leg. 2005) (adding TEX. NAT. RES. CODE, § 51.4021).

[22] State law limits the total value of the Real Estate Portfolio to fifteen percent of the value of the entire PSF. TEX. NAT. RES. CODE, § 51.402(c).

[23] The School Land Board, "Permanent School Fund: Equity Real Estate Policy," p. 1 (November 28, 2005).

[24] *See*, House Bill 3699 (McCall, 80th Leg. 2007)(amending TEX. NAT. RES. CODE, § 51.4021).

[25] The School Land Board, "Equity Real Estate Policy," pp. 17-18.

[26] The official website for The Townsend Group may be accessed at: http://www.townsendgroup.com (accessed May 13, 2008).

Internal Discretionary Portfolio

The Internal Discretionary Portfolio includes those properties directly purchased by the SLB for the PSF since the passage of House Bill 3588 in 2001.[27] Since that time, the SLB has purchased approximately $557 million of real property, totaling 126,552.77 acres of land on behalf of the PSF.[28] As a result of these acquisitions, the PSF has realized a 34.45% rate of return on those properties already bought and sold, and a 18.89% increase in value on those properties that it still retains.[29]

Table 1
Summary of Internal Portfolio Activity

	ACRES	HISTORICAL VALUE	SALES PRICE OR CURRENT VALUE	INTERNAL RATE OF RETURN
Acquisitions	126,552.77	$557,669,569		
Dispositions	8,072.88	$99,452,113	$221,019,534	34.45 %
Current Inventory	118,479.9	$458,179,506	$559,699,373	18.89 %[+]

[+] IRR for current inventory is calculated quarterly by State Street Bank. The latest available IRR is from 09/30/2007.

As shown by Table 1, the SLB and the AMD are actively engaged in the acquisition, retention, and disposition of those PSF assets that are within the Internal Discretionary Portfolio. This activity has included their involvement in a number of large projects across the state.[30] For example, the Wal-Mart Warehousing and Distribution Center in Baytown was completed in June, 2005, as part of a partnered deal between Wal-Mart and the SLB.[31] At a cost of $100 million, this facility consists of two buildings, each more than a mile long, totaling 4,000,000 square feet (almost ninety-two acres under roof) on a 480 acre site. Under the agreement, Wal-Mart developed the facility, sold it to the PSF, and then agreed to lease it back from the PSF for thirty years. Following the thirty year period, Wal-Mart is obligated to re-purchase the facility either at market value or for the original PSF investment, whichever is greater.

Other projects that the SLB and the AMD are involved in include properties in Austin, Sherman, and Sugar Land, just to name a few. The Austin transaction involves PSF owned land that has been leased for fifty years to private developers for a mixed-use development at The Triangle in central Austin.[32] The entire development is comprised of 456,000 square feet of residential

[27] As discussed below, in 2001 the legislature authorized the SLB to retain royalties from oil and gas leases, thereby greatly increasing the amount of money available for real estate investments. *See*, House Bill 3558 (Junell, 77th Leg. 2001) (amending TEX. NAT. RES. CODE, § 51.401).

[28] *See*, Texas General Land Office, "General Land Office: Background Information," distributed to the members of the Texas House Committee on Land and Resource Management Committee, Section 2, p. 6 (May 5, 2008).

[29] *See, Id.*

[30] The local benefits stemming from these projects are discussed in greater detail on pages 29-30 of this report.

[31] *See*, Angelou Economics, "Report: General Land Office: Impact Study of the Wal-Mart Distribution Center in Baytown, Texas," (March, 2005).

[32] *See*, Angelou Economics, "Report: General Land Office: Impact Study of the Triangle Development in Austin, Texas," (October, 2006).

space and 115,000 square feet of retail space. The Sherman transaction involves a thirty year lease with the manufacturing company CertainTeed.[33] The SLB for the benefit of the PSF purchased a closed facility in Sherman for $8 million and CertainTeed invested an additional $12 million to retrofit the facility. The Sugar Land transaction involves a partnership between a private developer and the PSF to redevelop 715 acres that once comprised the Imperial Sugar Site in the city and an adjacent 515 acres owned by the PSF.[34] When completed, this development will include 1.8 million square feet of residential properties, 1.25 million square feet of commercial properties, and 1.6 million square feet of mixed-use retail and residential properties.

External Portfolio

The PSF's External Portfolio contains those real estate investments owned by the PSF that are managed through external investment fund managers.[35] Currently, the External Portfolio is managed by eighteen different investment managers, none of whom manage more than nine percent of the total Real Estate Portfolio.[36] The primary job of these investment managers is to "acquire, sell and manage real estate investments" on behalf of the PSF, in accordance with state law and the SLB's policies, plans, and procedures.[37]

The External Portfolio was created following the passage of House Bill 2217 in 2005, which authorized the SLB to invest with investment fund managers.[38] As shown by Table 2, since that time, the SLB and AMD have moved away from directly purchasing land for the Internal Discretionary Portfolio and towards allocating available PSF assets to the External Portfolio.[39]

The types of properties that are contained within the External Portfolio include apartment buildings, shopping centers, office buildings, and various combinations of mixed use properties. For example, the External Portfolio contains an interest in twenty-two three story apartment buildings in Tempe, Arizona, that contain 510 apartments located on eighteen acres. This portfolio also includes a 90,958 square foot neighborhood shopping center in Roswell, Georgia, that was built in 2001 and is located on 12.2 acres of land. The portfolio has also invested PSF assets in a twenty-eight story office tower located near Oakland, California, and in a five story medical office building in Denver, Colorado. In addition, the portfolio also includes a 317,719 square foot mixed use, retail/office property located in the heart of Washington, D.C.'s Georgetown neighborhood. It is the largest enclosed urban shopping center in the District of Columbia, and has the largest public parking facility in Georgetown, with space for 620 vehicles.

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[33] *See*, Angelou Economics, "Report: General Land Office: Impact Study of the CertainTeed Manufacturing Facility in Sherman, TX," (October, 2006).

[34] *See*, Angelou Economics, "Report: General Land Office: Impact Study of the Imperial Sugar Redevelopment (Cherokee Tract 3) in Sugar Land Texas," (October, 2006).

[35] It is important to note that the SLB is statutorily prohibited from investing PSF assets into real estate investment trusts, commonly referred to as "REITs". TEX. NAT. RES. CODE, § 51.4021(b).

[36] *See*, Texas General Land Office, "Background Information," Section 2, p. 14. Importantly, an investment manager is prohibited from managing more than twenty-five percent of portfolio.

[37] The School Land Board, "Equity Real Estate Policy," p. 15.

[38] *See*, House Bill 2217 (McCall, 79th Leg. 2005) (amending TEX. NAT. RES. CODE, § 51.402(a)).

[39] *See*, "Table 2: Summary of Real Estate Investments" on page 14 of this report.

Increased Investment in Real Estate

In 2001, the SLB and the AMD began to significantly enlarge the PSF's real estate holdings.[40] This shift in activity was due primarily to statutory changes that greatly increased the money available to the SLB for such acquisitions.[41] Initially, the SLB used PSF funds to directly acquire real estate on behalf of the PSF. As has been mentioned, following the passage of House Bill 2217, the direct acquisition of real estate by the SLB began to decline, and SLB allocations to externally managed real estate funds have increased.[42] Both of these factors can be seen in the following table:

Table 2
Summary of Real Estate Investments

Year	Direct Real Estate Investments	Externally Managed Real Estate Funds	Total
2000	$1,600,000.00	$0.00	$1,600,000.00
2001	$5,001,000.00	$0.00	$5,001,000.00
2002	$51,250,000.00	$0.00	$51,250,000.00
2003	$23,320,209.47	$0.00	$23,320,209.47
2004	$58,677,966.16	$0.00	$58,677,966.16
2005	$261,873,865.69	$0.00	$261,873,865.69
2006	$113,714,699.93	$51,711,999.35	$165,426,499.28
2007	$22,175,434.26	$358,883,823.45	$381,059,257.71
Total	**$537,613,175.51**	**$410,595,822.80**	**$948,208,998.31**

Expanded Funding for Real Estate Investments

The dramatic increase in the SLB's investment in real property could not have taken place without certain statutory changes that provided a funding source for these acquisitions. In 2001, the 77th Texas Legislature enacted House Bill 3558 that authorized the SLB to retain royalties from oil and gas leases (instead of just the proceeds from the sale of PSF land) for subsequent purchases of land.[43] Prior to this, the revenue from oil and gas leases on PSF land was transferred to the State Board of Education for further investment. In the twenty-seven months following the effective date of House Bill 3558, more than $453 million became available to the SLB to invest in real estate for the PSF.[44] In comparison, in the sixteen years prior to the passage of House Bill 3558, the SLB purchased approximately $33 million (on average about $2 million per year) in real estate for the PSF.[45]

[40] As discussed below, in 2001 the legislature authorized the SLB to retain royalties from oil and gas leases, thereby greatly increasing the amount of money available for real estate investments. *See*, House Bill 3558 (Junell, 77th Leg. 2001) (amending TEX. NAT. RES. CODE, § 51.401).

[41] *See*, "Expanded Funding for Real Estate Investments," below for a history of these statutory changes.

[42] *See*, House Bill 2217 (McCall, 79th Leg. 2005) (adding TEX. NAT. RES. CODE, § 51.4021).

[43] *See*, House Bill 3558 (Junell, 77th Leg. 2001) (amending TEX. NAT. RES. CODE, § 51.401).

[44] *See*, Texas State Auditor's Office, "An Audit Report on Controls over Permanent School Fund Real Estate and Collection of Oil and Gas Revenue at the General Land Office," Report No. 04-040, p. 1 (June, 2004).

[45] *See, Id.*

Proceeds from the sale of PSF land, including House Bill 3558 dollars, are deposited into the Real Estate Special Fund Account (RESFA).[46] Money from this account is used by the SLB to invest in real estate for the benefit of the PSF.[47] Prior to the passage of House Bill 3558 in 2001, the SLB was only authorized to deposit the proceeds from the disposition of real property owned by the PSF into this account. Beginning with the enactment of House Bill 3558, the legislature has periodically expanded the types of funds that can be deposited into the RESFA. Currently, the SLB is authorized to deposit the following categories of funds into the RESFA:[48]

1) Funds received from any PSF land.

2) Funds received from any PSF mineral or royalty interest.

3) Funds received from any PSF real estate investment.

4) Funds received from any other PSF interest.

In addition to this expanded pool of resources now available to the SLB for land acquisitions, the legislature has authorized the SLB to indefinitely retain these funds. Prior to 2007, proceeds from the sale of land that were deposited into the account were required to be used within two years or they were removed from that account and deposited into the state treasury to the credit of the PSF. However, in 2007, the 80th Texas Legislature repealed this requirement, thereby allowing such funds to remain in the account until the SLB and the AMD deem that they should be expended.[49]

Expanded Transactional Authority

The ability of the SLB and the AMD to properly manage the growing Real Estate Portfolio could not have occurred without certain statutory changes providing additional authority to the SLB. Since 2005, the general statutory authority of the SLB regarding its control of PSF real estate has expanded. Prior to 2005, the SLB was vaguely authorized by law to control, sell, and lease PSF lands.[50] During the 79th and 80th Texas Legislative Sessions, the legislature responded to GLO requests that the SLB be granted the additional authority needed to properly operate the Real Estate Portfolio as a modern real estate fund.[51] As a result of these statutory changes to the SLB's authority, the SLB is now generally authorized to:

> [A]cquire, sell, lease, trade, improve, maintain, protect, or otherwise manage, control, or use land, mineral and royalty interests, real estate investments, or other interests, including revenue received from those sources, that are set apart to the

[46] Prior to the passage of House Bill 3699 in 2007, this account was called the "Special Fund Account" of the PSF. This fund was created in 1985 to hold revenue from land sales proceeds that would later be used to acquire replacement property.

[47] TEX. NAT. RES. CODE, § 51.401

[48] TEX. NAT. RES. CODE, § 51.401(a).

[49] *See*, House Bill 2217 (McCall, 79th Leg. 2005) (repealing TEX. NAT. RES. CODE, § 51.401(c)).

[50] *See*, TEX. NAT. RES. CODE, § 51.011(a) prior to its 2005 amendment.

[51] *See*, House Bill 2217 (McCall, 79th Leg. 2005) (adding TEX. NAT. RES. CODE, § 51.011(a-1)); House Bill 3699 (McCall, 80th Leg. 2007) (amending TEX. NAT. RES. CODE, § 51.011(a-1)).

> permanent school fund in any manner, at such prices, and under such terms and conditions as the board finds to be in the best interest of the fund.[52]

This expansion of the SLB's general authority parallels other specific additions to its authority that have been made in recent years. During the four legislative sessions starting in 2001, the legislature has granted to the SLB and the AMD greater authority to acquire, manage, and dispose of PSF real property assets. In 2001, the SLB was authorized "to acquire mineral and royalty interests for the use and benefit" of the PSF.[53] In 2003, the 78th Texas Legislature authorized the SLB to trade fee and lesser interests in land dedicated to the PSF for fee and lesser interests in land not dedicated to it.[54] In that same year the legislature also authorized state agencies and political subdivisions to "directly sell or exchange real property to which it holds title" with the SLB for the benefit of the PSF.[55] Importantly, the 78th Texas Legislature also authorized the GLO to use real estate brokers to assist in real estate transactions.[56]

In 2005, the 79th Texas Legislature enacted House Bill 2217 that significantly expanded the transactional authority of the SLB.[57] It was explained at the time that the SLB and the AMD needed this added authority in order to manage the growing Real Estate Portfolio. Under the provisions of this bill, the SLB was authorized to use funds in the RESFA to protect, maintain, or enhance the value of PSF land, to acquire interests in real estate, and to pay reasonable fees for professional services.[58]

House Bill 2217 also authorized the SLB to appoint special fund managers to invest RESFA dollars.[59] This change was made in part to implement a recommendation made by the Texas State Auditor Office in June, 2004, that asked the SLB to:

> Consider using external real estate managers or advisors to help locate, evaluate, and, if necessary, manage new investments so that the pace of investments can better match the rate at which funds are available for investment.[60]

In addition, the 80th Texas Legislature authorized the SLB to hire investment consultants and advisors (instead of only external fund managers), such as the Townsend Group who currently advises the SLB regarding the management of the Real Estate Portfolio.[61] These added authorizations have allowed the SLB to invest approximately $410,595,822 of PSF assets with external fund managers since the enactment of House Bill 2217 in 2005.[62]

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52 TEX. NAT. RES. CODE, § 51.011(a-1).

53 *See*, House Bill 3558 (Junell, 77th Leg. 2001) (amending TEX. NAT. RES. CODE, § 51.402).

54 TEX. NAT. RES. CODE, § 32.251.

55 *See*, House Bill 2044 (McReynolds, 78th Leg. 2003) (adding TEX. NAT. RES. CODE, § 31.0671). *See also*, TEX. NAT. RES. CODE, § 32.252.

56 *See*, House Bill 2249 (Howard, 78th Leg. 2003) (amending TEX. NAT. RES. CODE, § 51.052(i)).

57 House Bill 2217 (McCall, 79th Leg. 2005).

58 *See, Id.*, (amending TEX. NAT. RES. CODE, § 51.402(a)).

59 *See, Id.*, (adding TEX. NAT. RES. CODE, § 51.4021).

60 *See*, Texas State Auditor's Office, "An Audit Report on Controls over Permanent School Fund Real Estate and Collection of Oil and Gas Revenue at the General Land Office," p. 10.

61 *See*, House Bill 3699 (McCall, 80th Leg. 2007) (amending TEX. NAT. RES. CODE, § 51.4021).

62 *See*, "Table 2: Summary of Real Estate Investments" on page 14 of this report.

House Bill 2217 also authorized the SLB to make "improvements" to PSF property.[63] It was argued at the time that the SLB needed this authority in order to make routine and essential improvements to certain properties in order to maximize the resale value of these tracts. For example, it was explained that the resale price could be increased simply by allowing the SLB to construct sewer or other utility lines that benefited the property. Previously, the SLB was required to execute a land lease with a third party in order to make any improvement on PSF land, a type of arrangement that involved sharing the resulting proceeds with the third party.

The expansion of SLB authority to engage in various real estate transactions can be seen in the growing list of purposes for which RESFA funds can be used by the SLB. Prior to 2001, these funds could only be used to acquire property for the following purposes:

1) To add to a tract of PSF land to form a tract of sufficient size to be manageable.

2) To add contiguous land to PSF land.

3) To acquire, as PSF land, interests in real property for biological, commercial, geological, cultural, or recreational purposes.

Since 2001 this list has grown to include not only the three preceding purposes, but the following five general purposes as well:[64]

1) To acquire mineral and royalty interests for the use and benefit of the PSF.[65]

2) To protect, maintain, or enhance the value of PSF land.[66]

3) To acquire interests in real estate.[67]

4) To pay reasonable fees for professional services related to a PSF investment.[68]

5) To acquire, sell, lease, trade, improve, maintain, protect, or use land, mineral and royalty interests, or real estate investments, an investment or interest in public infrastructure, or other interests, at such prices and under such terms and conditions the SLB determines to be in the best interest of the PSF.[69]

Expanded Protections of Transactional Information

In addition to increased funding and greater authority to engage in real estate transactions, the Texas Legislature has also expanded the ability of the SLB and AMD to protect transactional

[63] *See*, House Bill 2217 (McCall, 79th Leg. 2005) (amending TEX. NAT. RES. CODE, § 51.011).
[64] TEX. NAT. RES. CODE, § 51.402(a).
[65] House Bill 3558 (Junell, 77th Leg. 2001) (adding TEX. NAT. RES. CODE, § 51.402(a)(4)).
[66] House Bill 2217 (McCall, 79th Leg. 2005) (adding TEX. NAT. RES. CODE, § 51.402(a)(5)).
[67] *Id.* (adding TEX. NAT. RES. CODE, § 51.402(a)(6)).
[68] *Id.* (adding TEX. NAT. RES. CODE, § 51.402(a)(7)).
[69] House Bill 3699 (McCall, 80th Leg. 2007) (adding TEX. NAT. RES. CODE, § 51.402(a)(8)).

information. Prior to 1999, appraisals prepared by or for the GLO for the sale or purchase of land were considered confidential and exempt from disclosure until the formal disposition of the property. Allowing this information to remain confidential until after the bids were opened helped ensure that the state received the highest price for the property. With certain amendments to the Public Information Act (PIA) in 1999, three separate Texas Attorney General's Opinions were issued that concluded that appraisal reports were "completed reports" subject to disclosure under the PIA.[70]

As a result of these Attorney General's rulings, in 2001 the 77th Texas Legislature enacted what is today Section 11.086 of the Natural Resources Code. The new Section 11.086 reinstated the exemption from having to disclose information relating to the location, purchase price, or sale price of property managed by the SLB or the GLO until the purchase or sale of the land was completed.[71] In 2003, the 78th Texas Legislature clarified Section 11.086 so that such information could be considered confidential until a deed was executed, rather than when a contract was awarded.[72] In 2007, this section was again amended to include protections for the SLB's newly authorized ability to develop property.[73] The legislature also exempted such information from disclosure until all applicable deeds (instead of just the first deed) were executed and certain contract requirements had been satisfied.[74]

In addition to the creation and expansion of Section 11.086, the Texas Legislature has also exempted the SLB and the GLO from the following types of statutes relating to real estate transactions, unless the provision states that it specifically applies to the particular agency:[75]

1) A statute that would require the SLB or the GLO to provide a notice or disclosure to a buyer of real property.

2) A statute relating to the sale, purchase, or financing of real property by an executory contract, including a contract for deed or other similar sale.

As the result of increased funding for real estate investments since 2001, the expanded authority of the SLB to engage in different types of transactional activities, and the statutory protections afforded to PSF transactional information, the Real Estate Portfolio has become what has recently been called "an investment program of an entirely different scope" than that previously managed by the SLB and the AMD.[76] This transformation has created new challenges for the SLB and the AMD, challenges that have led to definite rewards but contain potential pitfalls as well.

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[70] *See*, ATT'Y GEN. ORD. OR99-0036, February 22, 1999; OR2000-4499, November 22, 2000; OR2001-0262, January 24, 2001.

[71] *See*, House Bill 2138 (Marchant, 77th Leg. 2001) (adding TEX. NAT. RES. CODE, § 11.086).

[72] *See*, House Bill 1306 (Marchant, 78th Leg. 2003) (amending TEX. NAT. RES. CODE, § 11.086).

[73] *See*, Senate Bill 596 (Wentworth, 80th Leg. 2007) (amending TEX. NAT. RES. CODE, § 11.086).

[74] *See*, *Id.*

[75] *See*, House Bill 1853 (Corte, 80th Leg. 2007) (adding TEX. NAT. RES. CODE, §§ 31.002, 32.113, 161.237).

[76] *See*, Texas State Auditor's Office, "An Audit Report on Controls over Permanent School Fund Real Estate and Collection of Oil and Gas Revenue at the General Land Office," p. 1.

DISCUSSION

Relevant Policy Questions

A proper evaluation of the appropriateness of the real estate investment authority granted by the Texas Legislature to the School Land Board (SLB) involves a review of both the costs and benefits of such activity. On the one hand, the state's investment in real property interests strengthens and diversifies the holdings of the Permanent School Fund (PSF), and creates real economic benefits for the state and for those communities where SLB projects are located. On the other hand, investment in the real estate market involves a greater degree of risk than other types of investments, and questions have arisen regarding the propriety of the state's activity given the inevitability of state competition with the private sector. These issues raise the following three policy questions, which the Committee examines in this section of the report in an attempt to answer the question posed by the interim charge:

1) How risky is it for the PSF to be engaged to the degree that it is in the real estate market, and what protections are in place to best protect the PSF's real estate portfolio (Real Estate Portfolio)?

2) Is it proper to allow the state to directly invest in the real estate market given the advantages that it has over private sector participants?

3) What is the affect of the SLB's and GLO's real estate investments on both the state and on those local communities where these investments occur?

Risk Management

It is well settled that diversification "is a basic tenet of risk management, without which investment portfolios would tend to be more volatile than necessary . . . ."[77] The SLB's internal investment policy recognizes the importance of diversification:

> The primary objectives of real estate in the Fund’s portfolio are to provide an inflation hedge, preserve principle, and achieve a return that possesses low to negative correlations with stock and bond returns, thereby reducing the volatility and risk of the total Fund portfolio.[78]

While it is important for any institutional fund to be diversified, it is equally important that the level of risk of such diversification be appropriate, and that meaningful safeguards be in place to minimize potential risk. With this in mind, the 79th Texas Legislature enacted several provisions in 2005 that created safeguards against risk to the Real Estate Portfolio. These safeguards include, but are not limited to:

[77] American Law Institute, Restatement of the Law Third, Trusts: § 227.
[78] The School Land Board, "Equity Real Estate Policy," p. 1.

1) A provision adopting the "prudent investor standard".

2) A provision limiting the PSF's investment in real estate to not more than fifteen percent of the market value of the PSF.[79]

3) A provision containing qualification and compensation requirements for fund investment managers.[80]

4) A provision adopting an ethics policy and standards of conduct for fund investment managers.[81]

5) A provision containing reporting requirements on the performance of the Real Estate Portfolio.[82]

These statutory requirements have been supplemented by a more extensive set of rules, guidelines, and procedures adopted by the SLB. In 2005, the SLB adopted the Permanent School Fund Equity Real Estate Policy (Investment Policy), the official policy guide directing the SLB's investment planning, delegation of responsibilities, and decision making processes regarding the Real Estate Portfolio.[83]

Regarding risk management, the Investment Policy requires the SLB to "adopt and adhere to clearly defined risk management policies and procedures" in order to "preserve principle and avoid unnecessary risks."[84] These risk management policies are spelled out in the Investment Policy, and generally involve various means of diversifying the holdings and the management of the Real Estate Portfolio.

Prudent Investor Standard

In order to minimize the risk to the Real Estate Portfolio, it is appropriate for the SLB and the Asset Management Division at the GLO (AMD) to follow a meaningful and appropriate investment standard when making investment decisions. Unlike the State Board of Education, the SLB is not subject to a constitutional standard for the management of those assets under its control.[85] However, the SLB is statutorily prohibited from investing PSF assets unless it determines "using the prudent investor standard" that the use of the funds is in the best interest of the PSF.[86]

[79] *See*, House Bill 2217 (McCall, 79th Leg. 2005) (adding TEX. NAT. RES. CODE, § 51.402(c)).
[80] *See, Id.,* (adding TEX. NAT. RES. CODE, § 51.4021).
[81] *See, Id.,* (adding TEX. NAT. RES. CODE, § 51.408).
[82] *See, Id.,* (adding TEX. NAT. RES. CODE, § 51.412).
[83] *See*, The School Land Board, "Equity Real Estate Policy".
[84] *Id.,* p. 2.
[85] *See*, TEX. CONST., art VII, § 5(f) (authorizing the SBOE to undertake any investment "that persons of ordinary prudence, discretion, and intelligence, exercising the judgment and care under the circumstances then prevailing, acquire or retain for their own account in the management of their affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.").
[86] TEX. NAT. RES. CODE, § 51.402(b).

The SLB has adopted the American Law Institute's (AMI) Prudent Investor Rule (PIR) to follow when making its investment decisions.[87] The AMI is a private and well-respected organization consisting of judges, practicing lawyers, and legal scholars who are selected for membership on the basis of their professional achievement and demonstrated interest in the improvement of the law. These experts work together to draft model rules and codes to, among other things, promote the clarification and simplification of the law. The general rule under the PRI is that:

> The trustee is under a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust.[88]

Under the PRI, compliance requires among other things, that the trustee exercise "reasonable care, skill, and caution" when performing its duties, and that the trustee must "diversify the investments of the trust unless, under the circumstances, it is prudent not to do so."[89] In addition, the standard places upon the trustee the duty to conform to fundamental fiduciary duties of loyalty and impartiality, to act with prudence in delegating authority, and to incur only costs that are reasonable to the investment responsibilities of the trusteeship.[90]

Statutory Cap on Real Estate Investments

In an attempt to limit risk to the Real Estate Portfolio, the 79th Texas Legislature placed a cap on the amount of Real Estate Special Fund Account (RESFA) dollars that may be invested in real estate.[91] Section 51.402(c) of the Natural Resources Code provides that:

> The market value of the investments in real estate under this section on January 1 of each even-numbered year may not exceed an amount that is equal to 15 percent of the market value of the permanent school fund on that date.[92]

As of December 31, 2007, approximately eight percent of total PSF assets were invested in the Real Estate Portfolio, matching the target that the SLB established in its Investment Policy.[93] Given the complexity, uniqueness, and changing nature of an institutional fund like the PSF, it is difficult to determine with accuracy whether fifteen percent is too high or too low of a percentage to be invested in real property assets. However, it is helpful to understand that this percentage is not out of line with the asset allocations of other institutional funds. For example, a recent study conducted by the Texas Teachers Retirement System (TRS) for its pension fund determined that fifteen percent of its fund's assets should be invested in real property interests.[94]

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[87] *See*, Appendix 1-A to this section of the interim report. The American Law Institute's official web site may be accessed at: http://www.ali.org/ (accessed May 27, 2008).

[88] American Law Institute, Restatement of the Law Third, Trusts: § 227.

[89] *See, Id.,* § 227(a).

[90] *See, Id.,* § 227(b) - (c).

[91] *See*, House Bill 2217 (McCall, 79th Leg. 2005) (adding TEX. NAT. RES. CODE, § 51.402(c)).

[92] TEX. NAT. RES. CODE, § 51.402(c).

[93] The School Land Board, "Equity Real Estate Policy," p. 1.

[94] *See*, Teacher Retirement System of Texas "Comprehensive Annual Financial Report: A Retirement System of the State of Texas, Fiscal Year Ended, August 31, 2007," p. 68 (2007).

Diversification of Holdings and Management

The general method used by the SLB and the AMD to minimize risk to the Real Estate Portfolio is the diversification of the holdings and the management of these assets. The SLB and AMD utilize a variety of diversification practices that include the following:

1) Allocation of PSF real property assets between two investment classes, what the SLB has named Stable Return (institutional quality investments) and Non-Core (investments with varying risks and rates of return).

2) Acquisition of properties or interests in properties based on varying characteristics and qualities (different types, different locations, different sizes, etc.).

3) Allocation of PSF investment assets to a broad group of investment managers with different management styles.

The primary risk management practice utilized by the SLB and the AMD is the distribution of assets between two investment classes, what the SLB's Investment Policy labels as the Stable Return and Non-Core investment categories. The Investment Policy sets the target of allocation between Stable Return and Non-Core investments at sixty percent and forty percent respectively, plus or minus ten percent.[95] Currently, fifty-one percent of the Real Estate Portfolio is allocated to Stable Return investments, and forty-nine percent to Non-Core investments. The targeted allocation is intended to create a stable return from low risk investments, while also being able to "capture superior risk-adjusted returns" from somewhat riskier investments.[96]

The SLB's Investment Policy defines Stable Return investments to be "operating and substantially leased (eighty percent or more) institutional quality properties."[97] In addition, the Investment Policy provides that:

> These investments are institutional quality, well-located assets in the traditional property types: office, apartment, retail, and industrial. They generally offer relatively high current income returns and as a result a greater predictability of returns. The income component typically represents a significant majority of the expected total return of Stable Return investments. These investments are of comparatively low risk and provide a stable foundation for the Fund's real estate portfolio.[98]

Traditionally, assets allocated to the Non-Core category have included investments with different levels of risk and return. The SLB's Investment Policy explains the risk attributes that may be present in Non-Core investments as including:

1) Higher property level risk (leasing, renovation, development or repositioning

[95] The School Land Board, "Equity Real Estate Policy," p. 3.
[96] *Id.*
[97] *Id.*
[98] *Id.*

required).

2) A degree of business or operating risk (hotels, senior housing or investments in real estate operating companies).

3) Non-traditional formats or properties (distressed assets, private to public market arbitrage activities).

In addition to asset allocation between two broad assets classes, the SLB and AMD allocate PSF investment assets within other varied categories in order to diversify the Real Estate Portfolio. Specifically, the SLB believes that the attributes by which PSF investment assets should be allocated to "most effectively reduce risk are by property type, geographic location, size of investments, and investment manager and investment style."[99]

The SLB invests PSF assets in a number of different types of properties. The SLB's Investment Policy provides for investing in offices, retail spaces, industrial spaces, multi-family units, and hotels, just to name a few.[100] The SLB, according to its Investment Policy, prefers to establish ranges for each property type that will both ensure the prudent diversification amongst various property types, but will also enable it "to capitalize on opportunities caused by shifts in the real estate and capital markets."[101] The following table indicates these various ranges for investments in various types of property.

Table 4
Property Types Allocation Ranges[102]

	NPI	RANGE	NPI BASED RANGE
Office	37%	NPI ± 50%	18.5% to 55.5%
Retail	23%	NPI ±50%	11.5% to 34.5%
Industrial	18%	NPI ± 50%	9% to 27%
Multifamily	20%	NPI ± 50%	10% to 30%
TOTAL (traditional)			60% to 100%
Hotel	2%		0% to 10%
Specialty Properties			0% to 30%

The SLB and the AMD also argue that proper risk management should include investing in properties located in many different areas of the United States.[103] The SLB and AMD generally allocate PSF investment assets broadly, using five regions of the United States (East, Midwest, South, West, and Texas), though international investments that do not exceed twenty percent of the Real Estate Portfolio may be made, "dependent upon global real estate and capital market

[99] *Id.,* p. 8.
[100] *See, Id.* A description of certain specific properties owned in whole or in part by the PSF can be found on page 13 of this report.
[101] *Id.,*
[102] *See, Id.,*
[103] The School Land Board, "Equity Real Estate Policy," p. 9.

conditions and opportunities."[104] In addition, the SLB's internal policy prohibits placing:

> [M]ore than 20% of the allocation into a single metropolitan statistical area ("MSA") for the 20 largest MSAs in the United States and no more than 15% of the allocation in any other single MSA.[105]

Table 5 indicates the SLB's determination as to the proper ranges of investment allocation for each geographic area.

Table 5
Geographic Allocation Ranges[106]

U.S. Region	Targeted Allocation (TA)	Allowable Allocation Deviation Range	Allowable Allocation Range
East	27%	TA ± 50%	13.5% to 40.5%
Midwest	11%	TA ± 50%	5.5% to 16.5%
South	18%	TA ± 50%	9% to 27%
West	29%	TA ± 50%	14.5% to 43.5%
Texas	15%		7.5% to 15%

The SLB's Investment Policy also recognizes that "the failure of a single investment" could have a "significant or material impact on the performance of the total real estate program."[107] Accordingly, the Investment Policy prohibits investing more than five percent of the Real Estate Portfolio in a single investment.[108]

Finally, the SLB and AMD hire multiple investment managers with complementary investment strategies to manage the Real Estate Portfolio.[109] By using multiple investment managers with different strategies, the SLB is able to spread the risk that is associated with investment in the real estate market into many hands. Currently, the Internal Discretionary Portfolio is managed by the GLO's Internal Investment Management Team who are directly accountable to the SLB. The External Portfolio is managed by eighteen different investment managers, none of whom manage more than nine percent of the total portfolio.[110] Importantly, an investment manager is prohibited from managing more than twenty-five percent of External Portfolio.[111]

Investment Screening

The SLB and the AMD have in place a structured screening process that they follow when determining whether or not to invest specific PSF assets with external fund managers. This

[104] *Id.*
[105] *Id.*
[106] *See, Id.*
[107] *Id.,* p. 9.
[108] *Id.*
[109] *Id.,* p. 8.
[110] *See*, Texas General Land Office, "Background Information," Section 2, p. 14.
[111] The School Land Board, "Equity Real Estate Policy," p. 10.

process is intended to insert various levels of review and accountability into each investment decision that is made, thereby reducing risk to the Real Estate Portfolio.

The initial screening process generally begins with a preliminary review of a proposed investment by the GLO's Deputy Commissioner of Funds Management (DCFM) to determine if the investment fits within the framework of the External Portfolio's current strategy. Upon determining that the investment fits within this framework, the DCFM contacts the PSF's investment advisor to discuss the proposal and to arrange for the preparation of a due diligence report.

If it is determined that the investment should be made, the proposal is presented to the Investment Advisory Committee (IAC) for consideration. The IAC is a five-member committee consisting of the DCFM, the GLO Deputy Land Commissioner, the GLO General Counsel, the GLO Deputy Commissioner of Asset Management, and a member of the SLB. Representatives of the fund or investment firm that is responsible for the proposal make a formal presentation to the IAC followed by a question and answer period. Following the presentations, the IAC votes on whether or not to recommend the potential investment to the SLB for its approval. Finally, the SLB reviews the proposal and formally votes to accept or reject it.

Miscellaneous Risk Management Provisions

In 2005, the 79th Texas Legislature enacted a number of miscellaneous provisions intended to protect the Real Estate Portfolio. These provisions regulate a variety of issues related to the SLB's management of the Real Estate Portfolio, such as the appointment and compensation of outside professionals, the creation of an ethics policy, conflicts of interest and financial disclosures, and periodic reporting requirements.[112]

Section 51.4021 of the Natural Resources Code addresses the appointment and compensation of investment fund managers, consultants, and advisors. In order to be eligible for appointment, Texas law requires that these organizations must first be "in the business of managing or advising on the management of real estate investments."[113] In addition, investment fund manager, consultant, or advisor must:

> [A]gree to abide by the policies, requirements, or restrictions, including ethical standards and disclosure policies and criteria for determining the quality of investments and for the use of standard rating services, which the board adopts for real estate investments of the permanent school fund.[114]

SLB "policies, requirements, or restrictions" include such provisions as the requirement that investment managers have "proven experience providing like services, a successful performance history and an established client base", and the requirement that these managers be "guided by

[112] *See*, House Bill 2217 (McCall, 79th Leg. 2005) (adding TEX. NAT. RES. CODE, §§ 51.4021, 51.408, 51.409, 51.410).
[113] TEX. NAT. RES. CODE, § 51.4021(a).
[114] *Id.*, § 51.402(b)).

the `prudent expert' standard . . . ."[115]

Section 51.4021 of the Natural Resources requires that the compensation paid to an investment manager, consultant, or advisor "must be consistent with the compensation standards of the investment industry and compensation paid by similarly situated institutional investors."[116] The Investment Policy restates this requirement and adds:

> Fundamentally, the Fund will seek to pay an External Investment Manager a base fee intended to reimburse its costs with additional revenues payable contingent upon successful performance of the investments.[117]

In 2005, the 79th Texas Legislature also enacted a requirement that the SLB "adopt and enforce an ethics policy that provides standards of conduct relating to the management and investment" of Real Estate Special Fund Account (RESFA) dollars.[118] This ethics policy applies to each member of the SLB, the Land Commissioner, any employee of the SLB, and to any person who provides services to the SLB that relate to the management or investment of RESFA dollars.[119] Codified as Section 51.408 of the Natural Resources Code, this ethics policy is required to address various topics as they apply to the management and investment of the RESFA funds and to those persons responsible for managing and investing such assets.[120] The topics that must specifically be addressed are general ethical standards, conflicts of interest, prohibited transactions and interests, the acceptance of gifts and entertainment, compliance with applicable professional standards, ethics training, and compliance with and enforcement of the ethics policy.[121]

The 79th Texas Legislature also created a provision requiring the disclosure of conflicts of interests and finances.[122] As with the ethics policy provision, these disclosures must be made by all members of the SLB, the Land Commissioner, any employee of the SLB, and to any person who provides services to the SLB that relate to the management or investment of RESFA dollars.[123] Section 51.409 of the Natural Resources Code requires each of these people to disclose in writing to the SLB any "business, commercial, or other relationship that could reasonably be expected to diminish the person's independence of judgment in the performance of the person's responsibilities relating to the management or investment" of RESFA funds.[124] This provision prohibits any person who has made such a disclosure from "giving advice or making decisions about matters affected by the conflict of interest" until the SLB waives this prohibition.[125] In addition, Section 51.409 requires each employee of the SLB "who exercises

[115] The School Land Board, "Equity Real Estate Policy," p. 10.
[116] TEX. NAT. RES. CODE, § 51.4021(c).
[117] The School Land Board, "Equity Real Estate Policy," p. 10.
[118] *See*, House Bill 2217 (McCall, 79th Leg. 2005) (adding TEX. NAT. RES. CODE, § 51.408).
[119] TEX. NAT. RES. CODE, § 51.408(b).
[120] *Id.*, § 51.408(a).
[121] *Id.*, § 51.408(a).
[122] *See*, House Bill 2217 (McCall, 79th Leg. 2005) (adding TEX. NAT. RES. CODE, § 51.409).
[123] TEX. NAT. RES. CODE, § 51.409(a).
[124] *Id.*
[125] *Id.*, § 51.409(c).

significant decision-making or fiduciary authority" to file a financial disclosure statement.[126]

The 79th Texas Legislature also determined that the SLB should be required to periodically report to the legislature certain information regarding the management and the performance of the Real Estate Portfolio.[127] The first report is required to be submitted to the legislature by September 1st of even-numbered years and contains information regarding the investment activity of the SLB, the amount of funds to be invested, the expected rate of return on these investments, distributions to the PSF, and the economic affects of these investments.[128] The second report must be submitted not later than January 1st of odd-numbered years and assesses the return and the economic impact of the investments reported for the previous biennium by the SLB.[129]

Propriety of Competition with the Private Sector

When the SLB directly acquires or disposes of real property for the Real Estate Portfolio it is without question in competition with the private sector. To understand the scope of this competition it is important to take into account the following limiting factors:

1) The SLB will only be in competition with the private sector when it actually acquires or disposes of real property for the Internal Discretionary Portfolio, currently about ⅓ of the entire Real Estate Portfolio. There is no competition with the private sector when the SLB only invests PSF assets in the External Portfolio (externally managed real estate funds).

2) Since 2005, the direct acquisitions of real estate by the SLB for the Internal Discretionary Portfolio have declined significantly, and investments in the External Portfolio have increased.

3) Because the SLB is not directly engaged in the vertical development of properties, the state is not in competition with developers, but instead only with private sector parties who are also only interested in purchasing and selling land.

While these three factors certainly limit the state's direct competition with the private sector, the SLB will nevertheless from time to time be involved in the direct acquisition and disposition of real property, thereby putting it in competition with the private sector.

Questions have arisen regarding the propriety of the state competing with the private sector in the real estate market, especially given certain advantages that the state has in such transactions. Specifically, it has been argued that because the state is exempt from paying local *ad valorem* property taxes, has zero holding costs, and is able to pay cash for properties that it buys, that it has a distinct advantage over the private sector.

[126] *Id.*, § 51.409(d).
[127] *See*, House Bill 2217 (McCall, 79th Leg. 2005) (adding TEX. NAT. RES. CODE, § 51.412).
[128] TEX. NAT. RES. CODE, § 51.412(a)).
[129] *Id.*, § 51.412(b).

The state's exemption from paying local *ad valorem* property taxes on land that it owns creates a distinct advantage for it over private parties for a number or reasons. First, when the state purchases land that it intends to resell in the future, its holding costs will be less than that of the private sector primarily because the state will not pay any taxes on the land during its holding period. In addition, the state is able to enter into lease agreements covering property that it owns, such as in the Wal-Mart Distribution Center case, primarily because of its tax exempt status. In the Wal-Mart case, if the state was not able to structure the deal as it did, either the local community would have had to offer tax abatements to the company or the company most likely would have decided to build the facility elsewhere.

The state as a direct participant in the real estate market is also in a better position than the private sector because it has no holding costs on investment property. During the period that the state holds land that it intends to dispose of in one way or another, it pays neither *ad valorem* taxes on the property nor interest on money that a private sector party would have had to borrow to purchase the land. Unlike the state, a private sector investor would have to take both of these costs into account, not only in determining whether or not to purchase the property, but in determining when the property could be sold.

In addition, the state's ability to pay cash for the purchase of land gives it an advantage over a private sector participant. A seller of land will generally prefer to sell his or her property to a buyer who can pay cash today, instead of to a private sector party whose purchase is frequently contingent upon financing which is not always certain, and upon the often lengthy financing process.

As Land Commissioner Patterson has admitted, private landowners and developers do not have the same advantages as the state in such transactions. However, the Land Commissioner has explained that that his fiduciary duty to the PSF nevertheless requires the acquisition and disposition of land, even when it does involve competition with the private sector. However, the concerns regarding the propriety of the state competing with the private sector in such transactions is becoming less and less important given the limiting factors mentioned above, primarily the SLB's strategy of allocating PSF assets to the External Portfolio instead of the Internal Discretionary Portfolio.

Affect on the State and Local Communities

While the primary goal of investing PSF assets in real property is to strengthen and diversify the PSF, there are both direct and indirect secondary impacts on both the state and local communities resulting from such investments. First, it must be remembered that local taxing authorities are not able to impose *ad valorem* property taxes on property owned by the state. This exemption applies as well to state land that is leased to a private party, even for significant periods of time. As such, the collection of local *ad valorem* taxes are inevitably lessened when the state purchases real estate in a given community. However, there often are secondary tax revenue benefits to local communities that may offset the loss of *ad valorem* tax revenue (increased inventory, personal property, and sales taxes to name a few). In addition, numerous jobs have been created by projects that the SLB and the AMD have been involved in. These jobs include those surrounding the construction of the structure, the operation of the business following

construction, and the various collateral support jobs that arise as a result of the project. Importantly, unlike almost all government projects, these real estate ventures are funded not from taxes, but from the collateral value of the lands dedicated for the benefit and use of the PSF.

The GLO routinely commissions Angelou Economics (Angelou) to conduct independent studies to assess the economic impacts that SLB real estate transactions will have on both the state and local communities.[130] The estimates generated by Angelou show significant benefits to the state and the local areas involved in SLB projects.

According to Angelou, the state and the local governments in the area of the Wal-Mart Warehousing and Distribution Center in Baytown have and will continue to realize significant tax revenues as a result of the project, monies that otherwise would not have been collected. Prior to the project, the agricultural land generated approximately $6,000 in property taxes. During the thirty year lease period following the opening of the facility, Angelou estimated that approximately $124 million in business and personal property taxes would be generated from the facility. In addition, Angelou estimated that the facility would create 900 jobs with an annual payroll of $30 million. Indirect benefits were estimated to include the creation of 1,900 jobs with an annual payroll of $66 million, $9.6 million in taxes, and annual economic activity of $200 million. Similar benefits have been realized by the state and local communities across the state as the result of various other transactions, as shown by the following chart:

Table 3
Economic Impacts[131]

PROJECTS	TOTAL JOBS	ANNUAL PAYROLL	ANNUAL TAXES	ANNUAL ECONOMIC ACTIVITY
Wal-Mart (direct)	900	$30,000,000	$6,700,000	$95,000,000
Wal-Mart (indirect)	1,900	$66,000,000	$9,600,000	$200,000,000
Triangle (construction)	1,740	$72,000,000	$4,300,000	$156,000,000
Triangle (stabilized)	220	$5,100,000	$3,500,000	$47,600,000
CertainTeed (construction)	2,100	$144,000,000	$8,600,000	$314,000,000
CertainTeed (stabilized)	470	$14,000,000	$4,200,000	$87,000,000
Imperial (construction)	2,670	$110,000,000	$6,500,000	$239,000,000
Imperial (stabilized)	6400	$280,000,000	$30,000,000	$1,200,000,000

It is unclear what the economic benefits of such developments would have been if undertaken by the private sector. The GLO believes that the Wal-Mart and Triangle projects would not have

[130] The official website for Angelou Economics' may be accessed at: http://www.angeloueconomics.com/index.html (last accessed May 14, 2008).

[131] *See*, Angelou Economics, "Report: General Land Office: Impact Study of the Wal-Mart Distribution Center in Baytown, Texas," (March, 2005); Angelou Economics, "Report: General Land Office: Impact Study of the Triangle Development in Austin, Texas," (October, 2006); Angelou Economics, "Report: General Land Office: Impact Study of the CertainTeed Manufacturing Facility in Sherman, TX," (October, 2006); Angelou Economics, "Report: General Land Office: Impact Study of the Imperial Sugar Redevelopment (Cherokee Tract 3) in Sugar Land Texas," (October, 2006).

been initiated if the land had been in private hands.

CONCLUSION

Though the Committee may not always agree with every investment decision made by the School Land Board (SLB) and the Asset Management Division of the Texas General Land Office (AMD), the Committee believes that the SLB and the AMD take seriously their duties to the Permanent School Fund (PSF) and to the people of this state. Because the Land Commissioner is an elected official who has been entrusted by those people that have elected him to manage the AMD and chair the SLB, the Committee does not believe it is appropriate for the members to micro-manage the internal workings of these entities. However, the Committee is comprised of elected officials who also represent the people of this state, and as such, wish to make the following conclusions and recommendations.

Though investments of any kind are risky and hold the potential for loss, the Committee believes that the Texas Legislature, the SLB, and the AMD have enacted and adopted appropriate laws, rules, and policies to properly manage risk to the PSF. The Committee's only major concern regarding risk to the PSF is the seeming lack of coordination between the SLB and the State Board of Education (SBOE) regarding the management of the entire PSF. The Committee believes it is appropriate for these two bodies to coordinate their planning and investment of PSF funds so that the PSF as a whole is protected. In addition, the Committee believes that Texas law should also clarify that the SLB, not the SBOE, should be solely responsible for the real property holdings of the PSF.

The Committee also believes that it is fundamentally improper for the state to directly compete with the private sector in the acquisition of real property, especially given the advantages that the state has in such transactions. However, the Committee does recognize that there may be situations where the best interests of the PSF absolutely require such direct acquisitions. In addition, the Committee understands that the SLB has determined to allocate fewer assets to the Internal Discretionary Portfolio and more assets to the External Portfolio. Considering these factors, the Committee believes that the SLB can and should refrain from competing with the private sector in the acquisition of real property except as absolutely required by its fiduciary duty to the PSF.

In addition, given the importance, the complexity, and the changing nature of the PSF and its Real Estate Portfolio, the Committee believes that it is appropriate for independent bodies, such as the State Auditors Office, to routinely monitor the management, investments, and performance of the PSF and its Real Estate Portfolio.

RECOMMENDATIONS

1) The School Land Board and the State Board of Education should fully cooperate with one

another in the coordination of planning and investing Permanent School Fund assets so that the Fund as a whole is protected, perhaps through the retention of a single investment consultant.

2) State law should clarify that the School Land Board, not the State Board of Education, is solely responsible for the management of the real estate investments of the Permanent School Fund.

3) The School Land Board and the General Land Office should refrain from competing with the private sector in the acquisition of real property or real property interests, except as absolutely required by their fiduciary duties to the Permanent School Fund.

4) No more than ten percent of Permanent School Fund's real estate holdings should be held by the Internal Discretionary Portfolio at any given time. The School Land Board should, as soon as practicable, dispose of properties within the Internal Discretionary Portfolio so that the portfolio contains no more than ten percent of the Permanent School Fund's real estate holdings, subject to its fiduciary duty to the Permanent School Fund.

5) The State Auditor's Office should continue to monitor the real estate investment goals, strategies, outcomes, decisions, and activities of the School Land Board, the General Land Office, and those individuals and businesses hired by the state to mange any part of the Permanent School Fund's real estate portfolio.

APPENDIX 1-A

Prudent Investor Rule
American Law Institute
Restatement of the Law Third, Trusts: Prudent Investor Rule, 1992

§ 227. General Standard of Prudent Investment

The trustee is under a duty to the beneficiaries to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust.

a. This standard requires the exercise of reasonable care, skill, and caution, and is to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy, which should incorporate risk and return objectives reasonably suitable to the trust.

b. In making and implementing investment decisions, the trustee has a duty to diversify the investments of the trust unless, under the circumstances, it is prudent not to do so.

c. In addition, the trustee must:

   1. conform to fundamental fiduciary duties of loyalty (§ 170) and impartiality (§ 183);

   2. act with prudence in deciding whether and how to delegate authority and in the selection and supervision of agents (§ 171); and

   3. incur only costs that are reasonable in amount and appropriate to the investment responsibilities of the trusteeship (§ 188).

d. The trustee's duties under this Section are subject to the rule of § 228, dealing primarily with contrary investment provisions of a trust or statute.

Five Basic Principles of Rule

Sound diversification is fundamental to risk management and is therefore ordinarily required of trustees. Diversification is a basic tenet of risk management, without which investment portfolios would tend to be more volatile than necessary while having similar long-term expected returns.

Risk and return are so directly related that trustees have a duty to analyze and make conscious decisions concerning the levels of risk appropriate to the purposes, distribution requirements, and other circumstances of the trusts they administer. The point here is that risk is not inherently bad though it is prudent to avoid uncompensated, or unsystematic risk when possible (i.e., through diversification). Investment risk should be deliberately taken on only when it is judged likely to contribute to desirable investment performance for the portfolio as a whole. The level and nature of investment risk should be consistent with the trust's need, desire, and ability to tolerate that risk.

Trustees have a duty to avoid fees, transaction costs and other expenses that are not justified by needs and realistic objectives of the trust's investment program. It is usually both reasonable and appropriate to minimize incurred fees whenever possible, consistent with the investment strategy being implemented.

The fiduciary duty of impartiality requires a balancing of the elements of return between production of income and the protection of purchasing power. This confirms that a strategy which endeavors to generate current income while preserving principal is likely to result in a reduction of real income to beneficiaries due to inflation. For that reason (as well as tax-effects), it is often prudent to invest both for income (i.e., through dividends) and for capital appreciation, even if it means income alone is inadequate to meet a beneficiary's cash-flow needs.

Trustees may have a duty as well as having the authority to delegate as prudent investors would. This delegation is often in the form of investing in mutual funds. Trustees should exercise due care in selecting mutual funds for investment, concentrating on the most relevant predictors of future performance: fees, diversification, and asset class focus.

INTERIM CHARGE TWO

Eminent Domain

Observe and study ongoing litigation and actions by condemning authorities in light of the *Kelo* decision and make recommendations for changes in eminent domain law needed to protect private property rights. Specifically, examine the body of law used to determine the amount of compensation property owners receive when their land is condemned, in whole or part, and determine the appropriateness of this scheme as compared to others.

EMINENT DOMAIN

INTERIM CHARGE

"Observe and study ongoing litigation and actions by condemning authorities in light of the *Kelo* decision and make recommendations for changes in eminent domain law needed to protect private property rights. Specifically, examine the body of law used to determine the amount of compensation property owners receive when their land is condemned, in whole or part, and determine the appropriateness of this scheme as compared to others."[132]

SCOPE OF REPORT

This section of the Interim Report reviews the law of eminent domain and suggests statutory reforms that will more appropriately balance the fundamental right of individuals to own property with society's periodic need to condemn property in furtherance of the public good. Specifically, this section describes the power of eminent domain and the condemnation process, examines the importance of an individual's right to own property, reviews the expansive definition of "public use", and compares the different ways by which to determine what compensation is due to a property owner when a taking occurs. This section concludes with the generalized finding that, at a minimum, the power of eminent domain should be exercised only when absolutely necessary, only in furtherance of a truly "public use", and only when accompanied by compensation that makes a property owner completely whole, regardless of the cost to society.

As is apparent to those who study this branch of the law, it is not possible in a report of this type to comprehensively examine, explain, and compare each aspect of takings law, not to mention the various controversies and policy considerations that stem from its use and abuse. As such, this report presents a broad overview of the subject, with the focus on determining the best manner by which to balance the right of individuals to own property with the interests of the community at large.

SUMMARY OF COMMITTEE ACTION

Committee Hearing

The House Committee on Land and Resource Management met in a posted public hearing on

[132] Rule 3, Section 25(2), of the Rules of The Texas House, grants jurisdiction to the House Committee on Land and Resource Management "over all matters pertaining to . . . the power of eminent domain."

May 6, 2008, in Austin, Texas. Those who testified were:

Kristina Silcocks (Texas Attorney General's Office)
J. Mark Breeding (Eminent Domain Attorney)
Bill Peacock (Texas Public Policy Foundation)
Drew Thornley (Texas Public Policy Foundation)
Donald J. Sherwood (Integra Realty Resources)
Richard Cortese (Texas Farm Bureau)
Phil Russell (Texas Department of Transportation)
Scott Houston (Texas Municipal League)
Harold W. Collum (TUD Corporation)
Cathy Sisk (Harris County)
Steve Bresnen (North Harris County Regional Water Authority)
Steve Carroll (Texas Energy Coalition)

Summary of Testimony

Kristina Silcocks, Chief of the Transportation Division at the Texas Attorney General's Office (OAG), explained to the Committee the law and processes surrounding governmental takings in Texas, specifically those undertaken by state agencies. Ms. Silcocks explained to the members that the OAG is responsible for representing state agencies in condemnation proceedings, primarily the Texas Department of Transportation (TxDOT). Ms. Silcocks testified that the vast majority of TxDOT cases, perhaps as high as eighty-six percent, are negotiated purchases that are settled prior to the filing of a condemnation petition.

In regards to the law of "adequate compensation", Ms. Silcocks advised the members that the standard for determining "adequate compensation" under Texas law is the fair market value of the property taken, based upon the test of what a willing buyer would pay a willing seller in the open market. In the case of a partial taking, Ms. Silcocks informed the members that a property owner is entitled to the fair market value of the land taken and to certain damages to the remainder property, if any.

Ms. Silcocks fielded questions from the members of the Committee regarding a wide array of eminent domain and condemnation issues. In answer to questions concerning the Governor's veto of House Bill 2006 in 2007, Ms. Silcocks told the members that the Senate Amendment regarding diminished access to remainder property would have drastically changed the law of "adequate compensation". Ms. Silcocks advised the members that the current law regarding diminished access holds that no compensation is due to a property owner so long as the owner retains reasonable access to his or her property. As written, the Senate Amendment to House Bill 2006 would have required compensation for any diminishment to access, perhaps even for inconsequential diminishments such as the placing of a median in a new road.

J. Mark Breeding, a Houston attorney who has practiced eminent domain law for twenty-seven years, explained to the Committee his views of the current state of eminent domain law, especially in light of the Texas Legislature's attempt to reform the system in 2007. Mr. Breeding told the members that he believes that the system is not broken, and that attempts to change one

hundred years of statutory and case law could create significant and costly problems in the state. However, given the Committee's strong desire to reform the system in 2007, Mr. Breeding thought that it was appropriate for him to advise the members as to which reforms were truly problematic and which could be made with the least amount of trouble.

Mr. Breeding explained to the members that, in his opinion, a reasonable compromise was reached in 2007 with House Bill 2006. Specifically, Mr. Breeding was satisfied with the public use, public necessity, repurchase, and relocation assistance provisions in the bill, to name a few. However, Mr. Breeding cautioned the Committee to not legislate rules of evidence, and advised the members that the last minute Senate Amendments to the bill, especially regarding diminished accessed, were highly problematic.

Bill Peacock, the Director of the Center for Economic Freedom at the Texas Public Policy Foundation, advised the Committee that further reform is needed to address the United States Supreme Court's decision in *Kelo v. City of New London, Connecticut*, despite the important protections that were put in place in 2005 with the enactment of Senate Bill 7. Mr. Peacock pointed specifically to ongoing attempts by the City of El Paso to "revitalize" its downtown, potentially through the exercise of the power of eminent domain. Mr. Peacock also explained to the members that the many loopholes that were enacted with the passage of Senate Bill 7 in 1995 are problematic, especially the "slum and blight" exception that allows condemnations with secondary economic development purposes to occur. Finally, Mr. Peacock told the Committee that, in his opinion, the 2007 provisions found in House Bill 2006 were appropriate, with the exception of the Senate Amendment regarding diminished access, which he considered an area that needs further work.

Drew Thornley, an attorney with the Texas Public Policy Foundation, provided the Committee with an overview of how compensation is determined in Texas when property is condemned. Mr. Thornely explained to the members that an owner whose land has been taken through the power of eminent domain is entitled to the fair market value of the tract that is taken outright, and to certain damages for any non-condemned portion of the tract that remains (the remainder). However, Mr. Thornley informed the Committee that certain damages to the remainder, generally referred to as community damages, are not compensable. Mr. Thornley recommended that changes to Texas' compensation scheme should be made, and that such changes should ensure that landowners are made economically whole, a process that would involve considering each and every factor that voluntary buyers and sellers would considered in private market exchanges.

Donald J. Sherwood, a licensed appraiser and the Managing Director of Integra Realty Resources DFW, informed the Committee with his opinions regarding the state of eminent domain law in Texas and his recommendations as to how to reform the current system. Testifying primarily on the issue of "adequate compensation", Mr. Sherwood explained to the Committee that there are no simple solutions to fix the current system, but that the growing need for infrastructure in the state will continue to put condemning entities at odds with landowners. Mr. Sherwood made several recommendations to the members regarding how best to reform the system, specifically recommending that appraisers should be state certified and follow recognized standards, that both the public and special commissioners should be properly educated on the issue of eminent

domain, that those factors laid out in *State v. Schmidt* that truly affect the value of property should be considered, and that landowners should be compensated for their legal and appraisal costs.

Richard Cortese, a member of the Texas Farm Bureau's Board of Directors, explained to the Committee that the law of eminent domain in Texas is broken and needs to be fixed. Mr. Cortese informed the members that the condemnation process is heavily biased in favor of condemning entities and that there are not enough protections in place for Texas landowners. Specifically, Mr. Cortese recommended to the Committee that state law should be changed to require a condemning entity to make a good faith offer to a landowner that reflects the true market value of the piece of property, taking into consideration each and every market factor. In addition, Mr. Cortese explained to the members that state law should include meaningful penalties (financial and/or procedural) for failing to make such good faith offers, primarily to help ensure that such offers are made in the first place.

Mr. Cortese also explained to the Committees that landowners are often not receiving "adequate compensation" when their property is condemned because the courts exclude from the calculation many factors that a willing buyer and a willing seller would actually consider in a private negotiated sale. Mr. Cortese explained to the members that Texas, unlike many other states, does not allow landowners to be compensated for things such as diminished access to their property, loss of visibility, lost business profits and good will, and attorney's fees. Mr. Cortese recommended that Texas law should be changed to allow for factors such as these to be considered when compensation determinations are made.

Phil Russell, the Assistant Executive Director of TxDOT, explained to the Committee that TxDOT does its best to balance the private property rights of individuals with the public's interest in building a transportation system that meets the growing needs of the state. Mr. Russell admitted that finding this balance was not always an easy matter. Mr. Russell answered numerous questions from the members regarding issues such as the Trans-Texas Corridor, the affect of the 1993 *Schmidt* decision on compensation determinations, and the Governor's veto of House Bill 2006 in 2007. Mr. Russell, when asked, told the members that TxDOT's $1 billion estimate of the cost of House Bill 2006 was not overstated, though an exact amount could not reasonably be calculated.

Harold Collum, a resident of Tarrant County, described to the Committee his personal experiences with TxDOT regarding a tract of land that he owned in Fort Worth that was condemned by the agency. Mr. Collum was critical of the negotiation and condemnation process, especially regarding the low appraisal of his property and certain problems that arose when the state appealed the special commissioner's decision in favor of Mr. Collum.

Cathy Sisk, the Director of Legislative Relations for Harris County, informed the Committee of the process used by Harris County to determine the cost of the Senate Amendment to House Bill 2006 regarding diminished access. In Harris County, the estimated increased cost to the county over five years would have been $1 billion, which she explained was consistent with the numbers generated at the time by TxDOT. Ms. Sisk informed the members that, regarding diminished access, the current standard of "substantial impairment" is appropriate and should be retained.

Steve Bresnen, representing North Harris County Regional Water Authority (NHCRWA), informed the Committee that the provisions of House Bill 2006 in 2007 were generally workable, except for the last minute amendments made to the bill in the Senate. In addition, Mr. Bresnen answered several questions regarding the NHCRWA's use of the power of eminent domain.

Steve Carroll, an attorney who has practiced eminent domain law for twenty-seven years, advised the Committee that while it might be appropriate for the legislature to change the measure of compensation in takings cases, it could be problematic to change the rules of evidence in such situations. Mr. Carroll explained to the members that dozens of legal principles formulated over one hundred years would be undermined if the legislature changed the rules of evidence in takings cases. Mr. Carroll argued to the Committee that the 1993 *Schmidt* case did not change existing law because three of the four *Schmidt* factors were already incorporated into the body of eminent domain law prior to the decision.

BACKGROUND

The Power of Eminent Domain

> Government is instituted to protect property of every sort. . . . This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.[133]

Eminent domain is the power of the state (or those to whom the power has been duly delegated)[134] to take private property for public use.[135] Neither the United States nor the Texas Constitution specifically authorize the use of eminent domain, though the power is implied in both documents through the restrictions that they place upon its use.[136] The Takings Clause for the United States Constitution, found in the Fifth Amendment to that document, states in pertinent part that:

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[133] James Madison, "Property", *National Gazette*, March 29, 1792, reprinted in *The Papers of James Madison*, ed. R. Rutland *et al*. (Charlottesville: University Press of Virginia, 1983), vol. 14, p. 266-68.

[134] *See*, *Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 716 (Tex. App.--Corpus Christi 2000, pet. denied) (holding that the legislature may grant the authority to exercise that power to governmental and non-governmental entities as long as the exercise is for a public use).

[135] *See e.g.*, U.S. CONST., Amend. V; TEX. CONST., art I, § 17; TEX. PROP. CODE . §§ 21.001 *et seq*. Courts in New Hampshire and North Carolina construe sections of their state constitutions as implementing the common law requirement for just compensation for takings be paid by the state and its subdivisions.

[136] In determining the source of this power, it is important to remember the fundamental distinction between the federal and states constitutions. The United States Constitution is a "granting" document, meaning that the federal government has only those powers that are granted to it by the Constitution. Provisions in the federal Bill of Rights are direct limitations on the specific powers delineated in the Constitution. For example, the power of eminent domain is arguably granted to the federal government in the Necessary and Proper Clause, found in Article I, Section 8, of the Constitution. This clause is limited by the Takings Clause found in the Fifth Amendment. On the other hand, the Texas Constitution, like all state constitutions, is a "limiting" document, meaning that the state government has all those powers that are not prohibited to it.

> No . . . private property [shall] be taken for public use, without just compensation.[137]

In Texas, Section 17 of Article I of the Texas Constitution provides that:

> No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . .[138]

Both the United States and Texas constitutions require that the taking of private property must be for a "public use", and that when an authorized entity takes private property for a "public use" that it must fairly compensate the owner for the property taken. The right of a property owner to be compensated for the taking of his or her property is a vested right under the federal constitution.[139] Any state law that purports to take away this right is unconstitutional under the Fourteenth Amendment to the United States Constitution.[140]

It is a matter settled by law that the power of eminent domain is delegated by the Texas Constitution to the legislature.[141] The legislature may grant the authority to governmental and non-governmental entities so long as the exercise is for a "public use".[142] Chapter 21 of the Texas Property Code establishes the basic rules and process that must be followed by the parties and the courts before, during, and after a condemnation suit is filed.[143] In addition to these Property Code sections, numerous other statutory provisions have been enacted over the years that grant the power of eminent domain to various governmental and non-governmental entities, generally for specified public uses.[144]

William Blackstone, the foremost authority on Anglo-American jurisprudence wrote as axiomatic that "the law of the land . . . postpone[s] even public necessity to the sacred and inviolable rights of private property."[145] While the exercise of the power of eminent domain has become a routine matter for many condemning entities, it is important to remember that that the taking of an individual's private property involves an infringement of a fundamental right, a right

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[137] U.S. CONST., AMEND. V.

[138] TEX. CONST., art I, § 17.

[139] Prior to the adoption of the Fourteenth Amendment the power of eminent domain of state governments "was unrestrained by any federal authority." *Green v. Frazier*, 253 U.S. 233, 238 (1920). In *Barron v. City of Baltimore*, 32 U.S. 243 (1833), the United States Supreme Court ruled that the federal Bill of Rights restricted only the federal government and did not apply to the states.

[140] *See*, *Chicago, B. & Q. R. CO. v. City of Chicago*, 166 U.S. 226 (1897) (holding that the Fourteenth Amendment to the United States Constitution restrains actions by a state through either its legislative, executive, or judicial department, which deprives a party of his property without due compensation).

[141] *See*, *Mercier*, at 716 (2000); *Maberry v. Pedernales Elec. Coop.*, 493 S.W.2d 268, 269 (Tex. Civ. App.--Austin 1973, writ ref'd n.r.e.).

[142] *Id.*

[143] TEX. PROP. CODE . §§ 21.001 *et seq.*

[144] *See*, Texas Legislative Research Division, FACTS AT A GLANCE, "Texas Statutes Granting, Prohibiting, or Restricting the Power of Eminent Domain", (March 2006) (listing the numerous statutory provisions regarding eminent domain).

[145] William Blackstone, *Commentaries on Laws of England*, A Facsimile of the First Edition of 1765-1769 (Chicago: Univ. Of Chicago, 1979), vol. 1, p. 134.

that was held in the highest regard by the founders of this nation.

Importance of the Protection of Private Property

In 1795, Justice William Paterson, writing for the United States Supreme Court in *Vanhorne's Lessee v. Dorrance*, expressed the generally held Enlightenment view that:

> [T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. . . . The preservation of property then is a primary object of the social compact.[146]

In further strongly worded language, Justice Paterson explained that the power of eminent domain is a "despotic power," but one that "government could not subsist without."[147] In Paterson's opinion, the power of eminent domain should not be "exercised except in urgent cases, or cases of the first necessity."[148] Justice Paterson's words should not be read lightly. As a delegate to the Constitutional Convention and joint author of the United States Constitution he certainly understood not only the importance of the protection of private property to a free society, but also that this view was deeply ingrained in Americans' conceptions about the nature of their government and its relationship to the individual.

Like Justice Paterson, the founders of this nation considered the right to hold private property to be not only a fundamental right, but to be a primary source of all civil liberties.[149] James Madison, the author of the federal Takings Clause, explained in 1792 what he considered to be self-evident in when he stated that "As a man is said to have a right to his property, he may be equally be said to have a property in his rights."[150] As products of the Enlightenment, these men viewed property to be a God given and natural right that was a central component to both the

[146] *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795); *See, also*, John Locke, *Two Treatises of Government*, ed. by Peter Laslett, Sec. 138 (Cambridge, 1988), ("The *Supream Power cannot take* from any Man any part of his *Property* without his own consent. For the preservation of property being the end of government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should *have Property* . . . ."); Publius, "The Federalist X," in *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle Over Ratification*, ed. by Bernard Bailyn (New York: Literary Classics, 1993), vol. 1, p. 405. ("the diversity of the faculties of men, from which the rights of property originate . . . is the first object of government."); *Publius*, "The Federalist LIV," in *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle Over Ratification*, vol. 2, p. 199 ("government is instituted no less for protection of the property than of the persons of individuals."): James Madison, "Property," *National Gazette*, March 29, 1792, reprinted in *The Papers of James Madison*, ed. R. Rutland et al. (Charlottesville: University Press of Virginia, 1983), vol. 14, p. 266-68 ("Government is instituted to protect property of every sort . . . . This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.").

[147] *Vanhorne's Lessee*, at 311 (1795).

[148] *Id.*

[149] *See, e.g.*, A Citizen of America, "An Examination Into the Leading Principles of the Federal Constitution," in *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle Over Ratification*, vol. 1, p. 159 ("Let the people have property, and they will have power -- power that will for ever be exerted to prevent a restriction of the press, an abolition of trial by jury, or the abridgement of any other privilege."); John Adams, *The Works of John Adams,* ed. Charles Francis Adams (Boston: Little Brown, 1850), vol. 6, p. 280 ("Property must be secured or liberty cannot exist.").

[150] Madison, "Property," vol. 14, p. 266.

establishment and maintenance of all civil governments.

The conception that the possession of private property is a natural, and therefore, fundamental right, traces its roots back to Enlightenment ideas regarding the very nature of man and of civil government. This "Right of Englishmen" had been expounded at least since the seventeenth century by men like John Locke who traced the natural right to possess private property to pre-historical times. According to Locke, in the beginning the only things that an individual owned were his body and labor, everything else was held in common. By investing labor and skill into things, those things and their products became the person's own things, thus the conception of private property. Locke explained in his *Second Treatise on Civil Government* that:

> [T]hough the things of nature are given in common, yet man, by being master of himself, and proprietor of his own person, and the actions or labour of it, had still in himself the great foundation of property; and that, which made up the great part of what he applied to the support or comfort of his being, . . . was perfectly his own, and did not belong in common to others.[151]

This "Right of Englishmen" certainly migrated with colonists from England to North America and became, as Justice Paterson's opinion in *Vanhorne's Lessee* demonstrates, central to this nation's conception of liberty.[152] As Justice Clarence Thomas recently wrote citing the 1798 case of *Calder v. Bull*, "[t]he Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from `tak[ing] *property* from A. and giv[ing] it to B.'"[153]

Given the fundamental nature of the right to own property and the importance of this right to free societies, coupled with the contrary need of society to condemn property at times for the public good, it is no wonder that these two opposing interests have come into conflict at times. As with other situations where important public and private interests collide, it becomes the responsibility of the government to create and maintain a reasonable set of rules that properly balance these two important yet competing interests.

DISCUSSION -- "PUBLIC USE"

Both the United States and the Texas Constitutions require that the exercise of the power of eminent domain must be for a "public use".[154] The term "public use" has never had a precise definition and courts have historically struggled to determine what it actually does and even should mean. Determining whether a particular use is a "public use" is a judicial determination,

[151] Locke, Sec. 44.

[152] *See*, Errol E. Meidlinger, "The 'Public Uses' of Eminent Domain: History and Policy", *11 Env. L. Rev. 1* (Fall 1980),; Michael Malamut, "The Power to Take: The Use of Eminent Domain in Massachusetts", Pioneer Institute for Public Policy Research, White Paper No. 15 (December 2000).

[153] *Kelo v. City of New London, Connecticut*, 125 S. Ct. 2655, 2680 (2005) (citing *Calder* v. *Bull,* 3 Dall. 386, 388 (1798)).

[154] *See e.g.*, U.S. CONST., Amend. V; TEX. CONST., art I, § 17.

but judges have generally been deferential to legislative assertions that a particular use is a legitimate "public use".[155] Some courts have interpreted "public use" liberally, upholding the use of eminent domain in situations in which there was no actual "public use", but instead where the project was merely for a public purpose or created some public benefit.[156] Other courts have interpreted the term more narrowly to require actual occupancy by the public.[157]

Nevertheless, there is no question that the definition of "public use" has always included more than simply projects that allow only a governmental body or the general public to possess, occupy, and enjoy the property. Equally, there is no question that the historically broad definition of "public use" has continued to be expanded by the judiciary in recent years, most recently in the controversial 2005 United States Supreme Court decision in *Kelo v. City of New London, Connecticut*.[158]

"Public Use" Prior to the Twentieth Century

Starting in the seventeenth century, the general movement in America has been away from a common sense textual understanding of the term "public use" and towards an ever-increasingly liberal definition that more closely resembles "public benefit". From the earliest periods, legislative and judicial bodies have sanctioned the condemnation of private property for purposes that, while indirectly benefiting the public, often involved for-profit undertakings that primarily benefited private stakeholders. Similar to modern grants to utilities and common carriers, private corporations were frequently granted the right to take property for the creation and operation of such things as water-powered mills, turnpikes, railroads, and canals, each of which was arguably necessary to the citizenry of the growing nation.

Early takings for water-powered mills, turnpikes, and canals were justified fairly easy on the grounds that there truly was a public need for such projects, given the limited nature of government and the expansive nature of the country. Some entity had to provide these services. With the passage of time, and the growth of the nation and its industrial needs, the power of eminent domain was granted to entities and for such uses that benefited the public less directly. The law regarding railroads, utilities, and water-powered industries, for example, stretched the classic meaning of the power of eminent domain into an awkward and frequently unjustifiable set of laws.

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[155] *City of Cincinnati v. Vester*, 281 U.S. 439, 444 (1930) (holding that it is "well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one."); *Maher v. Lasater*, 354 S.W.2d 923, 925 (Tex. 1962).

[156] *See, e.g.*, California: *Redevelopment Agency of City and County of San Francisco v. Hayes*, 266 P.2d 105; *Kansas: State ex rel. Fatzer v. Urban Renewal Agency*, P.2d 656 (1956); Maine: *Crommett v. City of Portland*, 107 A.2d 841 (1954); New Jersey: *Redfern v. Board of Commissioners of Jersey City*, 59 A.2d 641 (1948); *New York: Murray v. La Guardia* 1943, 52 N.E.2d 884 (1943); Ohio: *State ex rel. Bruestle v. Rich*, 1953, 110 N.E.2d 778 (1953).

[157] *See, e.g.*, Georgia: *Housing Authority of City of Atlanta v. Johnson*, 74 S.E.2d 891 (1953); *South Carolina: Edens v. City of Columbia*, 91 S.E.2d 280 (1956).

[158] *Kelo*, at 2680 (2005) (citing *Calder* v. *Bull,* 3 Dall. 386, 388 (1798)).

The Mill Dam Acts

The changing jurisprudence regarding mill dams reflects the general expansion of the power of eminent domain from its early days in this nation through the nineteenth century.[159] These acts allowed private mill operators to dam waterways, in essence taking the flooded upstream property of their neighbors and affecting the water interests of their downstream neighbors. The power generated from such dams was used initially in grist milling operations and was necessary to the primarily agricultural economy, and therefore of public benefit. For this reason, and with the addition of state regulation, legislatures and courts generally sanctioned such takings.

Though the record is unclear, many historians believe that these acts were not uncommon in pre-revolutionary times, noting that the first such act was passed in Virginia in 1667.[160] In 1884, when the only known compilation was done, the seven pre-revolutionary mill dam acts had increased to twenty-nine.[161] During this period, the types of private industry that benefited from the mill dam acts changed as well. Takings authorized by the various acts were more frequently accomplished for the benefit of larger saw, textile, paper, and iron mills, projects that required larger dams, created greater damage to surrounding property, and produced far more private than public benefits. State courts generally did not oppose such actions. As the Massachusetts Supreme Court explained in 1832, its state's taking clause:

> [H]as been practically construed to authorize the legislature to transfer the property of one individual to another individual or corporation, whenever the public convenience and necessity require it, although . . . such a transfer is usually the private emolument of the individual or corporation.[162]

As United States Supreme Court Justice John Paul Stevens recently explained, the more common sense definitional test of takings, being that of "use by the public" eroded during the nineteenth century because in part "it proved to be impractical given the diverse and always evolving needs of society."[163] It is unclear whether the common sense textual definition of "public use" was truly "impractical", or whether it was merely more expedient to liberally construe the definition of "public use" to include takings by private parties primarily for their benefit. Regardless, many in the growing nation understood, as the Court of Chancery of New Jersey did in 1832, that all "great improvements . . . are made through private incorporated companies, and perhaps better accomplished in that way than any other."[164] As a result of such understandings, utilitarian orthodoxy began to overshadow what had historically been considered an inviolable individual right.

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[159] *See*, Morton J. Horowitz, "The Transformation in the Conceptions of Property in American Law, 1780-1860", *40 Univ. Chig. L. Rev. 248*, pp. 270-278 (1972-73).

[160] Meidlinger, p. 15.

[161] *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 19 (1885) (listing Virginia, Maryland, Delaware, North Carolina, Massachusetts, New Hampshire, and Rhode Island as having mill dam acts in existence prior to the Declaration of Independence).

[162] *Boston & Roxbury Mill Dam Corp. v. Newman, 29 Mass. 467 (12 Pick. 68) (1832).*

[163] *Kelo*, at 2662 (2005).

[164] *Scudder v. Trenton Delaware Falls Co.,* 1 N.J. Eq. 694 (1832) (upholding a grant of eminent domain to a private company to take land for seventy mill sites along the Delaware River).

Further Economic Expansion Activities

Following the Civil War, the legitimacy of authorizing certain private entities to exercise the power of eminent domain for economic growth was fairly well settled by law. The degree to which such uses were for public or private benefit varied; however, it was certainly settled that a legislative determination that the use resulted in some sort of public benefit was generally enough to satisfy the courts. Similar to today, the power of eminent domain was used by private and quasi-governmental entities in furtherance of projects involving railroads, telegraph and later telephone lines, irrigation canals, mining operations, and docking facilities, to name a few.

Judges routinely upheld legislation that empowered railroads to condemn private property.[165] Both legislative and judicial bodies sanctioned such activity based on the reasoning that railroad companies were carrying out the public purpose of improving transportation. Similar to public roads, these common carriers were obligated to transport persons and goods.

The situation was no different in Texas.[166] As late as 1850 the settled areas of Texas were "largely confined to the river bottoms of East and South Texas and along the Gulf Coast."[167] Given the general lack of navigable waterways, and the inadequacy of internal roads, many proposals were debated in the first half of the nineteenth century to find a solution to the transportation problem. In 1836, the Texas Rail Road, Navigation, and Banking Company was granted a charter by the First Congress of the Republic of Texas, with the power to construct railroads "from and to any such points . . . as selected." For many years following this grant, the economic growth of the state mirrored the extension of railroads and railroad service in the state. These common carriers were routinely granted the power of eminent domain and the courts routinely sanctioned such grants of power. Like public utilities, it would not have been possible for railroads to grow or operate in a financially sound way without such a grant of power.

Like grants to railroad companies, the Texas Legislature and the state's courts have at times allowed the taking of private property by private parties for what they considered public uses.

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[165] *See, e.g.*, in Texas*, Mangan v. Texas Transp. Co.*, 44 S. W. 998 (1898) (upholding the condemnation by the Texas Transportation Company for the benefit of the two Texas brewing associations for the operation of commercial rail lines between breweries and a railroad.); *Croley v. St. Louis S. W. RY. CO. Of Texas,* (Tex. Civ. App.) 56 S. W. 615 (1900) (upholding the condemnation of two strips of land for the widening of a railroad tract as a "public use"); *Chapman v. Railway* (Tex. Civ. App.) 138 S. W. 440 (1911) (upholding the condemnation of an 100 foot right of way by the Trinity Valley & Northern Railway Company as a "public use".); *West v. Whitehead, Tex.Civ.App*., 238 S.W. 976 (1922) (upholding the condemnation of a strip of land by the Kinney & Uvalde Railway Company to lay eight miles of track from a main line to a private mine.).

[166] *See, e.g.*, Ira G. Clark, *Then Came the Railroads: The Century from Steam to Diesel in the Southwest* (Norman: University of Oklahoma Press, 1958); Donovan L. Hofsommer, *The Southern Pacific, 1901-1985* (College Station: Texas A&M University Press, 1986); V. V. Masterson, *The Katy Railroad and the Last Frontier* (Norman: University of Oklahoma Press, 1952); Richard C. Overton, *Burlington Route: A History of the Burlington Lines* (New York: Knopf, 1965); Richard Cleghorn Overton, *Gulf to Rockies: The Heritage of the Fort Worth and Denver-Colorado and Southern Railways* (Austin: University of Texas Press, 1953; rpt., Westport, Connecticut: Greenwood, 1970); Charles S. Potts, *Railroad Transportation in Texas* (Austin: University of Texas, 1909); S. G. Reed, *A History of the Texas Railroads* (Houston: St. Clair, 1941; rpt., New York: Arno, 1981); Charles P. Zlatkovich, *Texas Railroads* (Austin: University of Texas Bureau of Business Research, 1981).

[167] *See*, *Handbook of Texas Online*, s.v. "Railroads", http://www.tsha.utexas.edu/handbook/online/articles/RR/eqr1.html (accessed August 30, 2006).

For example, in 1898, the Texas Court of Civil Appeals upheld a condemnation of street right of ways by the Texas Transportation Company (a private corporation comprised of the San Antonio Brewing Association and the Lone Star Brewing Association) as a "public use".[168] The company planned to lay railroad track that would expedite the carrying of beer between breweries and between a brewery and a railroad head. In *Mangan v. Texas Transp. Co.*, the court found that:

> It may be true that the breweries may be more benefited than the balance of the public, and that but few persons may, in fact, actually enjoy its benefits; but, if the use is public in point of law, this can make no difference.[169]

Seven years after *Mangan*, the Texas Supreme Court in *Borden v. Trespalacios Rice & Irrigation Co.* appeared uneasy with an unbounded definition of "public use" and the complete deference to the legislature regarding such determinations. In a strongly worded opinion, the court explained that:

> [W]e are not inclined to accept that liberal definition of the phrase 'public use' . . . which makes it mean no more than the public welfare or good. . . . We agree that property is taken for public use . . . only when there results to the public some definite right or use in the business or undertaking to which the property is devoted.[170]

Nevertheless, the court did affirm the lower court's determination that the taking of private property, by a private canal corporation, for the purpose of irrigating 60,000 acres of land belonging to twenty-six private owners, was within the definition of "public use".[171] However, the "public use" standard created by the *Trespalacios* Court remains the law in Texas today, and some have argued that the Takings Clause of the Texas Constitution as interpreted in *Trespalacios* "provides Texas property owners more protection than is provided landowners in the United States Constitution."[172] The degree of this added protection is questionable given the willingness at both the federal and state level to further expand the definition of "public use".

<u>"Public Use" In The Twentieth Century</u>

While earlier legislators and judges sanctioned takings that led to the provision of needed services like milling and transportation, twentieth-century legislative bodies and the judiciary pushed the definition of "public use" a step forward so that certain social concerns like urban decay, land apportionment, and economic development could be redressed. In 1954, the United States Supreme Court extended the term "public use" to include a taking of property that was

[168] *Mangan* (1898).
[169] *Id.,* at 1001.
[170] *Borden v. Trespalacios Rice & Irrigation Co.*, 86. S.W. 11, 14 (1905).
[171] *Id.*
[172] Stephen I. Adler, (n.d.). "Public Use: The *Kelo* Rule in Texas," Retrieved from Barron & Adler, L.L.P.'s website http://www.barronadler.com/admin/images/publication/1.pdf (accessed July 8, 2008) (arguing that "In requiring the public have 'some definite right or use,' Texas eminent domain jurisprudence *rejects* as public uses those projects which merely create a generalized public benefit such as economic welfare, economic development, or increasing the tax base.").

subsequently given to private urban renewal agencies for a public purpose, that being the elimination of slum and blight.[173] In *Berman v. Parker*, the Court upheld provisions in the federal *District of Columbia Redevelopment Act* (DCRA) that authorized the use of eminent domain for the condemnation of slum property that was subsequently redistributed to private agencies who agreed to use the land consistent with an urban renewal plan.[174] Importantly, the Court found that though specific parcels of land may fall outside of a "public use," they are necessary for the functioning of the redevelopment plan as a whole and so qualify as having "public purpose".[175]

The Texas Supreme Court followed suit in 1959 when it ruled that the condemnation of private property in accordance with a validly enacted urban renewal plan, and then selling the properties to private citizens, was a "public use".[176] As enacted, the *Texas Urban Renewal Law* (TURL) authorized municipalities to clear blighted areas for the redevelopment of the areas by private enterprise in accordance with restrictions designed to carry out the plan of renewal. In *Davis v. the City of Lubbock*, Justice Joe R. Greenhill writing for the majority, upheld the legislature's declaration that actions authorized by the TURL were for a "public use".[177]

In *Poletown Neighborhood Council v. City of Detroit*, the Michigan Supreme Court upheld Detroit's condemnation of a residential neighborhood and the conveyance of the land to General Motors for the construction of an assembly plant.[178] The Court found that the benefit received by General Motors was purely incidental and that the project fell within the public purposes stated by the legislature, here to prevent unemployment and economic distress. Importantly, the Court's ruling was not without controversy and was eventually overturned. Justice James Ryan, writing the dissent in *Poletown*, explained that with this case the:

> Court has subordinated a constitutional right to private corporate interests. As demolition of existing structures on the future plant site goes forward, the best that can be hoped for, jurisprudentially, is that the precedential value of this case will be lost in the accumulating rubble.[179]

In 2004, *Poletown* was reversed by the Michigan Supreme Court in *County of Wayne v.*

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[173] *Berman v. Parker*, 348 U.S. 26 (1954).

[174] *See*, *District of Columbia Redevelopment Act of 1945*, 60 Stat. 790, D.C.Code, 1951, §§ 5-701-5-719: The District of Columbia Redevelopment Land Agency was authorized to transfer to public agencies the land to be devoted to public purposes such as streets, utilities, recreational facilities, and schools, and to lease or sell the remainder as an entirety or in parts to a redevelopment company. The leases or sales were required to provide that the lessees or purchasers would carry out the redevelopment plan.

[175] *Berman*, at 35 (1954).

[176] *Davis, et al. v. the City of Lubbock, et al.*, 160 Tex. 38, 326 S.W.2d 699 (Tex. 1959); *Housing Auth. of City of Dallas V. Higginbotham*, 143 S.W.2d 79, 85 (Tex. 1940) (holding an urban renewal program to be a "public use" justifying condemnation where restrictions were in place to insure that the plans for the renewal were carried out and the slum conditions would not recur.).

[177] *Davis*, at 709 (1959).

[178] *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (Mich. 1981): *See*, Carla T. Main, "How Eminent Domain Ran Amok," *Policy Review* 133, pp. 13-19, for a substantial review of the facts in this case.

[179] *Poletown Neighborhood Council*, at 464 (1981).

Hathcock.[180] The Court determined that the public, when it ratified the Michigan Constitution in 1963, could not have understood "public use" to allow for the taking of private property for the benefit of another private party simply to raise tax revenues or create jobs.[181]

In 1984, the United States Supreme Court upheld Hawaii's use of eminent domain under its *Land Reform Act of 1967*, which authorized the condemnation of residential tracts in the state and then transferring ownership of the properties to existing lessees.[182] Following numerous hearings in the 1960s, the Hawaii Legislature determined that while the state and federal governments owned nearly forty-nine percent of the land in Hawaii, another forty-seven percent was in the hands of only seventy-two private landowners. This concentration of land ownership was especially evident on the island of Oahu, where twenty-two landowners owned 72.5% of the fee simple titles. The legislature concluded that this oligopoly was skewing the state's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare.

The Court found that Hawaii's act to regulate the oligopoly was a classic exercise of the state's police powers, and a comprehensive and rational approach to identifying and correcting market failure.[183] As such, the action satisfied the "public use" doctrine. Importantly, land does not have to be put into actual public use in order to use eminent domain. Instead, the Court determined that it will look to the purpose of the taking and not its effect.

It is certainly clear that from the earliest times in American history that the term "public use" has included more than just public infrastructure projects such as roads, schools, and courthouses. As is also clear, the definition of "public use" has continued to be stretched and expanded by the courts to mean more than it originally did. However, in 2005, the meaning of the term was expanded to the point, at least in the eyes of the public at large, that it became unjustifiable.

***Kelo v. City of New London* (2005)**

In June 2005, the United States Supreme Court ruled in *Kelo v. City of New London, Connecticut* that the governmental taking of property from one private party to give to another private party

[180] *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004).
[181] *Id.*
[182] *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984).
[183] In his article, "The Birth of the Property Rights Movement", Steven J. Eagle convincingly argues that the purpose of the state's police power is to secure rights by prohibiting harms. He explains that the police power is not to be used as a license to benefit others or to further the wellbeing of society. *See*, Steven J. Eagle, "The Birth of the Property Rights Movement", *Policy Analysis* 404 (June 26, 2001) ("The police power is the fundamental power of government to secure our rights, the power to protect members of the community against harm from each other, as defined by our rights against each other, or against harm from outsiders. . . . The police power is legitimate, for if we have the right to defend ourselves we have the right to band together for our collective defense. . . . Every individual has the intrinsic right to resist invaders, criminals, and contagious disease. Thus, anyone may delegate those rights under the social compact. . . . [However,] the police power is not a license, for example, for government to take property from some for the benefit of others, or for the purpose of adjusting or harmonizing or maximizing its own view of the 'wellbeing' of society. Nor can government invoke the police power to interfere with property rights where the exercise of those rights has not harmed others. Indeed, to invoke the police power to protect 'the community' from conduct that does not violate the rights of any of its individual members is to invest government with 'rights' not derived from its members.").

in furtherance of economic development constituted a permissible "public use".[184] In a five to four decision, the Court more fully embraced the broad interpretation of "public use" as “public purpose”, explaining that the promotion of economic development was a traditional and long accepted governmental function.

Justice Sandra Day O'Connor, in her dissent to the Court's opinion, described the basic facts behind this case as follows:

> In February 1998, Pfizer Inc., the pharmaceuticals manufacturer, announced that it would build a global research facility near the Fort Trumbull neighborhood. Two months later, New London's city council gave initial approval for the New London Development Corporation (NLDC) to prepare the development plan at issue here. The NLDC is a private, nonprofit corporation whose mission is to assist the city council in economic development planning. It is not elected by popular vote, and its directors and employees are privately appointed. Consistent with its mandate, the NLDC generated an ambitious plan for redeveloping 90 acres of Fort Trumbull in order to "complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront, and eventually 'build momentum' for the revitalization of the rest of the city.[185]

In assembling the land for this project, the City bought property and proposed using the power of eminent domain to acquire the rest. The City invoked a state law that specifically authorized the use of eminent domain to promote economic development. Several property owners in the area did not want to sell their homes. Susette Kelo had lived in the area since 1997, and had made extensive improvements to her home, which she prized for its view of the water. Wilhelmina Dery was born in her home in 1918 and had lived there her entire life. Her husband Charles had lived in the house since they married some sixty years before. There was no allegation that any of these properties were blighted or otherwise in poor condition; rather, they were condemned because they happened to be located in the development area.

In finding that the takings were constitutionally permissible, the Court found that New London had both determined that the area at issue was sufficiently distressed to justify a program of economic rejuvenation and that it had developed a plan designed to benefit the community, including the generation of new jobs and increased tax revenue. While the City could not take the private land simply to confer a private benefit on a particular private party, the exercise of eminent domain in this case, according to the Court, was envisioned under a carefully considered development plan that was not adopted to benefit a particular class of identifiable individuals. The Court also emphasized that nothing in its opinion precluded a state from placing further restrictions on the exercise of the power of eminent domain, explaining that many states in fact already imposed “public use” requirements that were stricter than the basic federal standards.

[184] *Kelo* (2005).
[185] *Id.*, at 2671.

The *Kelo* decision was widely criticized by lawmakers and the general public who viewed the outcome as an improper interpretation of the federal Takings Clause and as an egregious attack on the cherished notion that the possession of private property in this nation is a fundamental and basic right. However, given the historical trajectory of the expansion of the term "public use" throughout America's history, it is debatable how revolutionary the decision truly was. As has been recently written:

> The *Kelo* decision did not create the problem of condemnation for economic development purposes. Instead, the Supreme Court's decision simply upheld what other legislative bodies identified as an appropriate exercise of that authority. If anything, the *Kelo* decision was symptomatic of the problem of the expanded (and expanding) scope of the definition of public use.[186]

Ultimately, the holding in *Kelo* should be viewed as just the most recent decision reached in a long string of activist rulings that have made virtually meaningless the inclusion of the term "public use" in both the United States and Texas Constitutions. While being perhaps the "straw that broke the camel's back", the reasoning and the conclusions reached by the *Kelo* Court are not out of line with the Court's previous line of "public use" rulings. The Court simply took one more step down that slippery slope that it had been sliding down for decades.

"Public Use" Since *Kelo*

In response to the *Kelo* decision, legislatures across the nation began the process of amending their laws to limit the affect of the Court's decision. By July 2007, forty-two states had enacted some type of reform legislation in response to the *Kelo* decision.[187] In Texas, Governor Rick Perry responded to the ruling by expanding the scope of the First Called Session of the 79th Texas Legislature to enable the members to consider legislation "relating to limiting the use of eminent domain to take private property for private parties or economic development purposes."[188] Governor Perry said at the time that:

> The Supreme Court's ruling [in *Kelo*] would allow government to condemn your family's home, bulldoze it and build a new shopping mall or some other kind of economic development project simply to generate more tax revenue. I stand with an overwhelming majority of lawmakers and citizens who believe that this starts us down a slippery slope that will lead to the erosion of Texans' rights.[189]

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[186] Texas Conservative Coalition Research Institute, "Property Rights and Land Use Task Force Report, Protecting Private Property Rights: Reforming Eminent Domain in Texas", p. 19 (November, 2006).

[187] Castle Coalition, "Eminent Domain Legislation Status Since *Kelo*". Retrieved from the Castle Coalition's website: http://www.castlecoalition.org/pdf/legislation/US_States_ED_Legis_Map_2007.pdf (accessed July 7, 2008). Twenty-one states have enacted laws that severely inhibit the takings allowed by the Kelo decision, while twenty-one others have enacted laws that place some limits on the power of municipalities to invoke eminent domain for economic development.

[188] Office of Texas Governor Rick Perry, "Proclamation by the Governor of the State of Texas", (July 8, 2005).

[189] Office of Texas Governor Rick Perry Press Release, "Gov. Perry Expands Call of Special Session to Protect Private Property Rights", (July 8, 2005).

In response to Governor Perry's charge, seven bills and four joint resolutions were filed by members of the legislature during the First Called Session. The work of the legislature centered primarily around Senate Bill 62 by Senator Kyle Janek and House Joint Resolution 19 by Representative Frank Corte. Neither of these measures were enacted; however, much of the compromised language found in Senate Bill 62 was reintroduced, this time as Senate Bill 7, when the Second Called Session was convened in late July, 2005.[190]

Senate Bill 7 (2005)

The members of the legislature were eager to debate and then enact legislation that would redress the *Kelo* decision when they met again on July 21, 2005, for the Second Called Session.[191] On that day, Senator Janek introduced Senate Bill 7, which during the following month was debated, modified, and then enacted. Codified as Chapter 2206 of the Texas Government Code, the provisions found in Senate Bill 7 prohibit any state agency, political subdivision of the state, or any corporate entity created by the government from taking private property through the exercise of the power of eminent domain if the taking falls within one of the following three categories:[192]

1) The taking confers a private benefit on a particular private party through the use of the property.

2) The taking is for a public use that is merely a pretext to confer a private benefit on a particular private party.

3) The taking is for economic development purposes, *unless* 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.

It should be noted that the exception found in the preceding "economic development purposes" prohibition has been roundly criticized because it allows municipalities to condemn large areas of land for economic development purposes on the pretextual ground that the areas are slummed or blighted. To make matters worse, slum and blight provisions found in the Texas Community Development Act (TCDA) and the Texas Urban Renewal Law (TURL), Chapters 373 and 374 of the Texas Local Government Code, are unclear, broadly worded, and overly inclusive.[193] The problematic nature of these provisions makes it relatively easy for municipalities to disingenuously claim that the primary aim of any given condemnation is the elimination of slum and blight, not economic development.[194] The Texas Public Policy Foundation (TPPF), has convincingly argued that this "slum and blight" exception creates a large loophole that allows

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[190] In a technical move to prevent the passage a watered down Senate Bill 62, the Texas House of Representatives refused to appoint conferees to meet with the Texas Senate in Conference Committee to negotiate a compromised bill. *See*, Polly Ross Hughes, "Eminent domain bill appears dead for now", *Houston Chronicle*, (July 20, 2005).

[191] TEX. GOV. CODE. §§ 2206.001 *et. seq.*

[192] *Id.*, § 2206.001(a)-(b).

[193] *See, e.g.*, Tex. Gov. Code. § 374.003 (broadly defining "blighted area" and "slum area").

[194] *See*, TEX. LOC. GOV. CODE. §§ 373.001 *et. seq.*; TEX. LOC. GOV. CODE. §§ 374.001 *et. seq.*

municipalities to engage in *Kelo* type takings despite the intent of Senate Bill 7. In support of this argument, the TPPF points specifically to ongoing attempts by the City of El Paso to "revitalize" its downtown, most likely through the exercise of the power of eminent domain.

In 2007, the 80th Texas Legislature examined the slum and blight provisions found in the TCDA and the TURL as part of its overall attempt to reform the state's body of eminent domain law. The work of the Committee and of the members of the legislature regarding this issue centered almost wholly on Representative William "Bill" Callegari House Bill 3057. The provisions in House Bill 3057 would have tightened the definitions and procedures concerning slum and blight clearance, thereby limiting the scope and applicability of the state's slum and blight laws. Though the measure failed to be enacted, the Committee believes that the provisions found in the bill established a reasonable balance between the rights of property owners on the one hand, and the necessity of government to remedy the harms caused by slum and blight on the other.

As is evidenced by the testimony at the Committee's hearing on May 6, 2008, there is still no consensus among the various stakeholders regarding the effectiveness of Chapter 2206 at protecting Texas property owners from *Kelo* type takings. For example, the position of the Texas Municipal League is that Senate Bill 7 adequately addressed the issue of eminent domain authority and that "further substantive changes to the power of eminent domain . . . are unnecessary."[195] Others, such as the TPPF, have argued that more reforms are needed, especially the addition of a statutory and constitutional definition of "public use" and the repeal of the "slum and blight" exception. While the Committee believes that the passage of Senate Bill 7 did significantly improve the law of eminent domain in the state, it also understands that more reform, such as the closing of the "slum and blight" exception, needs to be accomplished.

It should be noted that through the years, the Committee has heard countless hours of testimony regarding both the importance and the difficulty of drafting an appropriate statutory or constitutional definition of "public use". To this point, a satisfactory definition of "public use" has not been found. Suggestions that would require a use of property that allows only the "state, a political subdivision of the state, or the general public of the state to possess, occupy, and enjoy the property" are problematic. For example, such a definition would prevent the condemnation of land by private pipeline companies who would be the only party possessing, occupying, and enjoying the property. It certainly is not the intent of the legislature to prevent the construction of pipelines or to inhibit the delivery of oil and natural gas to market.

If it is determined that a definition of "public use" is absolutely necessary, the Committee believes that more testimony should be taken on the following proposed constitutional definition, as drafted by the Institute for Justice:

> The term “public use” shall only mean (1) the possession, occupation, and enjoyment of the land by the general public, or by public agencies; (2) the use of land for the creation or functioning of public utilities or common carriers; (3) where the use of eminent domain (a)(i) removes a public nuisance; (ii) removes a structure that is beyond repair or unfit for human habitation or use; (iii) is used to

[195] Texas Municipal League, "Legislative Update", p. 4 (March 30, 2007).

> acquire abandoned property; and (b) eliminates a direct threat to public health or safety caused by the property in its current condition. The public benefits of economic development, including an increase in tax base, tax revenues, employment, general economic health, shall not constitute a public use.

While this definition does make exceptions for public utilities and common carriers, it nevertheless has the potential to be problematic. Critics of this definition explain that this definition would likely prevent private businesses (who provide important services) from leasing spaces at airports, rail stations, and ports if those facilities were constructed on condemned land. However, the Committee is generally of the opinion that the wording "functioning of . . . common carriers" would allow such private services to be provided, though it would ultimately be up to the courts to determine.

The Committee understands the importance and the sense of urgency that is attached to the desire to limit the exercise of the power of eminent domain to legitimate "public uses". While the Committee has not given up on the possibility that a workable definition of "public use" can be drafted, it believes that the same end can be achieved through the modification of other statutory provisions, changes that do not have the potential to create those kind of catastrophic unintended consequences associated with the drafting of an inadequate definition of "public use".

House Bill 2006 (2007)

With the *Kelo* decision and the gains made with the passage of Senate Bill 7 fresh in mind, the 80th Texas Legislature again addressed the issue of eminent domain reform in 2007. The centerpiece of this legislative activity was House Bill 2006 by Representative Beverly Woolley, a comprehensive reform bill that attempted to add needed protections for property owners by, for example, significantly reforming the condemnation process, the compensation scheme, and by providing the following statutory definition of "public use":

> Except as otherwise provided by this chapter, "public use," with respect to the use of eminent domain authority, means a use of property . . . that allows the state, a political subdivision of the state, or the general public of the state to possess, occupy, and enjoy the property.[196]

The members of legislature, especially the members of the Committee, worked diligently to create the compromised reform provisions found in House Bill 2006. In the waning hours of the legislative session the legislature passed House Bill 2006 and sent the enrolled version to Governor Perry. On June 15, 2007, the Governor officially vetoed House Bill 2006, explaining in his veto message that:

> [T]wo amendments were added in the 11th hour . . . that would send the cost of public projects spiraling beyond the amount Texas taxpayers should reasonably be required to pay. Estimates indicate the price tag would easily exceed $1 billion

[196] *See*, Enrolled Version of House Bill 2006, SECTION 1 (Woolley, 80th Leg. 2007).

above and beyond what is reasonable for state and local taxpayers.[197]

The two amendments that the Governor referred to in his veto message were inserted into House Bill 2006 on the Senate Floor near the end of the Session. Senate Floor Amendment No. 6, introduced by Senator Glenn Hegar, amended Section 21.042(e) of the Texas Property Code to require special commissioners to "consider any diminished access to the highway and to or from the remaining property . . ." when determining damages to remainder property.[198] The second amendment, Senate Floor Amendment No. 2, was added by Senator Kyle Janek and amended Section 21.041 of the Texas Property Code to require special commissioners to admit evidence on both the market value, before the condemnation, of the property being condemned and the net change to the market value of the remainder property.[199]

Admittedly, these two amendments if enacted would most likely have increased the cost of public works projects, though there is some debate as to whether the increase would have been significant or not. What is important about the inclusion of these amendments in House Bill 2006 is that they reflect the legislature's determination that, regardless of cost, landowners should be compensated for damages that they currently are not paid for. The apparent lesson to be taken from the adoption of these amendments is that the 80th Texas Legislature believes that it is more appropriate for the public as a whole to bear the costs of public projects instead of just those individual property owners directly affected by the project.

<u>City of Freeport</u>

Shortly after the Supreme Court's decision in *Kelo*, officials of the City of Freeport condemned three properties owned by two shrimp companies and then transferred the properties to a private developer so that an $8 million private marina could be built. One of the companies, Western Seafood Company (Western Seafood) had been in business for fifty years. Western Seafood filed suit in federal court for various types of relief.

Following a trial, the federal district court ruled that Freeport's use of its eminent domain power to transfer property from one private party to another was rationally related to the conceivable public purpose of "promot[ing] the public interest in a healthy local economy."[200] Based on this conclusion and other reasoning, the court found that the taking did not violate either the United States or the Texas Constitutions.

In October 2006, the United States Fifth Circuit Court of Appeals, comparing the facts and the law from *Kelo* to the present case, determined that the taking did not violate the United States Constitution. However, in light of the recent passage of Senate Bill 7, the Court remanded the state constitutional claim back to the district court so that it could reconsider the claim. At the state level, the Texas trial court rejected Freeport's condemnation petition and the City appealed the decision to the Texas Court of Appeals. Regardless of the outcome of the lawsuit, the actions

[197] Office of Texas Governor Rick Perry, "Message", (June 15, 2007).
[198] *See*, Enrolled Version of House Bill 2006, SECTION 7 (Woolley, 80th Leg. 2007).
[199] *See, Id.*, SECTION 6.
[200] *Western Seafood Co. v. City of Freeport*, 346 F. Supp. 2d 892, at 901 (S.D. Tex. 2004).

taken by the city officials in Freeport makes clear the willingness and the ability of some municipal leaders to engage in *Kelo* type takings when they are not adequately restrained.

Whittington v. City of Austin[201]

On August 9, 2001, the Austin City Council passed a resolution authorizing the condemnation of property owned by the Whittington Family in downtown Austin near the Austin Convention Center for an undisclosed "public use". Three months later the City of Austin filed a condemnation petition against the Whittingtons asserting that it intended to use the property to build a parking garage and an Austin Energy chilling plant. Mr. Whittington challenged the condemnation on "public use" grounds claiming that Austin's asserted "public uses" were merely pretextual and that the real purpose for the taking was to benefit a hotel developer who otherwise would have had to construct a parking garage for the new hotel.

Following a trial, review by the Court of Appeals in Austin, and a subsequent trial on remand, the case was finally concluded in 2007 when the trial court awarded the Whittingtons $10.5 million, more than twice what the city had originally offered. Though neither the trial court nor the Court of Appeals ruled on the "public use" claims, the allegation that the taking was in fact aimed at benefiting a private developer and that the city was able to simply create a pretextual reason for the taking are concerning. This case demonstrates that *Kelo* type takings could easily occur if a condemning authority is willing to bypass the law, especially since it would be up to the affected individual property owner to invest the significant amounts of time and money that would be required to successfully challenge the condemning entity in a condemnation proceeding.

City of El Paso's "Revitalization" Plan

The City of El Paso is currently engaged in a controversial *Kelo* type redevelopment plan that could ultimately involve the City's use of its power of eminent domain to condemn private property that it has labeled as blighted. This property will be transferred to private parties for the purpose of economic revitalization, otherwise known as economic development. El Paso’s Downtown Redevelopment Plan relies on amassing an inventory of private tracts that will be used to attract developers and retailers to the area. Currently, the redevelopment plan covers approximately 130 acres of prime downtown property that includes, according to an El Paso study, 1,055 businesses that employ 12,485 people with an annual payroll of more than $325 million. The property in the redevelopment zone can be condemned as early as November, 2008.

Because of the "slum and blight" exception created by Senate Bill 7 in 2005, municipalities in Texas are still authorized to condemn properties for *Kelo* type economic development purposes so long as this purpose is secondary to their attempts to eliminate slum and blight. Texas law considers the clearing of slum and blighted areas as *per se* "public uses" even if the specific property itself is not blighted. Accordingly, El Paso, like every other municipality in the state, can use the clearing of slum and blighted areas as a reason to exercise eminent domain authority to take almost any property for economic development purposes.

[201] *See*, *Whittington v. City of Austin*, 174 S.W.3d 889 (Tex.App.-Austin, writ denied).

Conclusion -- "Public Use"

The Committee understands that the definition of "public use" has never referred only to public infrastructure projects such as public roads, schoolhouses, post offices, and courthouses, even in the early years of the nation. The Committee also understands that the definition of "public use" has been expanded by the actions of legislative bodies and the rulings by courts to the point that it no longer is in balance with the important right of the people to possess private property. The Committee believes that the Texas Legislature should reform state law so that a proper balance between the rights of individuals and the needs of the state is achieved. The Committee believes that the 2007 suggestions made in House Bill 2006 and House Bill 3057 regarding "public use" were on the whole reasonable, appropriate, and necessary, and as such, should be reconsidered when the Texas Legislature convenes again in 2009.

DISCUSSION -- "ADEQUATE COMPENSATION"

Both the United States Constitution and the Texas Constitution require condemning entities to compensate landowners adequately when their property is taken for public use.[202] Neither constitution prevents a condemning entity from taking private property, they simply require that such an entity pay "adequate compensation" for the property it does take. While the federal constitution refers to "just compensation" and the Texas Constitution refers to "adequate compensation", Texas courts have held that there is no essential difference between the two terms.[203]

A large and often times complex body of federal and state law dictates what actual compensation an owner is due when all or part of his or her property is condemned. As a general rule, a condemning entity in Texas is generally required to pay both the local market value of any land that is taken outright, and for certain "compensable" damages to any remainder property, minus certain benefits to the property.[204] Phrased another way, a landowner is entitled to the market value of any land that is condemned, and for the difference between the market value of the remaining tract before and after the taking, excluding certain non-compensable damages and offset by certain benefits.

Process to Determine Compensation

Once a condemning entity files a condemnation petition, the judge of the court in which the petition is filed is required to appoint three disinterested persons who reside in the county as

[202] U.S. CONST., Amend. V ("No . . . private property [shall] be taken for public use, without just compensation."); TEX. CONST., art I, § 17 ("No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person.").

[203] *City of Houston v. Texan Land and Cattle Co.*, 138 S.W.3d 382 (Tex. App. Houston 14th Dist. 2004).

[204] *State v. Schmidt*, 867 S.W.2d 769, 772 (Tex. 1993); *State v. Carpenter*, 89 S.W.2d 194, 197 (Tex. 1936); *Buffalo B., B. & Colo. R.R. v. Ferris*, 26 Tex. 588, 603 (1863) (applying identical language from TEX. CONST. OF 1861, art. I, § 14) (holding that the Texas Takings Clause requires adequate compensation both for the part taken and any severance damages to the remainder.); *see also* TEX. PROP. CODE § 21.042(c).

special commissioners.[205] The job of these commissioners is to assess the damages to be paid to the landowner for the property being condemned and any remainder property.[206] The Texas Property Code requires these commissioners to admit evidence on the following:[207]

1) The alleged value of the property being condemned.

2) Any alleged injury to the property owner.

3) Any benefit to the property owner's remaining property.

4) The use of the property by the condemnor seeking to acquire the property.

Texas case law and Section 21.042 of the Texas Property Code set out the parameters under which the special commissioners are to make their assessments:[208]

1) Special commissioners shall assess the damages according to the evidence presented.

2) Any valuation must always consider the highest and best use that the property could be put to now or in the reasonable, foreseeable future.[209]

3) If an entire tract is taken, the damage to the property owner is the local fair market value of the property at the time of the special commissioners' hearing.

4) If a portion of a tract of land is condemned, the commissioners shall determine the damage to the property owner, after estimating the extent of the injury and benefit to the property owner and taking into account the effect of the condemnation on the value of the property owner's remaining property.

5) In estimating injury or benefit, the special commissioners shall consider injury or benefit that is peculiar to the property owner and that relates to the property owner's ownership, use or enjoyment of the particular parcel of real property, now or in the reasonable, foreseeable future. The commissioners may not consider injury or benefit that the property owner experiences in common with the general public.

6) If a portion of a tract or parcel of real property is condemned for use in conjunction with a highway project, the special commissioners shall consider the special and direct benefits that arise from the improvement or project that are peculiar to the property owner and that relate to the property owner's use, ownership and enjoyment of a particular parcel or the remaining property.

[205] TEX. PROP. CODE, § 21.014(a).
[206] *Id.*
[207] *Id.*, § 21.041.
[208] *Id.*, § 21.042.
[209] *See*, *City of Austin v. Cannizzo*, 267 S.W.2d 808 (Tex. 1954).

After assessing damages according to the preceding sets of rules, the special commissioners are required to file a written statement of their decision with the court.[210] Either party to the proceeding may object to the findings of the special commissioners and the court in which the petition was filed will hear the case *de novo*. At trial, neither party is limited to the claims or evidence that they presented during the special commissioners' hearing.

Entire Tract Condemnations

The law in Texas is fairly straightforward when an entire tract or parcel of real property is condemned. Section 21.042(b) of the Texas Property Code provides that in such a case "the damage to the property owner is the local market value of the property at the time of the special commissioners' hearing."[211] The generally accepted opinion of "market value" as defined by Texas courts may be stated as follows:

> Market Value is the price which the property will bring when it is offered for sale by one who desires, but is not obliged to sell, and is bought by one who is under no necessity of buying it, taking into consideration all of the uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future.[212]

A proper determination of market value should reflect all factors that buyers and sellers would consider in arriving at a sales price, exclusive of the fact of condemnation. The Texas Supreme Court has held that it is appropriate when determining market value to consider such matters as "suitability, adaptability, surroundings, conditions before and after, and all circumstances which tend to increase or diminish the property's market value."[213] In addition, appraisers, special commissioners, judges, and juries should consider the highest and best use of the property, taking into account "all uses to which the property was reasonably adaptable and for which it was, or in result probability would become, available within a reasonable time."[214] However, the courts have decided that it is not proper to admit evidence "relating to remote, speculative, and conjectural uses . . . which are not reflected in the present market value of the property."[215]

Because speculative evidence may lead to jury confusion and inaccurate damages awards, the Texas Supreme Court has recognized only three appraisal approaches as acceptable for determining market value in condemnation actions: the comparable-sales method, the cost method, and the income method.[216] The comparable sales method involves the direct comparison of the condemned property with known market transactions of similar improved properties. The cost method is usually based upon the cost or cash outlay to replace or reproduce an improvement, less an appropriate allowance for depreciation, plus the estimate of land value. The income method is based upon known or projected earnings with proper deductions for

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[210] TEX. PROP. CODE, § 21.048.
[211] *Id.*, § 21.042(b).
[212] *See*, *Cannizzo*, at 815 (1954).
[213] *Carpenter*, at 200 (1936).
[214] *See*, *Cannizzo*, at 815 (1954).
[215] *Carpenter*, at 200 (1936).
[216] *See*, *Religious of the Sacred Heart v. City of Houston*, 836 S.W.2d 606, 615-17, n.14 (Tex. 1992).

vacancy allowance and operating expenses. The net income is then capitalized into an indication of value by the application of demonstrated rates found in the market.

Generally, these market value rules are applied when determining not only the market value of the tract that is actually condemned, but when determining damages for any injury to the remainder property when only part of a whole tract is taken.

Partial Tract Condemnations

Determining adequate compensation when only part of a tract is taken through the condemnation process is more involved under Texas law. As a starting point, the Texas Property Code provides that when a portion of the tract is condemned the special commissioners:

> [S]hall determine the damage to the property owner after estimating the extent of the injury and benefit to the property owner, including the effect of the condemnation on the value of the property owner's remaining property.[217]

The courts have construed this and other provisions as requiring a condemning entity to pay both the local market value of land that is taken outright, and for certain compensable damages to the remainder property.[218] The value of the parcel taken should be determined by considering it as severed land at the time it was condemned.[219] Under this rule, the landowner is entitled to at least the market value of the part taken even if the condemnation actually increases the value of the remainder property.

Damages to remainder property are generally calculated by determining the difference between the market value of the remainder immediately before and after condemnation, considering the nature of any improvements and the use of the land taken.[220] However, a landowner is not entitled to compensation for every decrease in market value attributed to governmental activity.[221] As such, determining which injuries to the remainder are compensable depends upon the nature of the damage that is involved.[222] As a general rule, a landowner can recover for all "special" damages to the remainder, being those damages affecting the remainder property directly arising from the previous use of the part taken (loss of a parking lot or of natural drainage for example). On the other hand, a landowner may not recover for "community" damages, being those damages affecting the remainder property resulting from the affect of the project itself (impaired access to the remainder for example).

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[217] TEX. PROP. CODE, § 21.042(c).

[218] *Schmidt*, at 772 (1993); *Carpenter*, at 197 (1936).

[219] *Carpenter*, at 201-202 (1936).

[220] *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 218 (Tex. 2001)(citing *Carpenter*, at 197).

[221] *Felts v. Harris County*, 915 S.W.2d 482, 484 (Tex. 1996); *See also*, *Interstate Northborough P'ship*, at 218 (2001) (noting "not all condemnation damages are compensable . . . ."); *City of Austin v. Travis County Landfill Co., L.L.C.*, 73 S.W.3d 234, 242 (Tex. 2002) (noting that the Texas Constitution does not "require compensation for every decrease in market value attributed to a governmental activity") (quoting *Felts* at 484 (1996)).

[222] *See*, *Interstate Northborough P'ship*, at 218-20 (2001); *Schmidt*, at 774-81 (1993).

Texas courts have interpreted the state's Takings Clause as allowing recovery for damage to property only if the injury is not one suffered by the community at large. Damages arising from such things as dust, noise, and increased traffic are not compensable because they are sustained in common with the community in which the property is situated.[223] In addition, a landowner may not be compensated for such things as diversion of traffic, increased circuitousness of traffic, or the impairment of visibility of the remainder property.[224] On the other hand, when estimating injury or benefit to the remainder, special commissioners are required to consider an injury or benefit that:

> [I]s peculiar to the property owner and that relates to the property owner's ownership, use, or enjoyment of the particular parcel of real property, but they may not consider an injury or benefit that the property owner experiences in common with the general community.[225]

In a similar vein, Texas courts have considered the question of whether an owner is entitled to compensation when access to the remainder property is diminished, either in whole or in part.[226] Impaired access to remainder property is a compensable special injury only if access is completely denied or a material and substantial impairment of access exists as a matter of law.[227] However, diminished access is not compensable if suitable access remains. The rationale behind these rules appears to be that so long as the owner has reasonable access to the remainder property then the benefit of private ownership has been preserved and whatever injury has occurred need not be paid for (regardless of the diminished real world value of the property).

<u>*Carpenter & Schmidt*</u>

The general rule for determining remainder damages in Texas was established by the Texas Supreme Court in its seminal 1936 decision in *State v. Carpenter*. [228] In *Carpenter*, the Court determined that:

> [D]amages are to be determined by ascertaining the difference between the market value of the remainder of the tract immediately before the taking and the market value of the remainder of the tract immediately after the appropriation,

[223] *See*, *Felts* (1995).

[224] *Interstate Northborough P'ship*, at 219 (2001); *Schmidt*, at 774 (1993).

[225] TEX. PROP. CODE, § 21.042(d).

[226] *See e.g., DuPuy v. City of Waco*, 396 S.W.2d 103, 110 (Tex. 1965) (holding a landowner suffered compensable loss from construction of an overpass that raised the street in front of his property fourteen feet above grade, and left him on a cul-de-sac that could be accessed only by threading the supporting columns); *Archenhold Automobile Supply Co. v. City of Waco*, 396 S.W.2d 111, 114 (Tex. 1965) (holding compensation was not required to a business that retained other reasonable means of ingress, and thus suffered only partially diminished access to its property); *Schmidt*, at 771 (1993) (allowing recovery for land actually taken to widen a highway right-of-way, but holding unrecoverable any severance damages to the remainder for diversion of traffic, increased circuity of travel, lessened visibility, and inconvenience of construction activities); *Interstate Northborough P'ship*, at 217 (2001) (holding the relocation or closing of two of five driveways as a result of a road project were not compensable, but holding the costs of rearranging the remaining ones to ensure safe access were).

[227] *Interstate Northborough P'ship*, at 224 (2001); *State v. Heal*, 917 S.W.2d 6, 11 (Tex. 1996).

[228] *Carpenter* (1936).

taking into consideration the nature of the improvement, and the use to which the land taken is to be put.[229]

In *Carpenter*, the State of Texas, by and through the Commissioners Court of McLennan County, condemned an eight acre strip across Mr. Carpenter's 240 acre tract of land so that it could construct part of State Highway 44. Following a trial, the jury awarded Mr. Carpenter $803 for the condemned eight acres and $3,477 for damages to the remaining 232 acres. The Court of Civil Appeals affirmed the judgment of the trial court and the state appealed the decision to the Texas Supreme Court.

In upholding the decisions of both the trial and the appellate court, the Texas Supreme Court established a number of rules that are still relied upon today when determining what damages are due to a property owner when only part of his or her property is condemned. First, the Court established the above cited "Market Value" or "*Carpenter*" Rule for determining remainder damages. The *Carpenter* Rule is still applicable today, though the courts have legislated exceptions to the Rule. Under this "before and after" measure, damages are to be determined by establishing the difference in the market value of the remainder both before and after the condemnation. The *Carpenter* Court observed that in making such a determination that "it is proper as touching the matter of the value and depreciation in value to admit evidence upon . . . all circumstances which tend to increase or diminish the present market value."[230] To further clarify its ruling, the Court defined "market value" as being "the price which the property would bring when it is offered for sale by one who desires, but is not obligated to sell, and is bought by one who is under no necessity of buying it."[231] Finally, the Court ruled that the "value of the part actually taken should be ascertained by considering such portion alone . . . ."[232] This is the basis of the general rule today that a property owner is entitled to be compensated for the market value of the part taken even if the condemnation actually increases the value of the remainder property.

In 1993, the Texas Supreme Court handed down a ruling that many claim drastically undermined the Market Value Rule established in *Carpenter*.[233] In *State v. Schmidt*, the Texas Supreme Court, while acknowledging that the "rule in the *Carpenter* case . . . is as settled as any in our jurisprudence can be", ruled that four types of damages that unquestionably affect the true market value of remainder property should not be included in a remainder damages calculation.[234] A controversy has brewed since that time as to whether or not *Schmidt* significantly changed the law that existed in 1993.

[229] *Carpenter*, at 197 (1936).
[230] *Id.*, at 200.
[231] *Id.*, at 201-202.
[232] *Id.*
[233] *See, e.g.*, Drew Thornley, "Condemnation Compensation: Time to Get Back to Basics, Testimony before the House Committee on Land Use and Regulation", p. 2 (May 2008) (stating that ". . . the 1993 Texas Supreme Court case of *State v. Schmidt* carved out exceptions to, and, thus, replaced, *Carpenter's* remainder rule."); Texas Conservative Coalition Research Institute, "Property Rights and Land Use Task Force Report, Protecting Private Property Rights: Reforming Eminent Domain in Texas", p. 19 (November, 2006) (stating that "[t]he *Schmidt* case . . . carved major exceptions to the *Carpenter* rule on adequate compensation . . . .").
[234] *Schmidt*, at 773 (1993).

In *Schmidt*, the state condemned a seven foot strip of land located at the front of Mr. Schmidt's commercial tract as part of a highway project to convert US 183 into an elevated highway with controlled access via frontage roads. Following the condemnation, the market value of Mr. Schmidt's remainder property was drastically reduced, primarily because of the following four factors:

1) Passersbys could not see the business from the new elevated highway (lessened visibility).

2) Traffic was diverted away from the front of the lot and onto the elevated lanes of the highway (diversion of traffic).

3) It was more difficult for traffic to access the business located on the lot because of the controlled access frontage roads (increased circuity of travel).

4) Damages accrued as a result of the construction of this years-long project (inconvenience of construction activities).

In deciding that Mr. Schmidt could not recover damages for these four "*Schmidt* Factors", the Court relied on three separate arguments. First, the *Schmidt* Court explained that it and the state's appellate courts had always maintained that diversion of traffic and increased circuity of travel factors were non-compensable, and that there was no reason to treat the other two injuries claimed by Mr. Schmidt differently.[235] Second, the Court found that Mr. Schmidt was not entitled to remainder damages because the damages did not result from the taking of the property, "but from the State's new use of its existing right-of-way and of property taken from other landowners to widen it."[236] Finally, the Court found that the four *Schmidt* Factors are non-compensable community damages because they "are, by their nature, a consequence of the change in Highway 183 shared by the entire area through which it runs." [237]

Regardless of claims by some that the *Schmidt* decision changed decades of previous case law beginning with the *Carpenter* decision, it appears that *Schmidt* merely reaffirmed, or at worst clarified, that the four factors at issue in the case are non-compensable remainder damages. The *Schmidt* Court did not change the law of Texas, but merely upheld long standing Texas Supreme Court and appellate court decisions. The *Schmidt* Court, in reviewing previous state court rulings on primarily inverse condemnation claims,[238] correctly concluded that:

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[235] *See*, *Id.*, at 774, 777 ("Thus, we have often disallowed, and never allowed, recovery in an inverse condemnation case for damages resulting from a diversion of traffic or a circuity of travel. While we have never addressed the issue of whether a landowner has a right to recover for an impairment in the visibility of his premises to passing traffic, there is no reason why recovery for this type of injury should be more available than for a diversion of traffic or circuity of travel. Just as a landowner has no vested interest in the volume or route of passersby, he has no right to insist that his premises be visible to them.").

[236] *Id.*, at 777.

[237] *Id.*

[238] *See e.g., State Highway Comm'n v. Humphreys*, 58 S.W.2d 144, 145 (Tex. Civ.App.--San Antonio 1933, writ ref'd) (holding as non-compensable those diversion damages resulting from the rerouting of a highway, stating that the "highways primarily are for the benefit of the traveling public, and are only incidentally for the benefit of those who are engaged in business along its way."); *DuPuy v. City of Waco*, 396 S.W.2d 103, 109 (Tex. 1965)

> [W]e have refused to allow recovery for loss of value due to diversion of traffic and circuity of travel in both condemnation cases and inverse condemnation cases. We have not considered whether [remainder] damages should be allowed because of impaired visibility of property or disruption of use due to construction activities, but there is no reason why these two elements of injury should be treated differently than the others.[239]

While the Texas Supreme Court was correct in assessing that its decision in *Schmidt* did not change the law in Texas, the Texas Legislature does have a role in assessing whether or not *Schmidt* and those cases relied upon in *Schmidt* have created the appropriate body of law regarding adequate compensation in condemnation cases. Clearly there is a strong argument to be made that a landowner whose property has been condemned should be made economically whole by the condemnation process. Given the fundamental nature of the right to own private property it is only fair that when a condemning entity is required to take land that it should compensate the landowner for all of his or her resulting damages. In addition, there is an equity argument to be made in such cases that it is more appropriate for society as a whole to bear all of the costs associated with a public works project, not just those individuals who are directly impacted by it.

<u>Appropriateness of Current Compensation Scheme</u>

The Texas Legislature has the authority and the ability to enact a condemnation compensation scheme that is different from the one currently in place, subject of course to review by the judiciary. There are numerous compensation standards that could be adopted by the legislature, ranging from those that only tinker with the current system to those that significantly alter the way that "adequate compensation" is determined in the state. Any alteration to the current compensation system would certainly require statutory changes, and the more divergent changes would likely require amending the Texas Constitution.

The Texas Legislature could retain the current Market Value Standard in one form or another, making only those statutory or constitutional changes required to ensure that the courts understand and accept the version deemed appropriate by the legislature. For example, legislators could choose to confirm the current compensation scheme as expressed by *Schmidt*, or they could determine that it is appropriate to establish a system based on the strict language found in *Carpenter* ("admitting evidence upon . . . all circumstances which tend to increase or diminish the present market value."[240]). The legislature could even decide that public policy

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(holding a landowner suffered a compensable loss by a highway project that denied him reasonable access to his property, but maintained that the decision did not conflict with the principles established in *Humphreys* that "an abutting property owner does not have a vested interest in the traffic that passes in front of his property; that he cannot recover for loss of trade resulting from a highway relocation; and that he is not entitled to damages because of the construction of controlled access highways in such manner as to deny direct access to the new major highway."); *Archenhold Automobile Supply Co. v. City of Waco*, 396 S.W.2d 111, 114 (Tex. 1965) (holding that a landowner had not been deprived of reasonable access by a highway project and therefore was not entitled to any compensation."); *City of Beaumont v. Marks*, 443 S.W.2d 253, 257 (Tex. 1969) (holding that "[d]iversion of traffic resulting in the necessity of using circuitous routes is not compensable.").

[239] *Schmidt*, at 777 (1993).

[240] *Carpenter*, at 200 (1936).

requires the creation of a hybrid system that includes the best of both compensation schemes.

The legislature could also adopt a compensation standard that is based on considerations other than the market value of the land in question. For example, the legislature could establish a system that pays aggrieved landowners the cost to replace their property, or that compensates them for the social value of the land taken. The legislature could also determine that it is appropriate to reallocate the financial burdens associated with the taking of private property, by for example, changing state law regarding the payment of such expenses as attorney fees, court costs, and appraisal costs, to name a few. As with most choices presented to the legislature, each of these possibilities includes various potential costs and benefits that must be weighed by the members of the legislature in order to properly determine which compensation system to adopt.

<u>Basic Considerations and Initial Findings</u>

It is certainly the case that changing the current compensation system will affect the costs associated with any project that must rely on the condemnation of land. If the land acquisition costs of such projects grows too high, it is possible that some condemning entities may decide not to initiate such public or private projects in the first place. Given the growing population of the state and the necessity of maintaining, repairing, and creating that infrastructure required to meet the needs of this population, it is certainly important for the legislature to consider any increased cost associated with changing the current condemnation compensation scheme. In addition, legislators should be mindful of the political reality involved with passing provisions that increase the cost of public projects, as demonstrated by the veto of House Bill 2006 in 2007.

However, the Committee believes that considerations of cost should be of secondary concern when determining the most appropriate way to compensate landowners for the taking of their property through the condemnation process. The Committee recognizes that condemnations involve the infringement of a fundamental right, and as such, believes that every effort should be made to ensure that property owners are made economically whole by the process, regardless of the cost to society. As was stated by United States Supreme Court Justice Oliver Wendell Holmes in 1922, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[241] Put simply, such are the costs of living in a free society.

In addition, the Committee believes, given the fundamental nature of the right to own property and the fact that the cost of a public project must be borne by some party, that it is proper and equitable to require that society as a whole, not just those affected landowners, be liable for the actual cost of any takings' project. The members hope that by requiring condemning entities to pay the actual land acquisition costs of a project (offset by any benefits to the remainder) that these entities will prioritize and plan their projects more efficiently, thereby taking land only when it is truly needed for a legitimate and necessary "public use".

It should also be noted that the Committee takes seriously the warnings from some eminent domain experts that it would be dangerous to modify the well developed body of law regarding

[241] *Pennsylvania Coal Co. v. Mahon et al.* 260 U.S. 393, 416 (1922).

the admission of market value evidence in Texas takings cases. While the members recognize that such changes have the potential, if not handled thoughtfully, to create some problems, the members also understand that without changes to the rules of evidence any change to the measure of damages would be meaningless. Requiring that a landowner be compensated for the market value of his or her property is a hollow mandate so long as the landowner can only present evidence to the factfinder regarding certain compensable factors.

Finally, the Committee is of the opinion that reforming the compensation scheme, while important in its own right, does not completely resolve the compensation issue in Texas takings' cases. The members recognize that many if not most of the land acquisitions completed by condemning entities occur as the result of pre-condemnation negotiated sales. Kristina Silcocks, in her testimony before the Committee on May 6, 2008, explained to the members that approximately eighty-six percent of the land acquired by TxDOT is purchased as the result of negotiated sales prior to the filing of suit. The Committee generally supports the settling of land acquisition matters through negotiated sales instead of through the more costly and time consuming process of condemnation. However, the members recognize that it is also important that such negotiated sales conclude equitably, with landowners being compensated for at least the actual market value of their property and for any injuries to remainder property.

There is certainly enough anecdotal evidence to show that some condemning entities do not make legitimate initial good faith offers to purchase land, presumably based on the belief that many property owners will accept any seemingly reasonable offer, even if well below the market value price, instead of investing the time, money, and energy required to contest such offers. Given this reality, the Committee believes that the law of eminent domain in this state would be improved by enacting provisions that encourage the voluntarily conveyance of property prior to filing of a condemnation petition, and that ensure that such conveyances result in aggrieved property owners actually receiving "adequate compensation" for the property that is taken or injured. Such provisions would require condemning entities to make *bona fide* good faith purchase offers (with meaningful deterrents for non-compliance),[242] that full disclosure of all information relevant to purchase offers (such as appraisal reports) be made by all parties early in the process, and that landowners, in certain circumstances, be compensated for the cost of challenging the offer.

Market Value Standards

Like other states and the federal government, Texas has historically relied upon some version of the Market Value Standard as the basis for making "adequate compensation" determinations. This standard is based on the concept that "adequate compensation" includes the market value price of any tract conveyed through the condemnation process and the "difference between the market value of the remainder of the tract immediately before the taking and the market value of

[242] *See, e.g.*, Enrolled Version of House Bill 2006, SECTION 2 (Woolley, 80th Leg. 2007) (adding the new Section 21.0112 to the Texas Property Code: "Sec. 21.0112. BONA FIDE OFFER REQUIRED. An entity with eminent domain authority that wants to acquire real property for a public use must make a bona fide offer to acquire the property from the property owner voluntarily. A bona fide offer is an offer that is not arbitrary or capricious and is based on a reasonably thorough investigation and honest assessment of the amount of the just compensation due to the landowner as a result of the taking.").

the remainder of the tract immediately after the appropriation."[243] As has been mentioned, in 1936 the *Carpenter* Court defined market value as "the price which the property would bring when it is offered for sale by one who desires, but is not obligated to sell, and is bought by one who is under no necessity of buying it."[244] This is the basis of the current law today, for both land that is actually condemned and for any remainder property.

It should be noted, from a technical point of view, that the current definition of market value, like any definition of market value used in condemnation compensation determinations, prohibits the actual market value of a tract of land from being precisely ascertained because of the coercive nature of the condemnation process. As a Drew Thornley, an attorney and policy analyst at the Texas Public Policy Foundation (TPPF) has recently written:

> Because of government's [or any condemning entity's] constitutional condemnation authority, landowners do not have the luxury of choosing to keep their property, if they are unhappy with the amount of the [condemnor's] offer. At some point, the landowner must accept what is offered by the [condemnor] or awarded by the judiciary. Therefore, true [market value] does not occur in condemnations, as market transactions are voluntary exchanges between willing buyers and willing sellers.[245]

While this statement is undoubtedly true, there is nothing that can be done to directly remedy this inconsistency, given the unique nature of condemnation actions. If the legislature chooses to retain the Market Value Standard, as seems quite reasonable to do, then it would need to accept this inconsistency, rely on a functional approximation of market value as is currently done, and attempt to counterbalance any distortions through other statutory changes.

Perhaps of more relevance to this discussion is the certainty that it is rarely a simple matter to reach a consensus as to the market value of any condemned tract or its remainder. In fact, this is probably the single most contested issue that arises in condemnation cases. This is not surprising given the condemning entity's desire to pay as little for the property as possible and the landowner's desire to receive as much as possible for it. It is also important to recognize that the initial determination of the market value of a tract or its remainder is made by appraisers who readily admit that what they do resembles more an artful than a scientific endeavor. It should also be noted that, regardless of their independent status, appraisers are inherently conflicted because they are compensated by individuals and entities who have a significant stake in the outcome of their work. The Committee is unaware of any specific situation in which this conflict has resulted in a biased market value determination, and certainly does not wish to impugn the professionalism of the state's licensed appraisers. The Committee simply recognizes that this conflict exists, and that each of the preceding factors has the potential to limit the ability of any factfinder to accurately determine the market value of land taken or injured by a condemnation proceeding.

[243] *Carpenter*, at 201-202 (1936).
[244] *Id.*, at 197.
[245] Drew Thornley, "Condemnation Compensation: Time to Get Back to Basics, Testimony before the House Committee on Land Use and Regulation", p. 2 (May 2008).

Regardless of these inherent problems with applying the Market Value Standard to condemnation cases, the Texas Legislature could determine that it is appropriate to retain the basic standard, with or without allowing the payment of compensation for some or all of those injuries that are currently considered non-compensable under Texas law. Under a stricter approach, what can be labeled the model *Carpenter* Rule, a property owner would be compensated such that he or she is made economically whole by the process. Under this approach special commissioners and judges would be required to admit and consider all evidence relevant to determining the market value of the land taken and the diminishment in value to the remainder based on the strict language found in *Carpenter*:

> [I]t is proper as touching the matter of the value and depreciation in value to admit evidence upon . . . all circumstances which tend to increase or diminish the present market value [246]

The property owner would be paid the market value price of the tract that was actually condemned, and would be compensated for each and every injury to the remainder, offset by any benefits to it, regardless of whether or not the injury was unique or special to the landowner. This approach would require that each affected property owner would be compensated for injuries stemming from community damages, those damages that traditionally have not been admissible but that certainly affect the actual market value of any tract of land.

On the other hand, the Texas Legislature could also determine that, even with its flaws, the current compensation system as expressed by *Schmidt* is appropriate, representing the best efforts by both the legislature and the judiciary during the past one hundred years to find a balanced answer to the complex question of what does and should "adequate compensation" mean. Finally, members of the legislature could choose to create a hybrid system that attempts to maintain the spirit of the law established by the *Carpenter* Court while accepting certain rational exceptions to the strict rule. Under such a hybrid approach, something between the strict language found in *Carpenter* and the current body of law, a landowner would be paid for those damages that the legislature identifies as compensable, thereby allowing the legislature to weigh the costs and benefits of such an identification on a case by case basis.

There is a strong theoretical argument to be made that community damages should be included when determining what compensation is due to a landowner for injury to his or her remainder property. It is simply not possible to reach an accurate determination of the market value of a remainder tract without including all injuries that willing buyers and willing sellers would consider when negotiating the sale of the tract. Such a calculation would also require that property owners be compensated for the four *Schmidt* factors (lessened visibility, diversion of traffic, increased circuity of travel, and inconvenience of construction activities) when it could be shown that they diminished the market value of the remainder. It is certainly the case that many of those injuries that are currently considered non-compensable because of their community nature would be taken into account by willing buyers interested in purchasing the tract. Theoretically, in order to make property owners economically whole by the condemnation process (a premise held by the Committee), community damages need to be included as part of

[246] *Carpenter*, at 200 (1936).

the compensation calculation.

However, the Committee recognizes that if the costs associated with such a drastic change in the current law grow prohibitively large, then from a practical standpoint such a change would not be economically reasonable. The Committee is of the opinion that it is impossible to determine with any accuracy what the true costs of such a change in law would be, especially given that any award for community damages would be reasonably offset by any community benefits to the affected property. As such, the Committee is only able to state that from a theoretical standpoint property owners should be compensated for each and every damage to their remainder property (including community damages), though the Committee is unable to reasonably provide an opinion regarding the practicality of making such a change to the current compensation scheme until and unless it can be determined that such a change is economically feasible.

In addition, the Committee recognizes that allowing the award of community damages will create an anomaly in which some parties (those who have land actually condemned) will be compensated for community damages while others will not (those injured by the project but who have not had any land condemned). It can be argued that if a property owner would not be able to receive compensation for community damages if their property were not condemned, why should a property owner who has a one foot wide right of way of their property condemned benefit from community factors. By determining that no property owner should be compensated for such damages, the courts have in essence legislated the policy that landowners should not be made economically whole by the condemnation process. In such situations, the members believe that it is theoretically better, given the fundamental nature of the right at stake, to err on the side of property owners by at least compensating those who have had property condemned for community damages. As has been previously stated, the Committee believes that from a theoretical standpoint all of the costs of public projects should be borne by the public at large, not by those who have had their property condemned for such projects.

It should also be noted regarding the current non-compensability of many community damages, including the *Schmidt* factors, that Texas courts have consistently maintained that they stem from conditions that do not create a property interest, let alone a property interest that is compensable. For example, it has been reasoned that when buying a piece of property a landowner has no expectation that traffic flow or property visibility will remain the same, therefore no interest that can be lost or should be compensated for. However, the Committee believes that regardless of the nature of the right injured, the fact remains that willing buyers and willing sellers would consider most community damages in determining the market value of a tract of land. As such, community damages theoretically need to be accounted for in order to make a landowner economically whole by the process.

In addition to community damages, the Committee believes that property owners should be compensated for the diminished access to their remainder property caused by a project, if it can be demonstrated that the change in access lessened the market value of the tract. Under current law, impaired access to remainder property is a compensable special injury only if access is completely denied or a material and substantial impairment of access exists as a matter of law.[247]

[247] *Interstate Northborough P'ship*, at 224 (2001); *State v. Heal*, 917 S.W.2d 6, 11 (Tex. 1996).

Diminished access is not compensable if suitable access remains. The rationale behind these rules appears to be that so long as the owner has reasonable access to the remainder property then the benefit of private ownership has been preserved and whatever injury has occurred need not be paid for (regardless of the diminished real world value of the property). As has been previously mentioned, the Committee believes, regardless of the nature of the right injured, that property owners should be made economically whole by the condemnation process, a practice that requires consideration of all market factors including any diminished access to the property. The Committee believes that the determination as to whether or not a given diminishment of access actually affects the market value of a tract of land, and to what extent, should be left to the appraisers and factfinders in each case.

Non-Market Value Standards

The Texas Legislature could adopt a condemnation compensation scheme that actually pays a landowner whose property has been condemned more than the market value of the property taken or injured. It can be argued that such a compensation scheme is appropriate given the fundamental nature of the right to own private property, the importance of this right to any free society, the often times abusive actions by condemning entities, and the judiciary's general unwillingness to properly balance the fundamental right to own property with society's periodic need to condemn it. A change of this nature to the current compensation system would undoubtedly require amending the Texas Constitution to establish both that "adequate compensation" is an amount more than market value and that taxpayer dollars could be expended for this purpose.

The legislature could decide that it is appropriate to adopt a compensation standard that pays landowners for the cost to replace property that has been taken or injured by the condemning entity. Under current law, it is generally not appropriate to determine "adequate compensation" by establishing the cost to replace condemned property, especially when the market value can be determined.[248] However, the legislature could certainly determine that such a standard is the appropriate way to determine what damages are due to property owners. Such a system arguably reflects the concept of making landowners economically whole by the condemnation process. Under this standard, property owners could be paid for the market value price of the land alone based on comparable sales and for the cost of reproducing any structures less depreciation of the structure taken.

The legislature could also determine that is appropriate to include in compensation calculations any future value added to, or income derived from, any condemned property as a result of the project. The Committee has periodically been encouraged to allow landowners to receive compensation based on the future use of, or income generated from, the property. This assertion is generally based on the argument that it is equitable to allow property owners to share in the rewards of the project, given the fact that they had no choice in deciding whether to retain their property or to convey it to the condemning entity. Under the existing Project Enhancement Rule, a factfinder may not consider any enhancement to the value of the landowner's property that

[248] *State v. Bryan*, 518 S.W.2d 928, 932 (Tex.Civ.App.-- Houston [1st Dist.] 1975).

results from the taking itself in making market value determinations.[249] The Texas Supreme Court has explained that:

> This is because the objective of the judicial process in the condemnation context is to make the landowner whole. To compensate a landowner for value attributable to the condemnation project itself, however, would place the landowner in a better position than he would have enjoyed had there been no condemnation.[250]

The argument that landowners should be compensated more than the market value price for their property is supported from an economic efficiency standpoint. Geoffrey K. Turnbull, a Professor of Economics at Georgia State University, explains that the condemnation of private property, when properly undertaken, has the ability to promote economic efficiency by allowing the property to be put to its highest and most valued use, an action that benefits all.[251] However, Professor Turnbull has written that:

> Recent economic research [reveals that] eminent domain creates distortions in markets that reduce efficiency even with full compensation at market value [citation omitted]. More troubling, this hidden cost to society can exceed the social benefits of the land in public use.[252]

Given this new research, Professor Turnbull argues that property owners whose land has been taken "should be compensated with the social value of the property rather than the private market value . . . ."[253] By compensating landowners the social value of the land taken, Professor Turnbull explains that the "inefficient wedge introduced into investors' incentives by the threat of taking" would be removed, with the "added benefit of reinforcing the public use doctrine . . . ."[254] While an interesting theoretical argument, the Committee believes that any scheme to compensate property owners more than the market value price is ultimately not feasible.

There are both positive and negative aspects to creating a compensation scheme that allows property owners to receive more than the market value price as compensation for property taken or injured. On the one hand such a system would undoubtedly ensure that property owners are made at least economically whole by the condemnation process, thereby demonstrating that the legislature truly respects the fundamental nature of the basic right to own private property in this

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[249] *City of Fort Worth v. Corbin*, 504 S.W.2d 828, 830 (Tex. 1974).

[250] Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623, 628 (Tex. 2002).

[251] Geoffrey K. Turnbull, (September, 2003). "Efficient Compensation Rules for Eminent Domain," p. 1. Retrieved from the Georgia State University's Andrew Young School of Policy Studies' web site: http://aysps.gsu.edu/urag/researchnotes/2003/URAGResearchNotes1.pdf (accessed July 31, 2008) (explaining that "economists generally argue that requiring compensation at market value promotes efficient takings decisions to the extent it forces the government (and its constituents) to weigh the benefits of public use for the property against its foregone value in private use as measured by the required compensation at the market value of the property."). The concept of economic efficiency involves determining how to produce the greatest total social value for the least possible social cost. Economic efficiency is achieved when every resource is in its most productive use.

[252] *Id.*, p. 1.

[253] *Id.*, pp. 2-3.

[254] *Id.*, p. 3.

state. In addition, such a compensation scheme has the potential, as argued by Professor Turnbull, to create a more economically efficient takings system with all of its associated benefits (encouraging the prioritization of projects, the efficient planning of projects, and the performance of good faith negotiations prior to the filing of condemnation petitions, to name a few).

On the other hand, allowing landowners to be paid more than the market value price for their property is problematic. The obvious initial problem is the increased cost of such projects and the associated potential that needed projects will not be initiated. However, as has been mentioned, the Committee believes that cost considerations should be secondary when determining what compensation is due. In addition, there is an argument to be made that it is improper to create a system that allows an individual to receive a windfall simply because his or her property is needed for a public project. The argument can be made that the taxpayers of the state should not be forced to pay more than what is necessary to make a landowner economically whole.

Finally, adopting a non-market value compensation system would completely revolutionize the law of eminent domain in this state, an action that would undue a century of judicial precedent and require the creation of new standards and practices. The Committee is of the opinion that it is neither necessary nor appropriate to tear down the entire condemnation compensation system in this state, but instead believes that reform of the current Market Value Standard is advisable.

Reimbursement for Condemnation Costs

Currently, Texas law prohibits or limits the ability of landowners whose land has been taken through the condemnation process to recover expenses that arguably should be included in any condemnation compensation package. These expenses include those paid by property owners for court costs, lawyers, and appraisals when they decide to contest the actions of condemning entities. Currently, Texas law allows property owners to be compensated for some of these costs, under certain circumstance, but not for each of these expenses in most cases.

"Costs" in condemnation proceedings (a term that refers to court costs and not legal fees) are generally paid by the losing party in a condemnation action. Section 21.047(a) of the Texas Property Code provides that costs in a condemnation proceeding are to be assessed under the following set of rules:[255]

1) Special commissioners may adjudge the costs of an eminent domain proceeding against any party.

2) If the commissioners award greater damages than the condemnor offered to pay before the proceedings began or if the decision of the commissioners is appealed and a court awards greater damages than the commissioners awarded, the condemnor shall pay all costs.

[255] TEX. PROP. CODE, § 21.047(a).

3) If the commissioners' award or the court's determination of the damages is less than or equal to the amount the condemnor offered before proceedings began, the property owner shall pay the costs.

As stated, these rules apply to court costs, and do not apply to expenses incurred by landowners for hiring attorneys, appraisers, or any other expert that may be required to help the owner demonstrate his or her case. These costs are generally considered incidental expenses that may not be recovered unless otherwise authorized by statute. An exception to this general rule is found in Section 21.019(c) of the Texas Property Code, which provides that:

> A court that . . . grants a motion to dismiss a condemnation proceeding made by a property owner . . . may make an allowance to the property owner for reasonable and necessary fees for attorneys, appraisers, and photographers and for the other expenses incurred by the property owner to the date of the hearing or judgment.[256]

Given that condemnation suits are not often dismissed in favor of property owners, and that the burden of proving his or her case lies with the landowner, an individual who chooses to contest a low purchase offer will most likely need to retain a lawyer and an appraiser, and perhaps other professionals as well. Prudent property owners must weigh such costs when determining whether or not to contest a low or otherwise unreasonable purchase offer, regardless of the merit of their claim. Otherwise they risk becoming a net loser by the process if their expenses are not offset by a higher award.

These expense provisions appear to encourage condemning entities to make legitimate initial purchase offers and to discourage landowners from making excessive counter offers or claims, thereby increasing the likelihood that land will be conveyed through a negotiated sale and not through the more expensive and time consuming condemnation process. As has been noted, the Committee generally supports the settling of land acquisition matters through negotiated sales instead of through condemnation proceedings.

However, the members recognize that there are situations in which the voluntary conveyance of a tract can not reasonably be negotiated, frequently because of the inappropriate actions of condemning entities (unreasonably low offers for example). In this situation, the Committee believes that state law should provide some assurance to landowners that they will be able to recover their expenses when they reasonably and legitimately contest the determinations and actions of condemning entities. The members believe that without such assurance, many citizens will not invest the time, money, and energy required to contest otherwise improper condemnation actions. On the other hand, the Committee recognizes that allowing landowners to recover such expenses in every case, or in most cases under a minimal standard, could unnecessarily discourage negotiated sales and could generate frivolous litigation.

As such, the Committee believes that allowing landowners to be reimbursed for their expenses, under a reasonable set of rules, would help encourage landowners to contest those truly inappropriate purchase offers and actions by condemning entities, while at the same time

[256] *Id.*, § 21.019(c).

discouraging property owners from pursuing frivolous claims. The Committee believes that the appropriate policy in this regard would be loosely based on the following set of rules:

1) A landowner would be required to pay all reasonable costs, fees, and expenses of the condemning entity if he or she did not pursue the action in good faith, or when it can be shown that the assertions of the landowner were frivolous.

2) A condemning entity would be required to pay all reasonable costs, fees, and expenses of the landowner when the land is question is conveyed pursuant to a negotiated sale prior to the filing of a condemnation petition.[257] (Under this rule, a landowner would be at least compensated for the cost of hiring an appraiser to prepare a valuation report.).

3) A condemning entity would be required to pay all reasonable costs, fees, and expenses of the landowner when the special commissioners award greater damages than the condemnor offered to pay before the proceedings began.

4) A condemning entity would be required to pay all reasonable costs, fees, and expenses of the landowner if the decision of the special commissioners is appealed and a court awards greater damages than the commissioners awarded.

5) A condemning entity would be required to pay all reasonable costs, fees, and expenses of the landowner if the court determines that the entity did not make a good faith offer to voluntarily purchase the land in question.[258]

Regardless of the specific rules that the Texas Legislature chooses to adopt, the Committee is of the opinion that the goal of such provisions should be to encourage the reaching of equitable settlements prior to the filing of condemnation suits. Specifically, the legislature should enact provisions that encourage condemning entities to make legitimate good faith purchase offers and punish them when they don't, and that support the decisions of landowners to file suit when such purchase offers are inadequate.

Conclusion -- "Adequate Compensation"

The Committee believes that the condemnation compensation scheme currently in place in Texas does not adequately compensate landowners whose land has been taken or injured by a

[257] *See, e.g.*, FLORIDA STAT. § 73.015(4) (providing that "If a settlement is reached between the condemning authority and a property or business owner prior to a lawsuit being filed, the property or business owner who settles compensation claims in lieu of condemnation shall be entitled to recover costs . . . and attorney's fees . . . .").

[258] In 2005, Representative Rob Orr filed House Bill 3017 that proposed such a provision. The primary intent of House Bill 3017 was to encourage condemning entities to make good faith efforts to acquire land through a negotiated sale, thereby limiting the number of condemnation suits that would have to be filed. The provisions of the bill would have had this effect, but would also have had the effect of encouraging property owners to contest half-hearted and low offers for their property with some assurance that, if there claim was valid, that they could recover the costs associated with bringing the suit.

condemning entity. The members believe that an individual whose property has been condemned should be made economically whole by the condemnation process, something that is simply not occurring in the state at this time. The Committee is of the opinion that the Texas Legislature should retain the Market Value Standard, but that the standard should be reformed to more closely reflect the ideal compensation system established in *Carpenter*. Under this reformed standard, landowners would be fully compensated for any land actually taken and for those damages to the remainder that are not too speculative. The members believe that it is crucial that compensation calculations include each and every factor that willing buyers and sellers would actually consider in voluntary transaction. Specifically, the Committee believes that landowners should be compensated for those special damages, community damages, diminishments of access, and each factor that lessens the market value of their property, offset of course by any increase to the market value of the remainder resulting from the project. However, as has been previously stated, the Committee recognizes that if the costs associated with such a drastic change in the current law grow prohibitively large, then from a practical standpoint such a change would not be economically reasonable. In addition, the members believe that property owners should be reimbursed, under certain circumstances, for the expenses associated with addressing the unsolicited attempts by condemning entities to take their land.

The Committee believes that such a compensation scheme appropriately recognizes the fundamental right to own property and properly allocates the true costs associated with any public projects to the public who benefits from such projects, not to individual landowners. The Committee believes that such a compensation scheme will force each condemning entity to take a closer look at every proposed project and will encourage that each condemnation be conducted in a thoughtful and planned manner.

CONCLUSION

The Committee believes that the ability of an individual to freely own private property is a fundamental right that should be recognized, respected, and fully protected by the law. No different than the fundamental right to freely worship a god of one's choosing or to think and speak as one desires, so is the fundamental nature of the right to possess private property. This right holds such a sacred place in the hearts and minds of free people that it should not be violated except when absolutely necessary. The Committee believes that, unlike other fundamental rights, the right to own property is not afforded the high status that it deserves under the law, and that the individual's right to own private property is frequently dismissed in favor of determinations of what is good for the community at large.

The Committee recognizes that, as with other fundamental rights, there are certainly limitations on the right to own property free from governmental interference. While an individual is free to worship as they choose, they are not allowed to harm others in the process. While one is allowed to think and speak as one wishes, this right does not extend to yelling fire in a crowded theater. The framers of both the United States and Texas Constitutions understood the necessity of balancing the fundamental right to own property with the true needs of society. This recognition can be found in the Takings Clauses of both the federal and the Texas constitutions. However,

the Committee believes that there is currently a significant imbalance between these two interests, and that the right to own property is no longer treated as a fundamental right.

As such, the Committee believes that state law should be amended to allow the exercise of the power of eminent domain only when it is absolutely necessary, only in furtherance of a truly "public use", and only when accompanied by compensation that makes the property owner economically whole, regardless of the cost to society. The Committee believes that the entire cost of a public project should be borne by the public at large. The Committee believes that such provisions represent the very least that a condemning entity should do when it violates the fundamental right of free people to own private property.

RECOMMENDATIONS

1) The state's statutory provisions regarding the power of eminent domain and the condemnation process should be amended to allow the taking of private property only when absolutely required in furtherance of a truly necessary "public use". Such provisions should stem from the principle that the ownership of private property is a fundamental right that should only be violated when truly and absolutely necessary.

   The Texas Legislature should refrain from statutorily or constitutionally defining "public use" unless a consensus definition can be found that addresses the many significant unintended consequences that will result from an inappropriate definition. Instead, the legislature should limit the exercise of the power of eminent domain through other statutory changes, such as those provisions regarding slum and blight, judicial deference to assertions of "public use", and the process used to determine that a particular taking is for a "public use".

   State law should be amended to change the Texas law regarding condemnations to eliminate slum or blight, in accordance with the spirit of House Bill 3057. Specifically, state law should be amended to, at a minimum:

   a) More appropriately define "blighted area" to mean a single property that meets certain specified criteria that ensure that the property is truly blighted.

   b) Prohibit the condemnation of any property that is not truly blighted.

   c) Provide an opportunity for the owner of a "blighted" property to cure those factors causing the blight.

   d) Require a condemning entity to follow a prescribed and open process prior to initiating a condemnation suit to cure slum or blight.

   State law should remove the presumption that a legislative determination that a particular

use is a "public use" is a legitimate "public use". In addition, the determination of whether or not a stated use is truly a "public use" should be a question of fact. Also, special commissioners, judges, and juries should be discouraged from deferring to the decisions made by governmental bodies regarding the purpose of a taking.

2) The state's statutory provisions regarding the power of eminent domain and the condemnation process should be amended to require that a property owner be made economically whole by the condemning entity, meaning that the property owner is fully compensated for each and every economic damage suffered as a result of the taking. Such compensation should include those special damages, diminishments of access, and each market factor that lessens the actual market value of property, offset by any increase to the market value of the remainder resulting from the project.

   The 81st Texas Legislature should undertake to determine with some accuracy the true cost of amending state law to require the inclusion of community damages in eminent domain compensation calculations. If it can be determined that it is economically feasible for such damages to be compensated for then state law should be amended to allow for such compensation.

   State law should be amended to allow property owners to be reimbursed, under certain circumstances, for the expenses associated with addressing the unsolicited attempts by condemning entities to take their land, perhaps in line with the following set of rules:

   a) A landowner would be required to pay all reasonable costs, fees, and expenses of the condemning entity if he or she did not pursue the action in good faith, or when it can be shown that the assertions of the landowner were frivolous.

   b) A condemning entity would be required to pay all reasonable costs, fees, and expenses of the landowner when the land is question is conveyed pursuant to a negotiated sale prior to the filing of a condemnation petition. (Under this rule, a landowner would be at least compensated for the cost of hiring an appraiser to prepare a valuation report.).

   c) A condemning entity would be required to pay all reasonable costs, fees, and expenses of the landowner when the special commissioners award greater damages than the condemnor offered to pay before the proceedings began.

   d) A condemning entity would be required to pay all reasonable costs, fees, and expenses of the landowner if the decision of the special commissioners is appealed and a court awards greater damages than the commissioners awarded.

   e) A condemning entity would be required to pay all reasonable costs, fees, and expenses of the landowner if the court determines that the entity did

not make a good faith offer to voluntarily purchase the land in question.

State law should be amended to allow the admission of any evidence that is relevant to the determination of the true fair market value of any land that is condemned and any remainder property.

3) The state's statutory provisions regarding the condemnation process should be amended to ensure an appropriate balance between the interests of the state and those of individual property owners. Such provisions should recognize that the transfer of property through the condemnation process is never voluntary, and that the condemning entity will possess substantially more resources than the affected property owner.

State law should be amended to require a condemning entity to make every effort to purchase the property in question through a negotiated sale prior to filing a condemnation petition. Such provisions would include requirements that *bona fide* offers be made, that such offers be made in good faith, and that all relevant information regarding the offer and similar offers be disclosed, to name a few. These changes should provide for the imposition of meaningful consequences for failure to comply with their requirements, perhaps through financial disincentives or through the mandatory dismissal of a subsequent condemnation suit.

Provisions should be added to allow for the repurchase of condemned property under Subchapter E, Texas Property Code, in line with Section 52j, Article III, Texas Constitution.

INTERIM CHARGE THREE

Current Annexation Practices

Research annexation practices in the state to determine whether municipalities are abiding by both the spirit and the letter of the state's annexation laws, thereby maintaining a proper balance between municipal governments and individual residents.

CURRENT ANNEXATION PRACTICES

INTERIM CHARGE

"Research annexation practices in the state to determine whether municipalities are abiding by both the spirit and the letter of the state's annexation laws, thereby maintaining a proper balance between municipal governments and individual residents."[259]

SCOPE OF REPORT

This section of the Interim Report examines municipal annexation practices in the state, specifically focusing on the question of whether or not the current body of state law and its implementation by municipal governments creates a proper balance between municipalities, municipal residents, and those individuals living within the extraterritorial jurisdiction of municipalities. Specifically, this section describes the history of municipal annexation in Texas, the current body of law regarding annexation in the state, and the various controversies that exist as the result of the current state of municipal annexation affairs.

It is not an overstatement to assert that the law regarding municipal annexation in Texas is overly complicated, cumbersome, and frequently confusing. As such, it is not possible in a report of this type to comprehensively examine, explain, and compare each aspect of annexation law, not to mention the numerous controversies and policy considerations that stem from its use and abuse. As such, this section presents a broad overview of the subject, with the focus being on those more glaring and persistent controversies.

SUMMARY OF COMMITTEE ACTION

Committee Hearing

The House Committee on Land and Resource Management (Committee) met in a posted public hearing on May 5, 2008, in Austin, Texas. The Committee heard the testimony of six witnesses. Those who testified were:

Boyce L. Whatley (Mayor, City of Midlothian)
Bradley Young (Rural Citizens Against Annexation)
Matt Scott (Councilmember, City of Rockwall)
Richard Cortese (Texas Farm Bureau)

[259] Rule 3, Section 25(3), of the Rules of The Texas House, grants jurisdiction to the House Committee on Land and Resource Management "over all matters pertaining to annexation . . . ."

Karen Hall (resident of the City of Byran)
Julian Grant (Office of the Texas Attorney General)

Summary of Testimony

Boyce L. Whatley, the Mayor of the City of Midlothian, explained to the Committee that the law of annexation in Texas, especially since the passage of Senate Bill 89 in 1999, creates real problems for municipalities when they attempt to unilaterally annex areas within their extraterritorial jurisdictions (ETJ). Mayor Whatley informed the members of the current dispute within his community between the City and approximately 1,500 residents that the municipality is in the process of annexing. Mayor Whatley explained to the Committee that in his opinion people who purchase property within the ETJ of a municipality should realize that they most likely will be annexed at some point in the future and as such have no basis upon which to complain when an annexation is actually initiated. However, when prompted by questions from the Committee, Mayor Whatley admitted that he does understand how residents within a municipality's ETJ must feel when they are faced with the likelihood of a unilateral annexation, especially those individuals who were not within the municipality's ETJ when they bought their property.

Bradley Young, a member of Rural Citizens Against Annexation (RCAA), explained to the Committee what he considers to be the primary weaknesses of the current annexation system in light of the RCAA's recent attempts to prevent the City of Midlothian from annexing approximately 1,500 residents. Mr. Young made a number of suggestions to the members regarding how best to reform the current annexation system. For example, Mr. Young recommended to the Committee that provisions should be enacted to ease the financial burden on residents who choose to challenge a municipal annexation, especially considering the fact that municipalities have virtually unlimited budgets with which to support any attempt to annex new territory. Mr. Young also proposed to the members that affected residents should have the opportunity to negotiate the terms of service plans with municipalities at the statutorily required public hearings. In addition, Mr. Young advised the Committee that the law would be improved if the annexation negotiation process was clarified to among other things provide a mechanism by which to replace an appointed member if the need arose. When prompted by questions from the members, Mr. Young stated that he believes that residents should be able to vote on whether or not they are annexed by a municipality, and that municipal service plans should be required to be more detailed than they currently are.

Matt Scott, a councilmember from the City of Rockwall, explained to the Committee that he appreciates the complexity of annexation issues and the difficulty faced by legislators in attempting to balance the interests of municipalities, municipal residents, and those individuals living within the ETJs of municipalities. Councilmember Scott suggested to the members that the current set of hodgepodge annexation laws are cumbersome, disjointed, and confusing to municipalities, citizens, and the courts. Councilmember Scott advised the Committee to discard the current body of annexation law and create a comprehensive set of laws that are consistent, simplified, and easier to understand.

Richard Cortese, a member of the Texas Farm Bureau's Board of Directors, expressed to the Committee the Texas Farm Bureau's general approval of House Bill 1472 as enacted by the 80th Texas Legislature. However, Mr. Cortese explained to the members that certain issues have arisen as the result of the manner by which some municipalities are implementing the new law. Mr. Cortese reminded the Committee that House Bill 1472 created provisions that prevent a municipality from either annexing agricultural land or from enforcing its regulations that interfere with the agricultural use of the land unless the municipality first offers a non-development agreement to the landowner and the landowner declines to sign the agreement. According to Mr. Cortese, the purpose of House Bill 1472 was to create a mechanism that would allow a municipality to both control development and to annex more developed areas beyond agricultural lands, while at the same time allowing agricultural landowners (who often do not want municipal services, regulations, or tax burdens) to remain outside of the municipality's corporate boundaries.

However, Mr. Cortese explained to the members that some municipalities have presented landowners with strict non-development agreements that are contrary to the spirit of House Bill 1472 and that will unnecessarily prevent farm and ranch land from remaining in agriculture. For example, Mr. Cortese described to the Committee a case in which a municipality offered a non-development agreement to a landowner that included a provision annexing the land after five years. The landowner was faced with the choice of either declining the offer and having the land immediately subject to annexation or of agreeing to the offer and having the property annexed in five years. In Mr. Cortese's opinion, such an agreement does not reflect the spirit of the law envisioned by House Bill 1472.

Karen Hall described to the Committee her experience with being annexed by the City of Bryan, the municipality's subsequent failure to provide required services to the annexed area, her petition for disannexation from the municipality, and the series of lawsuits that resulted from the denial of her petition for disannexation. Ms. Hall advised the members that the only recourse under state law for affected landowners when a municipality fails to provide required public services following an annexation is to file a petition for disannexation. She further explained to the Committee that state law requires a district court to order the disannexation of an area if a valid petition is filed and the court determines that the municipality failed to perform its obligations in accordance with the service plan or failed to perform in good faith. According to Ms. Hall, this provision is currently interpreted by the courts to require municipalities to only perform those obligations that are specifically stated in their service plans, even if the service plan is grossly out of compliance with state law. According to judicial interpretations of state law, the only means by which to contest the actual validity of a service plan (or any other flawed procedural matter) is through a *quo warranto* proceeding, an action that may only be brought by the local district or county attorney, or by the Texas Attorney General, none of whom are generally willing to bring such an action. Ms. Hall suggested to the members that state law should be amended to provide aggrieved landowners with meaningful recourse in such situations, perhaps by allowing the disannexation of an area if a municipality does not provide services in accordance with a valid service plan.

Julian Grant, an Assistant Attorney General at the Texas Attorney General's Office (OAG), answered several questions from the Committee regarding the law of annexation and the OAG's

non-involvement in cases in which municipalities have not complied with state law. Mr. Grant's general opinion was that the OAG has traditionally not become involved in annexation disputes unless the annexation involved questions of statewide importance.

BACKGROUND

Municipal annexation is the process by which municipalities in Texas expand their corporate boundaries. The state legislature through legislative enactment (and the citizens through constitutional amendment) have modified the authority of municipalities to expand their corporate boundaries a number of times during the past century and a half.[260] Perhaps most significantly, in 1912 Texas voters amended the state constitution to allow a city with a population of more than 5,000 residents to adopt a city charter and take any action authorized by the charter not inconsistent with the state constitution or the general laws of the state.[261] Since there is no constitutional or statutory prohibition against municipal annexation, home rule municipalities (those created in accordance with the 1912 constitutional amendment) are free to annex additional territory so long as they comply with those applicable statutory requirements that have been established by the legislature. Over the years the legislature has enacted a number of statutory provisions regarding municipal annexation, most notably in 1963 with the enactment of House Bill 13 (the Texas Municipal Annexation Act) and in 1999 with the passage of Senate Bill 89.[262]

Municipal Annexation Act of 1963

In 1963, the 58th Texas Legislature enacted the Municipal Annexation Act (Act), a measure that codified a number of significant provisions intended by the legislature to more comprehensively regulate the annexation activities of municipalities in the state. Introduced as House Bill 13, the Act includes provisions that limit municipal annexations to the newly defined extraterritorial jurisdiction of a municipality, require the completion of certain procedural steps prior to the annexation of new territory, and that authorize newly annexed residents to petition for disannexation if the municipality fails to live up to certain statutorily required obligations. The many provisions that comprise the Municipal Annexation Act form the basis of the current body of annexation law in Texas today, now codified as Chapters 42 and 43 of the Texas Local Government Code.[263]

Under the framework established by the legislature with the passage of House Bill 13, a band of land (varying in width depending upon the population of each municipality) is created around each municipality in the state. The area within this band of land, known as a municipality's extraterritorial jurisdiction (ETJ), represents that municipality's future area of growth, being the

[260] *See*, Scott Houston, "Municipal Annexation In Texas: Is it Really that Complicated?", p. 6 (updated January 2008) (providing a history of municipal annexation). Retrieved from the Texas Municipal League's website: http://www.tml.org/legal_pdf/ANNEXATION012808.pdf (accessed May 10, 2008).

[261] TEX. CONST., art XI, § 5.

[262] *See*, House Bill 13 (Grover, 58th Leg. 1963); Senate Bill 89 (Madla, 76th Leg. 1999).

[263] *See*, TEX. LOC. GOV. CODE, §§ 42.001 *et. seq.;* §§ 43.001 *et. seq.*

only area from which the municipality may annex new territory. Specifically, the ETJ of a municipality is that area of unincorporated territory that is contiguous to the corporate boundaries of the municipality and that is located:[264]

1) Within ½ mile of those boundaries, in the case of a municipality with fewer than 5,000 inhabitants.

2) Within one mile of those boundaries, in the case of a municipality with 5,000 to 24,999 inhabitants.

3) Within two miles of those boundaries, in the case of a municipality with 25,000 to 49,999 inhabitants.

4) Within 3½ miles of those boundaries, in the case of a municipality with 50,000 to 99,999 inhabitants.

5) Within five miles of those boundaries, in the case of a municipality with 100,000 or more inhabitants.

Since 1963, municipalities have been prohibited from annexing territory within the ETJ of another municipality and from incorporating within the ETJ of another municipality without the written consent of the controlling municipality.[265] In addition, when a municipality annexes a new area within its ETJ state law provides that the ETJ of the municipality expands with the annexation to comprise the area around the new municipal boundaries.[266]

In addition to establishing the basic framework regarding ETJs, the Act also contains provisions that required municipalities to comply with certain procedural requirements prior to formally annexing new territories. For example, the Act contains provisions that required an annexing municipality to conduct a public hearing prior to annexing new territory,[267] required that an annexation be finalized within ninety days of initiating the proceedings,[268] and required an annexing municipality to provide certain services to the residents of the annexed area within three years or face the possibility of having to disannex the area.[269] As has been mentioned, many of the basic provisions or legal concepts contained within the Act are still applicable today when municipalities engage in annexation activities.

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[264] *See*, House Bill 13, SECTION 3(A) (Grover, 58th Leg. 1963) (now codified as TEX. LOC. GOV. CODE, § 42.021).

[265] *See*, *Id.*, SECTION 8 (now codified as TEX. LOC. GOV. CODE, § 42.041(a)).

[266] *See*, *Id.*, SECTION 3(C) (now codified as TEX. LOC. GOV. CODE, § 42.022(a)).

[267] *See*, *Id.*, SECTION 6 (requiring that "Before any city may institute annexation proceedings, the governing body of such city shall provide an opportunity for all interested persons to be heard at a public hearing to be held not more than twenty (20) days nor less than ten (10) days prior to institution of such proceedings.").

[268] *See*, *Id.*

[269] *See*, *Id.*, SECTION 10 (requiring an annexing municipality to provide within three years of the annexation "governmental and proprietary services" that are substantially equivalent to those provided by the municipality in similar areas of the municipality, and providing for affected residents to petition for disannexation if the municipality fails or refuses to provide the services.).

Senate Bill 89

In 1999, the 76th Texas Legislature enacted Senate Bill 89, a measure that amended the Municipal Annexation Act in a number of significant ways.[270] These changes were an attempt by the legislature to create a more appropriate balance between municipalities, municipal residents, and those individuals living within the ETJs of municipalities. For example, Senate Bill 89 contains provisions that attempt to protect the continuation of land use in annexed areas,[271] that revise requirements for the provision of services to areas following their annexation, and that establish negotiation and arbitration procedures regarding the provision of such services.[272] In addition, Senate Bill 89 includes a provision (now codified as Section 43.052 of the Texas Local Government Code) that requires municipalities to adopt an annexation plan as a prerequisite to annexing territory,[273] to wait three years to annex an area after it is included in the plan,[274] and to complete certain procedural requirements during the three year period.[275] However, the authors of the bill created a number of problematic exceptions to this general rule (with a separate set of less stringent procedural requirements to be followed) that have resulted in limiting the effectiveness of Senate Bill 89 as a tool to truly balance the interests of municipalities and affected residents.[276]

While the Committee commends the efforts made by the members of the 76th Texas Legislature to find a more appropriate balance between the needs of annexing municipalities and the rights of those residents affected by annexations, the fact remains that municipalities in the state have found ways to circumvent the spirit and the letter of the state's annexation laws such that an imbalance still exists between municipalities and residents. As such, the Committee is of the opinion that further reform to the body of annexation law in the state is appropriate.

Current Annexation Law and Procedures

Authority to Annex

It is a rule of law that home rule municipalities are authorized to do anything that the legislature could have authorized them to do, so long as such actions are not inconsistent with their charters, the constitution, or the general laws of the state.[277] Since there is no constitutional or statutory prohibition against municipal annexation, home rule municipalities are free to annex additional territory so long as they comply with those applicable statutory requirements that have been established by the legislature. In addition to this constitutionally implied authority, the Texas

[270] *See*, Senate Bill 89 (Madla, 76th Leg. 1999).
[271] *Id.*, SECTION 2 (adding TEX. LOC. GOV. CODE § 43.002).
[272] *Id.*, SECTION 8 (adding TEX. LOC. GOV. CODE §§ 43.0562, 43.0564).
[273] *Id.*, SECTION 4 (amending TEX. LOC. GOV. CODE § 43.052).
[274] *Id.*
[275] *See*, *Id. e.g.*, (amending TEX. LOC. GOV. CODE § 43.053 to require an inventory of services and facilities be taken); *Id.*, SECTION 7 (amending TEX. LOC. GOV. CODE § 43.056 regarding provision of services to annexed area); *Id.*, SECTION 8 (adding TEX. LOC. GOV. CODE § 43.0561 regarding public hearing requirements).
[276] *See*, *Id.*, (amending TEX. LOC. GOV. CODE § 43.052(h)).
[277] *See*, TEX. CONST., art 11, § 5 (providing that "no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.").

Legislature has specifically authorized a home rule municipality to "[e]xtend the boundaries of the municipality and annex area adjacent to the municipality" so long as such action is in accordance with the municipal charter and "not inconsistent with the procedural rules prescribed by [Chapter 43]."[278] While a home rule municipality must follow certain limited procedural rules established elsewhere in law, the fact remains that the governing bodies of such municipalities have the authority to unilaterally annex an area without the consent of any affected person or party.

Unlike home rule municipalities, general law municipalities in the state are authorized to exercise only those powers that are specifically granted to them by the legislature or that are implied by general law. While the legislature has authorized general law municipalities to annex additional territory, such municipalities are allowed by the state to do so only in accordance with specific provisions enacted by the legislature, provisions that have the potential to limit the initiation and completion of annexations by such municipalities.[279] For example, a general law municipality with a population of more than 5,000 people is authorized to annex an area through a petition and election process.[280] A Type A General Law Municipality is authorized to annex an area if the majority of the qualified voters of the area vote in favor of becoming part of the municipality.[281] A Type B General Law Municipalities is authorized to annex an area by ordinance if "a majority of the qualified voters of an area . . . vote in favor of becoming a part of the municipality [and] any three of those voters . . . prepare an affidavit to the fact of the vote and file the affidavit with the mayor of the municipality."[282]

It should be noted that there is a strong argument to be made that the legislature should amend state law to require voter approval prior to the annexation by any municipality of any new territory, with certain limited reasonable exceptions (the annexation is consented to by the residents or the annexed area is owned by the municipality, for example). The Committee has heard from those who believe that such a requirement will not unduly hamper the ability of municipalities to annex additional territory, but will instead provide a more appropriate balance between the periodic need of municipalities to annex additional territory with the right of the people to choose under which government's jurisdiction they will submit themselves and their property to. Given the controversial nature of this question and the importance of the rights that are involved, the Committee believes that at a minimum the Full House of the Texas House of Representatives should be given the opportunity to fully debate and decide the question.

Annexation Plan

Provisions in Senate Bill 89 require every municipality in Texas to adopt an annexation plan no later than December 1, 1999. Each annexation plan must specifically identify annexations that "may occur beginning on the third anniversary of the date the annexation plan is adopted."[283] Municipalities are authorized to amend their annexation plans to include new areas; however,

[278] TEX. LOC. GOV. CODE § 43.021.
[279] *See, e.g., Id.,* §§ 43.023 - 43.028, 43.032 - 43.033.
[280] *Id.*, § 43.023.
[281] *Id.*, § 43.024(b).
[282] *Id.*, § 43.025.
[283] *Id.*, § 43.052.

such newly added areas can not be annexed during the three year period following the adoption of the amendment.[284] In addition to this requirement, there are several rules that apply when a municipality chooses to add or remove an area from its annexation plan:

1) An area that is removed from the annexation plan during the first eighteen months after being included in the plan cannot be placed back in the plan for one year.[285]

2) An area that is removed from the annexation plan after the first eighteen months after being included in the plan cannot be placed back in the plan for two years.[286]

3) An area that is in an annexation plan must be annexed no later than thirty-one days after the three year period ends or the municipality must wait five more years to annex the area.[287]

As was mentioned in the previous discussion of Senate Bill 89, some categories of annexations are exempted by state law from having to be included in an annexation plan. Chapter 43 of the Texas Local Government Code specifically exempts the following types of annexations from the requirement that they be included in a municipal annexation plan:[288]

1) The area contains fewer than one hundred separate tracts of land on which one or more residential dwellings are located on each tract.

2) The area will be annexed by petition of more than fifty percent of the real property owners in the area proposed for annexation.

3) The area is or has been the subject of an industrial district contract or a strategic partnership agreement.

4) The area is located in a colonia.

5) The area is less than one thousand feet wide and is annexed in connection with a boundary adjustment with an adjacent city.

6) The area is located completely within the boundaries of a closed military installation.

7) The municipality determines that the annexation is necessary to protect the area proposed for annexation or the municipality from imminent destruction of property or injury to persons, or nuisance.

[284] *Id.*, § 43.052(c).
[285] *Id.*, § 43.052(e).
[286] *Id.*
[287] *Id.*, § 43.052(g).
[288] *Id.*, § 43.052(h).

Scott Houston, the Director of Legal Services for the Texas Municipal League, has written that "[because] of these exemptions, it is probably fair to say that most annexations will not be required to be in an annexation plan."[289] Importantly, areas that are exempt from being included in an annexation plan are capable of being annexed much more quickly and according to more limited procedural requirements than those annexations that are included in an annexation plan. The Committee is generally of the opinion that these exceptions have rendered the general rule virtually meaningless and that state law should be amended to require that most annexations be included in an annexation plan, thereby subject to the more meaningful set of substantive and procedural requirements that are found in Subchapter C of Chapter 43 of the Texas Local Government Code.

Annexation Procedures -- Areas Included in an Annexation Plan

Annexations of areas that are contained within a municipal annexation plan must be conducted in accordance with the specific set of procedures set out in Subchapter C of Chapter 43.[290] These procedures require among other things that an annexing municipality compile a comprehensive inventory of those facilities and services that are provided by public and private entities in the area proposed for annexation.[291] In addition, an annexing municipality is required to prepare a service plan for the provision of services to those areas that it intends to annex.[292] State law requires that the level of such services be comparable to the level of services provided to other areas within the municipality.[293] The service plan must also include a program by which the annexing municipality will provide services to the area no later than 2½ years after the effective date of the annexation unless certain services cannot reasonably be provided within that period, in which case they must be provided no later than 4½ years after the effective date of the annexation.[294] Importantly, certain vital municipal services must be provided by the municipality to the residents of the annexed area on the effective date of the annexation (police and fire protection, emergency fire services, solid waste collection, road maintenance, parks, etc.).[295]

A municipality that plans to annex territory that is included in its annexation plan must also hold two public hearings (not later than the ninetieth day after the inventory is available) at which persons interested in the annexation are given the opportunity to be heard.[296] At least one of these hearings must be held in the area proposed for annexation if a suitable site is reasonably available and more than twenty adults who are permanent residents of the area file a written protest of the annexation with the secretary of the municipality within ten days after the date of the publication of the hearing notice.[297] In addition, such annexing municipalities (with the exception of the City of Houston) are required to not only negotiate with affected property owners concerning the service plan, but to submit to arbitration if the negotiations are

[289] Scott Houston, "Municipal Annexation In Texas: Is it Really that Complicated?", p. 14.
[290] TEX. LOC. GOV. CODE, §§ 43.051 *et. seq.*
[291] *Id.*, § 43.053.
[292] *Id.*, § 43.0569(a).
[293] *Id.*, § 43.056(g).
[294] *Id.*, § 43.056(b).
[295] *Id.*
[296] *Id.*, § 43.0561.
[297] *Id.*, § 43.0561(b).

unsuccessful.[298]

Annexation Procedures -- Areas Exempted From an Annexation Plan

Annexations of areas that are exempt from being included in a municipality annexation plan must be conducted in accordance with a different and more limited set of procedural requirements than those annexations that are included in a municipality's annexation plan. These limited procedures are found in Subchapter C-1 of Chapter 43 and are generally less stringent than the procedures laid out in Subchapter C.[299] It should be noted, however, that several provisions in Subchapter C apply to annexations regardless of whether or not they are included within a municipality's annexation plan (specifically Sections 43.051, 43.054, 43.0545, 43.055, 43.0565, 43.0567, and 43.057). These carryover sections include provisions that, among other things, restrict annexations to the ETJ of the annexing municipality (with exceptions),[300] require an annexed area to be at least 1,000 feet wide (with exceptions),[301] and limit the maximum amount of annexation each year to ten percent of the incorporated area of the municipality (with exceptions).[302]

A municipality that plans to annex territory that is not included in its annexation plan must hold two public hearings at which persons interested in the annexation are given the opportunity to be heard.[303] In addition, the annexation of an area must be completed within ninety days after the date that the governing body institutes the annexation proceeding or the proceeding is void.[304] State law also requires the annexing municipality to direct its planning department or other appropriate municipal department to prepare a service plan that provides for the extension of full municipal services to the area to be annexed.[305] The various requirements associated with the creation of a service plan for annexations that are included within an annexation plan under Subchapter C apply as well to the provision of services under Subchapter C-1.[306]

Limited Purpose Annexation

Home rule municipalities with a population of 225,000 or more are authorized to annex territory for the limited purpose of allowing such municipalities to apply their planning, zoning, health,

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[298] *Id.*, §§ 43.0562, 43.0564.

[299] *Id.*, §§ 43.061 *et. seq.*

[300] *See, Id.*, § 43.051 (requiring a municipality to annex area only in its ETJ unless the municipality owns the area).

[301] *See, Id.*, § 43.054 (prohibiting strip annexations unless the boundaries of the municipality are contiguous to the area on at least two sides or the annexation is initiated on the written petition of the owners or of a majority of the qualified voters of the area or the area abuts or is contiguous to another jurisdictional boundary.).

[302] *Id.*, § 43.055 (limiting the maximum amount of annexation each year to ten percent of the incorporated area unless the area is annexed at the request of a majority of the qualified voters of the area and the owners of at least fifty percent of the land in the area or the area is owned by the municipality, a county, the state, or the federal government and used for a public purpose or the area is annexed at the request of at least a majority of the qualified voters of the area or the area is annexed at the request of the owners of the area.).

[303] *Id.*, § 43.063(a).

[304] *Id.*, § 43.064(a).

[305] *Id.*, § 43.065(a).

[306] *Id.*, § 43.065(b).

and safety ordinances in an unincorporated area.[307] A municipality that annexes an area for these limited purposes is not required to provide public services to the area during the limited purposes period; however, the municipality is prevented from imposing a property tax in the area (though it can collect sales tax), and is not allowed to extend its municipal ETJ as a result of the limited purpose annexation.[308]

Procedurally, the annexing municipality is required to hold two public hearings,[309] prepare a report that contains a planning study and regulatory plan,[310] and must complete the annexation within ninety days after the governing body of the municipality institutes the annexation proceeding.[311] In addition, state law generally requires that full purpose annexation must occur within three years of the date the area is annexed for limited purposes.[312]

Disannexation

Residents who have been annexed by a municipality who believe that they have not been provided the services that they are entitled to may petition for disannexation from the municipality.[313] The general process allows a majority of the qualified voters of the area to petition a municipality to disannex a previously annexed area if the municipality fails or refuses to provide services to the area according to the service plan within 2½ years (4½ if certain services cannot reasonably be provided within 2½ years).[314] If the municipality fails or refuses to disannex the area within sixty days, a petitioner may sue in district court for disannexation.[315] The court is required to disannex the area if it finds that the municipality failed to perform its obligations in accordance with the service plan or failed to perform in good faith.[316] Upon disannexation, a municipality must refund to the landowners the amount of money collected in property taxes and fees during the period that the area was a part of the municipality less the amount of money that the municipality spent for the direct benefit of the area during that period.[317] Finally, the waiting period for a municipality to again annex any disannexed territory is ten years.[318]

[307] *Id.*, § 43.121(a).
[308] *Id.*, §§ 43.130(c), 43.131.
[309] *Id.*, § 43.124 (requiring the hearings be held following notice on or after the fortieth day but before the twentieth day before the date the annexation proceedings are instituted, allowing each member of the public who wishes to testify, etc.).
[310] *Id.*, § 43.123.
[311] *Id.*, § 43.126.
[312] *Id.*, § 43.127.
[313] *Id.*, § 43.141. *See also*, § 43.142 (authorizing home rule municipalities to disannex an area according to the charter of the municipality and not inconsistent with the procedural rules prescribed by Chapter 43.); § 43.143 (authorizing a petition and election process for general law municipalities to disannex area.); § 43.144 (authorizing a general law municipality to disannex sparsely populated areas by ordinance under certain conditions.).
[314] *Id.*, § 43.141(a).
[315] *Id.*, § 43.141(b).
[316] *Id.*
[317] *Id.*, § 43.148.
[318] *Id.*, § 43.141(c).

Non-Development Agreements

In 2007, the 80th Texas Legislature enacted House Bill 1472 with the stated purpose of authorizing municipalities to enter into non-development agreements with landowners of agricultural or wildlife management use land, rather than annexing the land.[319] The proponents of the measure argued that the bill's provisions would balance the interests of municipalities and many rural landowners by creating a mechanism that would allow municipalities to control development, comprehensively plan around agricultural tracts, and annex more developed areas beyond agricultural lands, while at the same time allowing agricultural landowners (who often do not desire municipal services, regulations, or tax burdens) to remain outside of the municipalities' corporate boundaries.

Now codified as Section 43.035 of the Texas Local Government Code, the provisions enacted by House Bill 1472 prohibit a municipality from either annexing agricultural land or from enforcing its municipal regulations that interfere with the agricultural use of the land unless the municipality first offers to enter into a non-development agreement with the landowner and the landowner declines to sign the agreement.[320] The non-development agreement is required to guarantee the continuation of the extraterritorial jurisdictional status of the area and to authorize the enforcement of all regulations and planning authority of the municipality that do not interfere with the use of the area for agriculture, wildlife management, or timber uses. Importantly, the new provisions provide that an area adjacent or contiguous to an area that is the subject of a non-development agreement is considered adjacent or contiguous to the municipality (allowing a municipality to "skip over" the agricultural land to annex territory beyond it).[321]

At the May 5, 2008 public hearing, Richard Cortese speaking on behalf of the Texas Farm Bureau explained to the members that certain issues have arisen as the result of the manner by which some municipalities are implementing the new law. For example, Mr. Cortese informed the Committee of the following two situations that he was aware of:

> In at least one case the municipality wrote an agreement with a five year term, with a provision that automatically annexed the property at the end of that five year term. By statute these agreements can be for 15 years each, and with successive renewals or extensions for up to 45 years. Parties may include annexation provisions in the agreement but those provisions are required to be agreed upon by the landowner and the municipality. In the case of this five year agreement, the landowners were being forced into annexation.
>
> In another case, a municipality was offering non-development agreements to agriculture property owners, but planned to annex individual homes that were located on the agricultural land. This was not the intent of H.B. 1472. It creates

[319] *See*, TEX. LOC. GOV. CODE, § 43.035(a) (providing that this new section applies only to an area that is both eligible to be the subject of a development agreement under Subchapter G, Chapter 212, Local Government Code, and is appraised for ad valorem tax purposes as land for agricultural or wildlife management use under Subchapter C or D, Chapter 23, Tax Code, or as timber land under Subchapter E of that chapter.).

[320] *Id.*, § 43.035(b).

[321] *Id.*, § 43.035(c).

> isolated pockets of city property in the middle of a farm or ranch. It will be difficult to provide services to these isolated homes. The nightmare of directing emergency services and first responders to an emergency situation in this area is mind boggling.[322]

The Committee is of the opinion that House Bill 1472 was intended to prevent the type of situations described by Mr. Cortese and to provide a meaningful compromise that recognizes both the value of protecting agricultural land and the legitimate needs of municipalities to expand their jurisdictions. Given the newness of the law, the Committee believes that it is appropriate to continue to monitor how municipalities are implementing the provisions of House Bill 1472, understanding that reform of the new provisions may be required at a future date if the spirit of the law is not respected.

Controversial Body of Law

While it is arguably the case that the ability of municipalities to annex new territory is in some cases appropriate, there is no question that the law in Texas regarding municipal annexation and the annexation practices of some municipalities have been and continue to be controversial in the eyes of many Texans. Since its formation in 1995, the House Committee on Land and Resource Management has routinely heard the ubiquitous and boisterous complaints on a myriad of annexation topics by those who have either been annexed by municipalities or will be annexed in the near future. In the seven regular legislative sessions since its formation, 174 separate pieces of legislation have been referred to the Committee regarding the issue of municipal annexation. There were fifty bills alone referred to the Committee in 1997, the year following the controversial annexation by the City of Houston of the affluent Kingwood subdivision in northeast Harris County.

The Committee has historically been supportive of legislation aimed at addressing the reasonable complaints of the people of this state regarding annexation law and municipal practices, specifically the unilateral ability of municipalities to annex territories without the consent of those being forced into the municipality's growing corporate boundaries. However, it should be noted that there are a number of other annexation issues that the Committee believes should be reviewed as well, primarily those regarding the general lack of accountability that municipalities have concerning annexation and the many loopholes in the current system that allow municipalities to skirt the spirit of the law as enacted by the Texas Legislature.

DISCUSSION

In practical terms it can be stated that municipal governing bodies are not accountable to any higher authority for the actions that they take when annexing new territory, with the exception of

[322] Richard Cortese, "Statement by Richard Cortese, Texas Farm Bureau, To the House Committee on Land and Resource Management on Annexation, May 5, 2008," distributed to the members of the Texas House Committee on Land and Resource Management Committee, pp. 3-4 (May 6, 2008).

their own citizens at the ballot box at some future point in time. The current body of annexation law authorizes these governing bodies to unilaterally undertake the annexation of an area without the approval of its residents or those individuals that it decides to annex. In addition, when a municipality chooses to not comply with the limited and loose set of procedural and substantive requirements found in the Texas Local Government Code, there is in a practical sense nothing that aggrieved landowners can do to remedy the municipality's error or abuse. While it is true that the Texas Legislature attempted with the enactment of Senate Bill 89 in 1999 to balance the interests of municipalities and those individuals living within municipal ETJs, the fact remains that no meaningful balance between these parties exists today given the unilateral ability of municipalities to annex territory and the inability of aggrieved landowners to seek and be granted redress when municipalities fail or refuse to comply with the letter or spirit of state law.

Unilateral Power

As has been previously stated, the governing body of a home rule municipality in the state today has the virtually unfettered authority to unilaterally annex new territory, without the consent of either their own constituents or those residing in the municipality's extraterritorial jurisdiction (ETJ), so long as the governing body abides by the requirements and restrictions established by the legislature in the Texas Local Government Code. It should be noted that even the minimal requirement that a municipality comply with the state's statutory annexation provisions is not required in any practical sense in order for a municipality to initiate or complete an annexation, given the unwillingness of authorized governmental officials to bring suit to force municipal compliance with state law and the inability of affected residents to contest such non-compliance in a meaningful way. Nevertheless, and regardless of the actual municipal abuses that have and continue to occur under the current annexation system, a fundamental policy question exists as to whether or not municipalities in the state should be allowed to annex territory without the consent of those residents affected by the annexation. This is not a new debate and the arguments both in favor and against unilateral annexations have been made numerous times.

Over the years, the Committee has taken the testimony of hundreds of average Texans who uncompromisingly oppose the ability of municipalities to unilaterally annex new territory. In fact, it has not been uncommon for busloads of angry citizens to take time from their busy schedules to assemble at the state capitol for the purpose of expressing their opposition to the current annexation scheme. These countless individuals passionately argue that on the most basic and fundamental level free people should be able to choose under which governmental authority they are subjected to, a choice that is denied to them when they are involuntarily made citizens of a municipality through unilateral annexation. These individuals have reminded the Committee that such is a basic tenet of all free societies.

The critics of unilateral annexation further explain that many people have purposefully made the decision to live outside of the corporate boundaries of a municipality. Sometimes this decision is made so that they can live free of the oftentimes burdensome, unnecessary, and paternalistic sets of municipal regulations that restrict or prevent them from doing such things as raising livestock on their land, burning brush, or constructing new barns or fences as they choose. Sometimes the decision is based on purely economic motives. For example, the Committee has heard from elderly and poorer individuals who simply can not afford to pay the taxes that a municipality

would impose on them, and so choose to live in unincorporated areas.

Most municipal officials (and those who lobby the state government on their behalf) maintain that municipalities need the ability to unilaterally annex new territory in order to both raise needed revenue and to control the orderly growth within and outside their corporate boundaries. These proponents of the current annexation scheme argue that such unchecked annexation authority is actually vital to the economic survival of Texas municipalities. These individuals present the following scenario as the likely outcome of any significant restriction on the authority of municipalities to annex additional territory. First, those municipal residents who can afford to move outside of the limits of the municipality will do so in order to decrease their tax burden and to avoid a number of urban problems. If municipalities are unable to annex these people back into the tax base the municipality will be unable to meet municipal needs, which municipalities argue will grow as the result of urban flight. Eventually this "downward spiral continues until the city can no longer sustain itself and must rely on aid from other sources, such as the state."[323]

On the other hand, it can certainly be argued that if this is truly the case then municipalities in the state such as Dallas, which have little or no ability to annex additional new territory, will suffer continuing deterioration, a conclusion that is hard to sustain. In addition, many have argued that requiring some sort of voter approval in order for a municipal annexation to occur will not necessarily prevent annexations from occurring, but will instead require annexing municipalities to annex new territory only when truly necessary and in a manner tailored to satisfy the needs and desires of those residents that will be affected by the annexation.

Proponents of the current annexation system also explain that it is unfair for municipal residents to shoulder the costs that arise when non-municipal residents who work and shop in the municipality utilize the municipality's infrastructure and services without paying for them. They explain that this is an equity issue that only annexation can address. This conclusion is supported by a 2003 report prepared by the Perryman Group for the Texas Municipal League, which asserted that:

> The inability to expand in an unfettered manner creates a situation of market failure in that the emerging growth areas are not required to pay the full social costs of their expansion. In effect, they become “free riders” on the transportation, communications, financial, legal, cultural, educational, residential, and other activities provided by the central city. The result is perpetual deterioration on the sustainability of the core of the area, which in turn accelerates flight to outlying areas. This spiral, if left unchecked, ultimately erodes the viability of the urban centers, diminishes the quality of key support networks, and imposes future costs and constraints on the entire region.[324]

[323] John J. Goodson, "Annexation Vexation," Texas House Research Organization Session Focus Report, p. 4 (January 13, 1997).

[324] The Perryman Group, "The Impact of Overly Restrictive Annexation Policy on Economic Activity in Texas and Its Metropolitan Regions," p. 21 (April, 2003).

However, it should be noted that while a municipality does not collect *ad valorem* taxes from such non-municipal residents, these non-municipal residents nevertheless contribute to the municipal coffers through, at the very least, the municipal sales tax on all goods and services purchased by these individuals within the corporate limits of the municipality.

In addition, those who favor allowing municipalities to unilaterally annex territory explain that this authority is important to ensure the orderly growth and development of the municipality and the areas surrounding it. These individuals explain that incompatible land uses and substandard development occur in the areas outside their corporate boundaries, primarily as the result of the inability of counties under state law to regulate land use and development in unincorporated areas. They argue that such conditions result in urban sprawl, traffic and air quality problems, and a host of other health, safety, and environmental dangers that create significant problems for entire regions of the state.

As a general rule, the members of the Committee have supported the proposition that it is a fundamental right in a free society for people to be able to choose where they live and under what authority they subject themselves to. As such, the Committee has routinely entertained and passed legislation requiring resident approval of an annexation as a precondition to the annexation occurring.[325] Some bills have been passed by the Committee requiring an annexing municipality to obtain the consent of both the voters in the area to be annexed and the voters residing within the corporate limits of the annexing municipality prior to annexation.[326] The Committee has even considered and approved legislation that would prevent a municipality from annexing an area unless it first circulated a petition and obtained the signatures of the owners of property constituting at least one-half of the appraised value of real and personal property located in the area proposed for annexation, and of at least one-half of the owners of such property in that area.[327] While the Committee has routinely passed legislation of these types (frequently early in the legislative session), no measure of state wide impact proposing resident approval has ever been scheduled for debate on the House Floor.

The Committee believes that the perennial question of the propriety of the unilateral ability of municipalities to annex new territory is of such importance that the Full House of the Texas House of Representatives should be given the opportunity to fully debate and decide the question. The Committee recognizes the periodic need for municipalities to extend their boundaries, but believes that an appropriate balance must be found between this need and the fundamental right of the people to choose under which authority they are subjected to.

Limited Remedies

As has been stated, residents who have been harmed by the illegal actions of a municipality, either during the annexation process or following the annexation itself, have little practical recourse by which to have the illegal action redressed. When a municipality fails or refuses to comply with the procedural requirements found in the Texas Local Government Code there is no

[325] *See, e.g.*, House Bill 564 (Combs, 74th Leg. 1995).
[326] *See*, House Bill 568 (Mowery 78th Leg. 2003); House Bill 323 (Mowery 79th Leg. 2005).
[327] *See*, House Bill 2329 (Mowery, 76th Leg. 1999); House Bill 2200 (Mowery, 77th Leg. 2001).

provision in current law that allows an aggrieved citizen to bring suit. Under state law, the only means by which to contest procedural irregularities is through a *quo warranto* proceeding, an action that may only be brought by the local district or county attorney, or by the Texas Attorney General, none of whom are generally willing to bring such an action. A similar problem exists for aggrieved residents when a municipality fails or refuses to provide services to a newly annexed areas as required by law. While aggrieved residents are authorized to petition the municipality for disannexation and even sue the municipality in district court if services are not provided, the courts have diminished the importance of this legal remedy by interpreting state law to require municipalities to only provide those services that are specifically stated in their service plans, even when such service plans are grossly out of compliance with state law and obligate the municipality to only provide inadequate services.

Failure or Refusal to Provide Services

If a municipality fails to provide services to a newly annexed area within the statutorily prescribed amount of time, the only recourse for aggrieved residents is to petition the municipality for disannexation. As has been stated, the general disannexation process involves a petition by a majority of the qualified voters of the area when the municipality fails or refuses to provide services to the area in accordance with the service plan within 2½ years (4½ if certain services cannot reasonably be provided within 2½ years).[328] If the municipality fails or refuses to disannex the area within sixty days, a petitioner may sue in district court for disannexation (certainly a costly and frequently cost prohibitive method to require a municipality to comply with its obligations under state law).[329] The district court is required to disannex the area if it finds that the municipality failed to perform its obligations in accordance with the service plan or failed to perform in good faith.[330]

At the May 5, 2008 public hearing the Committee took the testimony of Karen Hall who described to the members her experience when she petitioned and then sued the City of Bryan for disannexation following the municipality's failure to provide required services to a newly annexed area in which she lived. Following a summary judgment determination in favor of the municipality the Court of Appeals in Waco reviewed the case. Ms. Hall did not argue that the City had failed in a significant way to comply with the provisions of the service plan as written. Instead, Ms. Hall argued that the service plan as written did not provide for the provision of "full municipal services" as required elsewhere in the Texas Local Government Code. The City argued that the only means to challenge the contents of an annexation service plan is through a *quo warranto* proceeding brought on behalf of the state and that so long as a City provided services in accordance with the terms of its annexation service plan, disannexation was an improper remedy. The Court of Appeals agreed with the City, finding in essence that a municipality is only required to perform those obligations that are specifically stated in their service plans, even if the service plan is grossly out of compliance with state law.

[328] *Id.*, § 43.141(a).
[329] *Id.*, § 43.141(b).
[330] *Id.*

The Committee is of the opinion that the disannexation provision, found in Section 43.141 of the Texas Local Government Code, could easily be amended to remedy this situation, thereby allowing affected residents to be disannexed when an annexing municipality fails to provide services as required by both the letter and the spirit of the law. For example, Section 43.141(b) could easily be amended to read as follows:

> (b) . . . . The district court shall enter an order disannexing the area if the court finds that a valid petition was filed with the municipality and that the municipality failed to perform its obligations in accordance with the service plan and Section 43.056. . . . .[331]

The Committee is of the opinion that such a change is appropriate and should be made by the 81st Texas Legislature.

Procedural Irregularities and Abuses

A suit to contest procedural irregularities must be brought by either the local district or county attorney, or by the Texas Attorney General, on behalf of the state as a *quo warranto* petition. A *quo warranto* action is brought on behalf of the public and is intended to avoid a multiplicity of suits by private parties, and the conflicting results that could result. A *quo warranto* action is discretionary in that the state has the discretion whether to file the action and cannot be compelled to file the action. It is unclear precisely how often such actions have been filed regarding annexation abuses, though anecdotal evidence suggests that quo *warranto* proceedings are rarely brought. Julian Grant, in his testimony before the Committee on May 5, 2008, admitted that the Office of the Texas Attorney General generally does not intervene in local annexation disputes, and in fact has only done so when the annexation involves questions that involve the state (annexation on the border or involving coastal questions, for example). As such, while state law may mandate that municipalities comply with a number of procedural requirements, the fact that they will almost never be called to task for their non-compliance creates an atmosphere ripe for abuse and one that is heavily biased in favor of municipalities.

On the one hand, there are strong arguments to be made that it would be bad public policy to authorize affected residents to freely sue annexing municipalities simply upon the assertion that a procedural irregularity has occurred. Given the highly charged atmosphere surrounding many municipal annexations, coupled with the significant financial burden levied on taxpayers when their municipal government is forced to defend its actions in court, it would be truly problematic to allow aggrieved residents to sue an annexing municipality without some check in place to ensure that such claims are valid. On the other hand, as has already been stated, the current *quo warranto* system is not adequately protecting residents from the abusive, negligent, or simply illegal procedural actions of municipalities.

In 2007, Representative Anna Mowery introduced House Bill 520 that attempted to resolve this *quo warranto* problem.[332] House Bill 520 authorized the voters of an area identified by an

[331] *See, e.g.*, Committee Substitute Version of House Bill 328, SECTION 1 (Leibowitz, 80th Leg. 2007).
[332] House Bill 520 (Mowery, 80th Leg. 2007).

annexation plan (or an area annexed under an annexation plan) to petition the Texas Attorney General or the local district attorney to initiate legal proceedings if they believed that the annexing municipality had failed to comply with the procedural requirements imposed by Subchapter C of Chapter 43 of the Texas Local Government Code.[333] Under provisions in the bill, the Texas Attorney General or district attorney would be required to conduct an investigation of the facts presented in the petition and to initiate legal action if it was determined that the facts presented in the petition supported initiating the proceeding.[334]

The Committee is of the opinion that provisions (perhaps such as though introduced in House Bill 520) can be drafted and enacted that create a meaningful tool for aggrieved residents, that protect municipalities from frivolous claims, and that grant some latitude to those judicial officials to whom such assertions of municipal misconduct are brought.

CONCLUSION

The Committee understands that annexation is a necessary tool for municipalities, but recognizes the seemingly endless controversies that surround its current use. The Committee is generally of the opinion that an imbalance exists between the power of municipalities to unilaterally annex new territory and the limited and loose set of provisions that currently are in place to protect those residents who are affected by the improper actions of some municipalities. As such, the Committee is of the opinion that some reform to the current annexation scheme is needed to create a more appropriate balance between those involved with municipal annexations.

As a general rule, the Committee has historically supported the proposition that it is a fundamental right in a free society for people to be able to choose where they live and under what authority they subject themselves to. The members of the Committee are generally of the opinion that the perennial question of the propriety of the unilateral ability of municipalities to annex new territory is of such importance that the Full House of the Texas House of Representatives should be given the opportunity to fully debate and decide the question.

The Committee is also of the opinion that far too many annexations are unnecessarily excluded from having to be included by a municipality in its annexation plan. The members believe that the vast majority of annexations should occur following the successful completion by the municipality of all of the procedural requirements found in Subchapter C of the Texas Local Government Code. The Committee recognizes that such a change in law may cause some inconvenience to some municipalities in some cases, but believes that such inconvenience is offset by the benefits received by residents of both the municipality and of the area that is to be annexed.

Finally, the Committee is of the opinion that in order for annexing municipalities to be accountable for their actions that there must be a mechanism in place that provides for

[333] *See, Id.*, SECTION 1.
[334] *See, Id.*

meaningful recourse for affected residents when the municipality fails or refuses to comply with state law.

RECOMMENDATIONS

1) The Full House of the Texas House of Representatives should be given the opportunity to fully debate and decide the question of whether or not municipalities should be required to acquire the approval of the residents that it proposes to annex as a precondition to annexation.

2) State law should be amended to severely limit the types of areas that may be excluded from having to be included in a municipality's annexation plan under Section 43.052(h) of the Texas Local Government Code.

3) State law should be amended to ensure that aggrieved citizens have meaningful recourse when a municipality fails to comply with state law, regardless of whether the non-compliance results from a procedural or a substantive manner.

   Specifically, Section 43.141 of the Texas Local Government Code should be amended to require a court to disannex an area if a municipality fails to provide full municipal services to a newly annexed area as required by Section 43.056 of the Texas Local Government Code, not simply if the municipality fails to comply with the annexation service plan as written.

   State law should be amended to create a meaningful tool for aggrieved residents to contest (or have contested on their behalf) the procedural abuses or mistakes made by municipalities during and following the annexation process (perhaps as was suggested in 2007 by House Bill 520).

INTERIM CHARGE FOUR

Effectiveness of the Private Real Property Rights Preservation Act

Examine the effectiveness of the Private Real Property Rights Preservation Act (Chapter 2007, Government Code).

EFFECTIVENESS OF THE PRIVATE REAL PROPERTY RIGHTS PRESERVATION ACT

INTERIM CHARGE

"Examine the effectiveness of the Private Real Property Rights Preservation Act (Chapter 2007, Government Code)."[335]

SCOPE OF REPORT

This section of the Interim Report examines the Texas Legislature's attempt through the passage of the Texas Private Real Property Rights Preservation Act (Act) to balance the fundamental right of the individual to own and possess property with the limited interest of the "state" to act for the communal good through the regulations that it adopts. Specifically, this section examines the branch of eminent domain jurisprudence referred to as "regulatory" takings, the background to the introduction and the passage of the Act, the specific provisions of the Act, and the current effectiveness of the Act at balancing the rights of the individual with that of the community at large.

SUMMARY OF COMMITTEE ACTION

Committee Hearing

The House Committee on Land and Resource Management (Committee) met in a posted public hearing on May 6, 2008, in Austin, Texas. The Committee heard the testimony of five witnesses. Those who testified were:

Bob Turner (Former Member of the Texas House of Representatives)
Gary McGehee (Texas Farm Bureau)
Bennie Bock II (Texas & Southwestern Cattle Raisers' Association)
Scott Houston (Texas Municipal League)
Scott Norman (Texas Association of Builders)

Summary of Testimony

Bob Turner, a former Texas State Representative and co-author of the Texas Private Real Property Rights Preservation Act (Act), provided the Committee with information regarding the

[335] Rule 3, Section 25(2), of the Rules of The Texas House, grants jurisdiction to the House Committee on Land and Resource Management "over all matters pertaining to . . . the power of eminent domain . . . ."

background, enactment, provisions, and shortcomings of the Act. Mr. Turner described to the Committee the circumstances surrounding the introduction and passage of the Act in 1995, most notably that the political reality at that time prevented the authors from enacting more meaningful protections for property owners. Mr. Turner explained to the members that he recognizes the limitations of the Act, but warned the Committee that it would take a great deal of political strength to significantly reform the Act's provisions in any meaningful way.

Gary McGehee, a member of the Texas Farm Bureau's Board of Directors, explained to the Committee that the Act was intended, among other things, to ensure that property owners are adequately compensated when a governmental action diminishes the value of their property. Mr. McGehee explained that the Act is not an effective tool for protecting private property owners from regulatory takings, primarily because the Act exempts certain governmental entities, exempts many actions by most other governmental bodies, and because it contains provisions that discourage bringing suit to enforce its provisions. Specifically, Mr. McGehee advised the Committee to repeal the municipal exemption, to remove the "loser pays" provision, and to extend the period of time during which a landowner can bring suit or file a contested case from 180 days to two years.

Bennie Bock, representing the Texas & Southwestern Cattle Raisers' Association (TSCRA), informed the Committee that the TSCRA supported the passage of the Act in 1995 and still supports the original intent of the Act, that being to ensure that property owners are compensated when a governmental action negatively affects the value of their property. However, Mr. Bock explained that the Act has not been effective in this regard, primarily because it contains numerous exemptions and because it discourages the filing of lawsuits. Mr. Bock informed the Committee that the TSCRA supports removing the "loser pays" provision, reducing the number of exemptions (especially the special blanket exemption for municipalities), and extending the statute of limitations for bringing suit or filing a contested case.

Scott Houston, the Director of Legal Services for the Texas Municipal League, explained to the Committee that it is good public policy for municipalities to be exempted from the provisions of the Act. Mr. Houston argued to the members that municipalities would be sued for almost every ordinance that they adopted if they were subject to the Act. Mr. Houston explained to the Committee that municipalities simply can not afford to either compensate property owners or defend themselves in court for every decision that they make. Based on this economic reality, municipalities would be forced to either not adopt or not enforce regulations, thereby nullifying their whole reason for being.

Scott Norman, Vice President for Governmental Affairs for the Texas Association of Builders, described to the Committee both the beneficial and problematic provisions in the Act, specifically arguing that the blanket exemption for municipalities undermines most of the positive provisions within the law. Mr. Norman explained to the members that municipal ordinances and regulations account for the vast majority of governmental actions that negatively affect the value of private property. Mr. Norman suggested to the Committee that the Act would be improved with the repeal of the blanket municipal exemption, the removal of the "loser pays" provision, and by extending the period during which a landowner could file suit or file a contested case from 180 days to two years.

BACKGROUND

The Power of Eminent Domain

> Government is instituted to protect property of every sort. . . . This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.[336]

Eminent domain is the power of the state (or those to whom the power has been duly delegated)[337] to take private property for public use.[338] Neither the United States nor the Texas Constitution specifically authorize the use of eminent domain, though the power is implied in both documents through the restrictions that they place upon its use.[339] The Takings Clause for the United States Constitution, found in the Fifth Amendment to that document, states in pertinent part that:

> No . . . private property [shall] be taken for public use, without just compensation.[340]

In Texas, Section 17 of Article I of the Texas Constitution provides that:

> No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . .[341]

Both the United States and Texas constitutions require that the taking of private property must be for a "public use", and that when an authorized entity takes private property for a "public use" that it must fairly compensate the owner for the property taken. The right of a property owner to be compensated for the taking of his or her property is a vested right under the federal

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[336] James Madison, "Property", *National Gazette*, March 29, 1792, reprinted in *The Papers of James Madison*, ed. R. Rutland *et al*. (Charlottesville: University Press of Virginia, 1983), vol. 14, p. 266-68.

[337] *See*, *Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 716 (Tex. App.--Corpus Christi 2000, pet. denied) (holding that the legislature may grant the authority to exercise that power to governmental and non-governmental entities as long as the exercise is for a public use).

[338] *See e.g.*, U.S. CONST., Amend. V; TEX. CONST., art I, § 17; TEX. PROP. CODE . §§ 21.001 *et seq*. Courts in New Hampshire and North Carolina construe sections of their state constitutions as implementing the common law requirement for just compensation for takings be paid by the state and its subdivisions.

[339] In determining the source of this power, it is important to remember the fundamental distinction between the federal and states constitutions. The United States Constitution is a "granting" document, meaning that the federal government has only those powers that are granted to it by the Constitution. Provisions in the federal Bill of Rights are direct limitations on the specific powers delineated in the Constitution. For example, the power of eminent domain is arguably granted to the federal government in the Necessary and Proper Clause, found in Article I, Section 8, of the Constitution. This clause is limited by the Takings Clause found in the Fifth Amendment. On the other hand, the Texas Constitution, like all state constitutions, is a "limiting" document, meaning that the state government has all those powers that are not prohibited to it.

[340] U.S. CONST., AMEND. V.

[341] TEX. CONST., art I, § 17.

constitution.[342] Any state law that purports to take away this right is unconstitutional under the Fourteenth Amendment to the United States Constitution.[343]

"Physical" Versus "Regulatory" Takings

> So great . . . is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.[344]

A governmental entity can "take" private property through either a "physical" or a "regulatory" taking. A "physical" taking generally occurs when an authorized entity (often a governmental body) exercises the power of eminent domain through the condemnation process to physically occupy real property.[345] A "regulatory" taking generally occurs when a governmental entity adopts and applies laws or regulations that are overly restrictive of the property owner's use of his or her property.

The courts have consistently held that a physical taking is an exercise of the power of eminent domain and that such a taking is compensable. It is clear that when a governmental entity takes title to property for a public use that the entity must compensate the owner for the taking. When such cases are litigated, the court is generally asked only to determine what compensation is due, or to determine whether or not the taking is for a public use, not whether it constitutes a taking in the first place.[346] Even temporary or periodic invasions by an entity have been deemed by the courts to be physical takings, especially when the invasion is substantial or recurring.[347] In

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[342] Prior to the adoption of the Fourteenth Amendment the power of eminent domain of state governments "was unrestrained by any federal authority." *Green v. Frazier*, 253 U.S. 233, 238 (1920). In *Barron v. City of Baltimore*, 32 U.S. 243 (1833), the United States Supreme Court ruled that the federal Bill of Rights restricted only the federal government and did not apply to the states.

[343] *See*, *Chicago, B. & Q. R. CO. v. City of Chicago*, 166 U.S. 226 (1897) (holding that the Fourteenth Amendment to the United States Constitution restrains actions by a state through either its legislative, executive, or judicial department, which deprives a party of his property without due compensation).

[344] William Blackstone, *Commentaries on Laws of England*, A Facsimile of the First Edition of 1765-1769 (Chicago: Univ. Of Chicago, 1979), vol. 1, p. 135.

[345] In Texas, the condemnation process is generally governed by the provisions found in Chapter 21 of the Texas Property Code.

[346] *See, e.g. Berman v. Parker*, 348 U.S. 26 (1954) (holding that the governmental taking of private property that is subsequently given to a private urban renewal agency for a public purpose is a "public use"); *Davis, et al. v. the City of Lubbock, et al.*, 326 S.W.2d 699 (Tex. 1959) (holding that a governmental taking of private property, in accordance with a validly enacted urban renewal plan, that is then sold to private citizens is a "public use"); *Kelo v. City of New London, Connecticut*, 125 S. Ct. 2655 (2005) (holding that a taking by a governmental entity that benefits private parties, on the assumption that the added tax base of new private developments will benefit the public as a whole, is a "public use").

[347] *See, e.g. Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (holding that the Fifth Amendment requires the government to pay a property owner compensation for a regulatory taking even if the taking is only temporary); *United States v. Causby, 328 U.S.*, 256 (1946) (holding that the takeoff and landing of military planes within the immediate reaches of private property constitutes a taking when there is an interference with the actual use of the property); *City of Austin v. Travis County Landfill Co., L.L.C.*, 73 S.W.2d 234, 239 (Tex. 2002) (considering aircraft overflights takings claim, asserted under Texas Constitution, by reference to federal standard established in *Causby*); *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (holding that civilian airplane

addition, even seemingly limited physical intrusions have been held to be physical takings. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, the United States Supreme Court determined that a New York law requiring landlords to allow television cable companies to emplace cable facilities in their apartment buildings constituted a taking even though the facilities occupied at most only 1½ cubic feet of the landlords' property.[348]

On the other hand, courts have been willing to allow substantial governmental regulation of private property before they consider it a taking for which the owner must be compensated.[349] For example, in the early regulatory takings decision in *Village of Euclid v. Amber Realty Co.*, the United States Supreme Court determined that a zoning ordinance that reduced the value of Amber Realty's property by seventy-five percent was a valid exercise of the city's police power, and not a compensable taking under the United States' Constitution.[350] As in *Euclid*, the judiciary has historically authorized governing bodies to broadly regulate private property, primarily because of these entities responsibility for protecting the public's health, safety, and welfare as part of their "police power."[351] According to current case law, these entities are constitutionally permitted to affect the use and value of private property through the establishment and enforcement of such things as building codes, zoning regulations, and environmental regulations, just to name a few.

However, the judiciary has established that a regulation may rise to the level of a compensable taking under certain circumstances. As Justice Oliver Wendell Holmes explained in 1922, the general rule is "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[352] Since 1922, the courts have struggled to create rules by which to determine whether a given regulation has "gone too far", thereby rising to the level of a compensable taking. The result has been the creation of a complex and varying set of uncertain rules that are applied to each case on an *ad hoc* basis.

The United States Supreme Court has determined as a categorical rule that compensation is due to a property owner when a governmental regulation or action "denies all economically

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over-flights caused noise comparable to that of "a riveting machine or steam hammer" that made people in the house unable to converse or sleep is a taking).

[348] *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

[349] *See, e.g., Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (holding that a restriction that devalued property by approximately ninety percent, from $800,000 to $60,000 was not a taking); *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926) (holding that a zoning regulation that reduced value of the property by seventy-five percent was not a taking); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (holding that the Fifth Amendment does not guarantee the most profitable use of property); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (holding that a zoning ordinance that limited an owner to building between one and five single family residences on 5 acres purchased for residential development to not be a taking); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023 (3d Cir. 1987) (holding that a reduction in value from $495,600 to $52,000 was not a taking).

[350] *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

[351] *See, e.g., Barbier v. Connolly*, 113 U.S. 27, 31 (1885) (stating that 14th Amendment was not intended to interfere with power of state to "prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity"); *Furey v. City of Sacramento*, 780 F.2d 1448, 1454 (9th Cir. 1986) (observing that power to place reasonable restrictions on use of land without compensating landowners is within local government's inherent police power).

[352] *Pennsylvania Coal Co. v. Mahon et al.* 260 U.S. 393, 416 (1922).

beneficial or productive use of land."[353] For example, in *Lucas v. South Carolina Coastal Council*, the United States Supreme Court ruled that provisions within South Carolina's *Beachfront Management Act* (BMA) prohibiting the erection of any permanent structures in certain coastal areas resulted in a regulatory taking that the state was required to pay for.[354] The BMA provisions in question prohibited David Lucas from building two single-family homes on either of two residential lots that he had paid $975,000 for in 1986, two years prior to the enactment of the prohibition. In cases such as this, the courts have determined that a regulatory taking has occurred and that compensation is required, regardless of the public interest that is advanced by the governmental entity responsible for the regulation.

However, when a regulation does not render a property completely valueless, the United States Supreme Court has attempted to balance the interests of the property owner and the public by analyzing the following three case-specific factors that were first laid out by the Court in *Penn Central Transportation Co. v. City of New York* in 1978:[355]

1) The economic impact of the regulation upon the property owner.

2) The extent to which the regulation has interfered with distinct investment-backed expectations.

3) The character of the governmental action.

Importantly, the United States Supreme Court has held that these factors are not intended to "supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required."[356] As such, regulatory takings' determinations should be based on all relevant circumstances and should not be limited to the three *Penn Central* factors.

When presented with regulatory takings' cases, Texas courts have generally applied the body of jurisprudence that has been created by the federal courts over the past century.[357] Currently,

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[353] *See*, *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834, (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015-16 (1992); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495, (1987); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 295-296, (1981).

[354] *Lucas*, (1992).

[355] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978) (holding that a New York law that prevented the owner of Grand Central Terminal from constructing a multistory office building above the terminal was not a compensable taking); *See* also, *Lucas*, at 1016-20 (holding that the South Carolina *Beachfront Management Act* that prohibited the building of any permanent habitable structures in certain areas is a *per se* taking under the United States Constitution because it deprived the property owner of all economic viable uses of the property); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1478 (2002) (holding that determining whether or not a thirty-two month building moratorium was a taking should be made by use of the framework established in *Penn Central*).

[356] *Pallazzolo v. Rhode Island*, 553 U.S. 606, 634 (2001).

[357] *See, e.g.*, *Sheffield v. City of Glenn Heights*, 140 S.W.3d 660, 669 (Tex. 2004) (looking to "federal jurisprudence for guidance, as we have in the past, ..." in a regulatory takings' case brought under the Texas Constitution); *City of Austin v. Travis County Landfill Co., L.L.C.*, 73 S.W.2d 234, 239 (Tex. 2002) (considering takings claim asserted under Texas Constitution by reference to the federal standard established in *Causby*); *Mayhew*

most Texas regulatory takings cases are controlled by the 2004 determination made by the Texas Supreme Court in the case of *Sheffield Development Co., Inc. v. City of Glenn Heights*.[358] In *Sheffield*, a developer sued the City of Glenn Heights, claiming that the city's building moratorium and subsequent rezoning of the developer's property diminished the value of the property, thereby constituting a compensable taking under the Texas Constitution.[359] The Court of Appeals, after concluding that the city's action resulted in a thirty-eight percent diminution in value of the property, agreed with the developer and ordered the city to pay $485,000 in damages. The Texas Supreme Court, ruling in favor of Glenn Heights, rejected the Court of Appeals mathematical approach and instead attempted to balance the specific interests of the public and of the property owner, explaining that:

> There is . . . no one test and no single sentence rule . . . . The need to adjust the conflicts between private ownership of property and the public's interests is a very old one which has produced no single solution.[360]

A recent commentator has remarked that the "*Sheffield* decision is far from precise in its reasoning and does little to establish workable standards to guide local governments [or property owners] in predicting what is and is not a taking . . . ."[361] This criticism can be applied to attempts by the judiciary in general to create a body of law that provides certainty in this area. Couple this uncertainty with the general judicial deference to determinations made by governmental bodies and the result is an inequitable and imbalanced situation in which the rights of private property owners are frequently trumped by claims of the general good. As a result of the courts' inability to adequately protect private property rights, citizens have looked to their legislatures to do the job statutorily.

The Private Real Property Rights Preservation Act[362]

In 1995, the 74th Texas Legislature enacted the Private Real Property Rights Preservation Act (Act) in response to complaints voiced around the country that the fundamental right to own

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v. Town of Sunnyvale, 964 S.W.2d 922, 932 (Tex. 1998) (assuming that "state and federal guarantees in respect to land-use constitutional claims are coextensive, . . ." and analyzing the takings claims "under the more familiar federal standards.").

[358] *Sheffield,* (Tex. 2004).

[359] Interestingly, *Sheffield* could not bring suit against the city under the Texas Private Real Property Rights Protection Act because of the general municipal exemption.

[360] *Id.*, at 670 (quoting *City of College Station v. Turtle Rock Corp*., 680 S.W.2d 802, 804 (Tex. 1984)).

[361] Robert F. Brown, (April, 2004). "Small Islands in the Serbonian Bog: An Analysis of Sheffield v. Glenn Heights". Retrieved from Brown & Hofmeister, L.L.P website: http://www.bhlaw.net/CM/ArticlesPresentations/Small%20Islands%20in%20the%20Serbonian%20Bog%20-%20An%20Analysis%20of%20Sheffield%20v%20Glenn%20Heights%20092606.pdf, p. 20 (accessed May 28, 2008).

[362] There have been numerous articles written about the Texas Private Real Property Rights Protection Act since its enactment in 1995. *See, e.g.* George E. Grimes, Jr., "Texas Private Real Property Rights Preservation Act: A Political Solution to the Regulatory Takings Problem", 27 ST. MARY'S L.J. 557 (1996); Daniel Anderson, "The Texas `Takings' Statute: Ten Basic Facts to Know", 60 TEX. B.J. 12 (1997); Christian Brooks, "Political Bluff and Bluster: Six Years Later, A Comment on the Texas Private Real Property Rights Preservation Act", 33 TEX. TECH. L. REV. 59 (2001).

property was not being adequately protected.[363] Introduced as Senate Bill 14 and codified as Chapter 2007 of the Texas Government Code, the provisions of the Act attempt to enlarge the scope of protections afforded to property owners whose property has been negatively effected by a governmental action.[364] These protections are established in the Act through a variety of means, most importantly by the creation of a statutory cause of action for property owners who believe that a governmental action has resulted in the reduction in the market value of their property.[365] In addition, the Act contains a broader definition of "taking" that takes into account a diminution of the property's value, a requirement that governmental entities in Texas evaluate the affect of their actions on property rights, and a provision that allows a jury to determine if a taking has occurred, to name a few.[366]

<u>Protection Against Uncompensated Regulatory Takings</u>

The Act does not limit the ability of a governmental entity to implement regulations. The Act simply requires that when a "governmental action" reduces the value of an affected piece of property by twenty-five percent or more, that the responsible governmental entity must either compensate the owner for the loss or withdraw the regulation.[367] The Act defines "governmental entity" and "governmental action" broadly, to include most entities and actions. For example, "governmental entity" is defined to include the following two categories of governmental bodies:[368]

1) A board, commission, council, department, or other agency in the executive branch of state government that is created by constitution or statute, including an institution of higher education as defined by Section 61.003, Education Code.

2) A political subdivision of this state.

The Act also defines "governmental action" broadly, though indirectly, in the "applicability" section of the Act, by making the following actions subject to the provisions of the Act:[369]

1) The adoption or issuance of an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure.

2) An action that imposes a physical invasion or requires a dedication or exaction of private real property.

However, as is the case with many of the important and meaningful provisions within the Act, these definitions are limited by the applicability provisions found in Section 2007.003 that have

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[363] *See*, Grimes, p. 580-589 (arguing that the "rise in property rights activism is largely a response to the environmental protection movement of the last quarter century"); Brooks, p. 59-63, 81-83.
[364] *See*, Senate Bill 14 (Bivens, 74th Leg. 1995); TEX. GOV'T. CODE, §§ 2007.001 *et. seq.*
[365] TEX. GOV'T. CODE, § 2007.021.
[366] *See, Id.* §§ 2007.002(5), 2007.043, 2007.023(a).
[367] *Id.,* §§ 2007.023, 2007.024.
[368] *Id.,* § 2007.002(1).
[369] *Id.,* § 2007.003(a).

the practical effect of exempting many governmental entities and actions.

On another note, Senate Bill 14 as introduced did not afford an offending governmental entity with the option of paying compensation or withdrawing the regulation. Under this early version of the bill, the governmental entity was required at a minimum to pay the owner for the temporary taking caused by their action, even if the regulation was subsequently rescinded or changed.[370] As with many of the stronger provisions in Senate Bill 14, this section was watered down during the political process to allow governmental entities the option to simply rescind their action.

New Cause of Action

The Act creates a cause of action against a political subdivision of the state to determine whether an action by the subdivision has resulted in a taking.[371] In regards to actions by state agencies, the Act authorizes an aggrieved landowner to file a contested case with the agency to "determine whether a governmental action . . . results in a taking under [Chapter 2007]."[372] The Act also waives sovereign immunity to the extent of liability created by the new provisions, and authorizes courts to award property owners all damages, including loss of market value, reasonable and necessary attorney's fees, expert witness fees and all prejudgment interest.[373]

Importantly, it was not until late in the legislative process that Senate Bill 14 was amended to require a losing property owner to pay the costs of a governmental entity in a lawsuit or contested case. This "loser pays" provision remains one of the significant deterrents to bringing suit, a primary source of criticism regarding the effectiveness of the Act.

New Definition of "Taking"

The Act includes a broadened definition of "taking" that incorporates both the current law regarding takings under the United States and Texas Constitutions, and a new statutory definition that attempts to further protect property owners from regulatory takings.[374] The new definitional language considers a "taking" to include a governmental action that "is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property . . . ."[375] While this definition is an important statutory addition, the applicability section of the Act significantly limits the number of entities and actions that the new definition applies to, thereby rendering the addition little more than a symbolic statement by the legislature of what a regulatory taking should be.

Takings Impact Assessments

The Act requires a governmental entity to consider the impact that a proposed governmental

[370] *See*, Senate Bill 14 as Introduced, (Bivens, 74th Leg. 1995).
[371] TEX. GOV'T. CODE, § 2007.021.
[372] *Id.,* § 2007.022.
[373] *Id.,* §§ 2007.004(a), 2007.026.
[374] *Id.,* § 2007.002(5).
[375] *Id.,* § 2007.002(5)(B)(ii).

action may have on the property rights of those affected by the regulation. This consideration is accomplished by requiring non-exempted governmental entities to prepare a written Takings Impact Assessment (TIA) prior to taking any of the following actions:[376]

1) Adopting or issuing an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure.

2) Taking an action that imposes a physical invasion or requires a dedication or exaction of private real property.

3) Taking an action affecting the extraterritorial jurisdiction of a municipality, excluding annexation, that enacts or enforces an ordinance, rule, regulation, or plan that does not impose identical requirements or restrictions in the entire extraterritorial jurisdiction of the municipality.

A governmental entity is required to analyze certain factors and then present information regarding these factors in the TIA. Importantly, the Act provides that a "governmental action requiring a [TIA] is void if an assessment is not prepared."[377] Specifically, a TIA is required to contain the following information:[378]

1) A description of the specific purpose of the proposed action.

2) An identification of whether and how the proposed action substantially advances its stated purpose, and the burdens imposed on private real property and the benefits to society resulting from the proposed use of private real property.

3) A determination whether engaging in the proposed governmental action will constitute a taking.

4) A description of reasonable alternative actions that could accomplish the specified purpose.
5) A comparison, evaluation, and explanation of how an alternative action would further the specified purpose, and whether an alternative action would constitute a taking.

As has been noted regarding other substantive provisions within the Act, the inclusion of certain applicability provisions exempt most governmental entities from having to conduct TIAs, thereby making the requirement for such TIAs likewise ineffective.

The authors of the Act intended to pass a piece of legislation that would create a process by which governmental entities would truly consider the effect that their decisions and actions would have on property owners, and by which property owners who had been harmed by these

[376] *Id.,* § 2007.043.
[377] *Id.,* § 2007.044(a).
[378] *Id.,* § 2007.043(b).

decisions and actions could have their harms equitably redressed. However, as was pointed out at the Committee's May 6, 2008 hearing, the authors of the Act were faced with significant political opposition and were forced to settle with the current flawed Act.

DISCUSSION

Effectiveness of the Act

Various concerns regarding the effectiveness of the Texas Private Real Property Rights Preservation Act (Act) as a property rights protection measure have been raised by property rights advocates since the enactment of Senate Bill 14 in 1995. While the provisions of the Act are on paper quite substantial, very few landowners actually benefit from these provisions. This is due primarily to the limited applicability of the Act, and to the prohibitive nature of bringing suit to enforce its provisions. As the result of these two factors, the Act can not be labeled as "effective" in protecting private property rights in Texas. One commentator has gone as far as to say that the Act is "so limited by exceptions, exclusions, and financial disincentives to bring action that it most likely amounts to little more than a vote gathering machine for the legislators that supported it."[379]

Limited Applicability

The Act's applicability provision, found in Section 2007.003, Texas Government Code, has the effect of exempting many governmental entities and actions from having to comply with the provisions of the Act. As a result, each and every one of the truly substantive protections and provisions that remain within the Act can actually be applied in only a limited number of situations, making the Act itself ineffective at protecting the private property rights of Texans.

For example, the Act defines "governmental entity" broadly to mean a "political subdivision of this state" or a "a board, commission, council, department, or other agency in the executive branch of state government . . . including an institution of higher education . . . ."[380] This broad definition by itself is an important addition to the Act. However, the Act also creates a near blanket exemption for municipalities, the type of governmental entity that is responsible for perhaps the greatest number of complaints from property owners, most often regarding the affect that a municipal zoning ordinance has had on the value of their property. All municipal enactments, including zoning ordinances, are exempt from the requirements of the Act with the exception of non-uniform municipal regulations imposed within their extraterritorial jurisdictions.[381]

Critics, including those who testified before the Committee on May 6, 2008, have suggested repealing the exemption for municipalities. Their primary argument is that there is no valid

[379] *See*, Brooks, p. 90.
[380] *See*, TEX. GOV'T. CODE, § 2007.002.
[381] *Id.*, § 2007.003(b)(1).

reason to exempt municipalities. In fact, these critics note that for the Act to be truly effective, it should at a minimum apply to municipalities who are most often responsible for enacting and enforcing those regulations that diminish the value of private property. Legislation has periodically been introduced and debated in the Texas Legislature proposing the repeal of this exemption, to this point without success. Specifically, in 1999 and again in 2001, Representative Frank Corte introduced bills that would have removed the specific exemption for municipalities.[382] In 2005, the 79th Texas Legislature came close to removing the municipal exemption with its work on Representative Robert "Robby" Cook's House Bill 2833, a hotly debated bill that made it all the way to the Senate Floor for debate prior to the ending of the legislative session.[383]

In addition to the virtually blanket exemption for municipalities, the applicability section of the Act also exempts a wide range of governmental actions. By exempting a broad group of actions, the Act creates enough loopholes to allow most otherwise included governmental entities to assert that their actions fall outside the scope of the Act.[384] There are at least twenty-two types of activities, listed in fourteen separate provisions, which governmental entities are authorized to engage in without having to comply with the Act's requirements.[385] Many of these provisions are broad and open-ended. For example, governmental actions that attempt to curtail public or private nuisances or that are "necessary to prevent a grave and immediate threat to life or property" are just two of the broad exceptions that a governmental entity can cite in order to fall outside the provisions of the Act.[386]

As was mentioned, in 2005, Representative Robert "Robby" Cook introduced House Bill 2833, a fairly comprehensive revision of the Act that included amending the list of exemptions in a substantial, reasonable, and equitable manner.[387] For example, Representative Cook suggested dividing the laundry list of action exemptions in two, creating one set of actions that would remain exempted from the provisions of the Act, and another set of actions (previously exempt) that would be exempt only if they did not "affect building size, lot size, impervious cover, or the timing of the development or improvement of real property. . . ."[388] Important to this attempted revision, Representative Cook included language expanding the applicability of the Act by redefining "taking" to include any governmental restriction that had the effect of limiting the overall impervious cover of a piece of property to less than forty-five percent.[389] House Bill 2833 was passed by 117 members of the Texas House of Representatives, was voted out of the Senate Committee on Natural Resources, but ultimately failed to be passed by the members of the Texas Senate.

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382 *See,* SECTION 1, House Bill 2935 (Corte, 76th Leg. 1999); SECTION 1, House Bill 25 (Corte, 77th Leg. 2001).

383 *See* SECTION 2, House Bill 2833 (Cook, 79th Leg. 2005).

384 TEX. GOV'T. CODE, § 2007.003(b).

385 *Id.,* § 2007.003(b)(2)-(14).

386 *Id.,* § 2007.003(b)(6) and (7).

387 House Bill 2833 (Cook, 79th Leg. 2005).

388 House Committee Substitute to House Bill 2833, SECTION 2 (Cook, 79th Leg. 2005).

389 *Id.,* SECTION 1.

From a recent survey of state agencies, it appears that most are either ignoring the provisions of the Act or are able and willing to claim one of the many exceptions to exempt them from compliance with the Act. In 2006, Representative William "Bill" Callegari conducted a formal written survey of eighty-three state agencies to determine the level of compliance with the Act. Of the sixty-two state agencies that responded, only the Texas Commission on Environmental Quality stated that it had ever created a Takings Impact Assessment (TIA). The remaining sixty-one state agencies had not conducted a single TIA.

Finally, the Act limits the type of situations in which the action of a governmental entity will be brought under its provisions. The new definition of "taking" that requires a government action that "affects an owner's private real property that is the subject of the governmental action," is limiting for two main reasons.[390] First, the provision clearly applies only to actions affecting real property, thereby excluding personal property by implication. In addition, this provision specifically limits the applicability of the Act to property that is the subject of the action. This has the effect of excluding adjoining property owners who have nevertheless been negatively affected by the action. A recent commentator has described scenarios in which such a limitation would be problematic:

> Consequently, a decision to build a new state prison on state property would not create a cause of action in adjoining landowners whose property was reduced in value by the action. In addition, a decision by a government entity to allow a property owner to engage in a regulated use that nearby property owners claimed reduced their property values would not grant the complaining property owners a cause of action against the government.[391]

As a result of the Act's limited applicability, the protections in the Act rarely have any value to actual landowners affected by these governmental entities who claim their actions do not fall within the applicability provisions of the Act.

Infrequent Contests by Property Owners

It is uncertain how many affected property owners have brought suit against a governmental entity under the cause of action created by the Act. It is certain that this Act can in no way be labeled a litigation generator. In the thirteen years since its adoption, only two cases involving the Act have made it to the Texas Supreme Court, and only two other cases of importance have been decided by the state's appellate courts.[392] Critics and commentators on the Act have stressed a number of provisions that create an inhospitable environment for an aggrieved property owner to bring suit. Of course, the ability to seek relief granted by the Act becomes fairly meaningless if subsequent provisions make it realistically prohibitive to do so.

[390] TEX. GOV'T. CODE, § 2007.002(5)(B). *See*, Grimes, at 590-591.

[391] *See*, Grimes, p. 590-591.

[392] *See, Bragg v. Edwards Aquifer Authority*, 71 S.W.3d 729 (Tex. 2002) (holding that the plain language of the Private Real Property Rights Preservation Act does not require the Authority to prepare Takings Impact Assessments before action on individual water well permit applications); *Hallco Texas, Inc. v. McMullen County*, 221 S.W.3d 50 (Tex. 2007).

"Loser Pays" Provision

A primary factor discouraging litigation is a provision within the Act that requires a property owner who is unsuccessful in court to pay the governmental entity's attorney's fees and court costs.[393] Because a property owner has to prove at least a twenty-five percent reduction in their property's value, and will most likely have to pay experts to do demonstrate this reduction to often fickle jury members, it is not easy for a claimant to determine the likelihood of victory under the Act. Add to this the fact that even if the landowner is successful at trial, he or she is only entitled to have the governmental actions invalidated, which a governmental entity could do to avoid paying damages to the landowner, and it becomes quite risky to bring suit under the Act.[394]

Importantly, Senate Bill 14 did not contain a "loser pays" provision until late in the legislative process. A "loser pays" provision was not added to the bill until after the Full Senate had sent the bill to the House and until after the House Committee on Land and Resource Management had reported Senate Bill 14 to the Full House. It was only on the House Floor, and later in the Conference Committee, that this provision was made part of the bill.[395]

Short Statute of Limitations

Another factor that may have the affect of limiting litigation is the requirement that a property owner file suit or a contested case 180 days after they know or should have known that the governmental action restricted or limited their private property rights.[396] This is an extremely short statute of limitations when compared to other similar types of causes of actions. For example, a property owner is allowed ten years to file suit for a physical taking under the Texas Constitution.

As introduced, Senate Bill 14 provided a two year statute of limitations for bringing suit under the Act. Like the "loser pays" provision, the current language in the Act allowing only 180 days to bring suit was added to Senate Bill 14 late in the legislative process.[397] In fact, an amendment on the House Floor that proposed changing the filing period was withdrawn, and it was only in the Conference Committee that this change was made.

No Compensation for Temporary Taking

The judiciary has recognized the compensable nature of temporary takings and the fact that economic damage may have occurred as the result of a governmental action during even short periods of time.[398] As filed in 2005, Senate Bill 14 did recognize that, just because a governmental entity rescinds or otherwise changes an offending regulation, an affected property owner may have nevertheless suffered real economic damages prior to the rescission or change.

[393] TEX. GOV'T. CODE, § 2007.026(b).
[394] *Id.,* §§ 2007.023, 2007.024(c).
[395] *See*, "Amendment 31", House Journal, 74th Legislature, Regular Session, p. 2804 (May 17, 2005).
[396] TEX. GOV'T. CODE, §§ 2007.021(b), 2007.022(b).
[397] *See*, "Amendment 26", House Journal, 74th Legislature, Regular Session, p. 2801 (May 17, 2005).
[398] *See, e.g. Evangelical Lutheran Church* (1987).

As introduced in Senate Bill 14, Section 2007.023(d), Texas Government Code, provided:

> If the trier of fact determines that a governmental action resulted in a taking, and the governmental action has ceased or has been rescinded, amended, invalidated, or repealed, the private real property owner may recover compensation in an amount equal to the temporary or permanent economic loss sustained while the governmental action was in effect.[399]

However, as has been stated, like many other meaningful provisions in Senate Bill 14, this provision was removed prior to the enactment of the Act. As it is structured now, the Act allows a governmental entity to merely invalidate an offending governmental action, without payment the aggrieved property owner for any taking that has occurred since the application of the regulation to the piece of property. The ability of a governmental entity who loses a challenge brought by a landowner to simply invalidate the Act is certainly a factor in the low number of suits being brought under the Act.

As a result of the Act's applicability provision and those provisions that discourage the bringing of suit to enforce the Act, the Act can not be labeled as "effective" in protecting private property rights in Texas.

Model Legislation

The Committee has included as Appendix 4-A draft legislation that attempts to address the shortcomings of the Act. The draft legislation is modeled after Representative Robby Cook's House Bill 2833 (79th Leg. 2005), and suggests the following changes to the Act:

1) The Act is made applicable to a broad group of governmental entities and governmental actions. These changes address the applicability concerns of the critics of the Act and reflect the original intent of the authors.

   The blanket exemption for municipalities is repealed (SECTION 2).

   The numerous governmental activities exceptions are repealed or amended (SECTION 2).

   Impervious cover regulations that go "too far" are deemed to be compensable regulatory takings (SECTION 1).

2) The provisions that have the affect of discouraging litigation to enforce the intent and provisions of the Act are amended.

   The 180 day statute of limitations for either bringing suit or for contesting a case to enforce the Act is amended to allow at least two years to bring suit or contest a case (SECTIONS 3 and 4).

[399] Senate Bill 14, SECTION 1 (Bivens, 74th Leg. 1995).

The "loser pays" provision is amended to require a losing property owner to pay a governmental entity's attorney fees and court costs only if the property owner knew the lawsuit or contested case was frivolous (SECTION 7).

3) The Act is amended to recognize that a property owner should be compensated when the action of a governmental entity results in a temporary taking (SECTIONS 5 and 6).

The Committee believes that these amendments to the Act will go a long way towards ensuring that property owners have meaningful protection against the often times insensitive actions of their government.

CONCLUSION

> [T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man . . . . The preservation of property then is a primary object of the social compact.[400]

The Committee believes that it is not an exaggeration to state that our political, social, and economic freedoms are rooted in the ability of the people to own and possess private property without fear of excessive governmental interference. As such, the Committee commends the authors of the Texas Private Real Property Rights Preservation Act (Act) for their noble attempt to protect the truly fundamental right of Texans to own private property without fear that an unresponsive governmental body will adopt laws or regulations that will diminish the value of that property. The Committee also believes that the often times unrestrained actions of governmental bodies, especially municipalities, coupled with the deferential attitude taken by the courts towards such actions, has led to a situation in which the rights of individual property owners have been undermined for what some might claim is the public good. The Committee believes, as was stated by United States Supreme Court Justice Oliver Wendell Holmes in 1922, that:

[400] *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795); *See, also*, John Locke, *Two Treatises of Government*, ed. by Peter Laslett, Sec. 138 (Cambridge, 1988), ("The *Supream Power cannot take* from any Man any part of his *Property* without his own consent. For the preservation of property being the end of government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should *have Property* . . . ."); Publius, "The Federalist X," in *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle Over Ratification*, ed. by Bernard Bailyn (New York: Literary Classics, 1993), vol. 1, p. 405. ("the diversity of the faculties of men, from which the rights of property originate, . . . is the first object of government."); *Publius*, "The Federalist LIV," in *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle Over Ratification*, vol. 2, p. 199 ("government is instituted no less for protection of the property than of the persons of individuals."); James Madison, “Property,” *National Gazette*, March 29, 1792, reprinted in *The Papers of James Madison*, ed. R. Rutland et al. (Charlottesville: University Press of Virginia, 1983), vol. 14, p. 266-68 (“Government is instituted to protect property of every sort . . . . This being the end of government, that alone is a just government, which impartially secures to every man, whatever is his own.”).

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.[401]

By providing definitions and processes regarding regulatory takings, the Texas Legislature in 1995 recognized the danger cited by Justice Holmes and attempted to address this danger in a balanced and reasonable manner. Unfortunately, the political reality of the time (and unfortunately most likely of today as well) led to the insertion of numerous exemptions to the provisions of the Act that, coupled with provisions discouraging the bringing of suit to enforce it, created a document that is little more than symbolic. The Committee believes that it is important that meaningful reforms be made to improve the Act, thereby protecting the fundamental right of free people to freely own private property.

RECOMMENDATIONS

1) The blanket exemption for municipalities from the provisions of the Texas Private Real Property Rights Preservation Act found in Section 2007.003(b)(1), Texas Government Code, should be repealed.

2) The numerous activities exceptions found in Section 2007.003(b), Texas Government Code, should be repealed or amended, as is appropriate, to minimize the numerous loopholes found in the current law. (See Appendix 4-A, SECTION 2).

3) The 180 day statute of limitations for either bringing suit or for contesting a case to enforce the Texas Private Real Property Rights Preservation Act found in Section 2007.021(b) and Section 2007.022(b), Texas Government Code, should be amended to allow at least two years to bring suit or contest a case.

4) The "loser pays" provision found in Section 2007.026(b), Texas Government Code, should be amended to require a losing property owner to pay a governmental entity's attorney fees and court costs only if it is shown that the property owner knew the lawsuit or contested case was frivolous.

5) If it is determined that a governmental action resulted in a taking, and the governmental action has ceased or has been rescinded, amended, invalidated, or repealed, the private real property owner should be entitled to recover compensation in an amount equal to the temporary or permanent economic loss sustained while the governmental action was in effect. (See Appendix 4-A, SECTIONS 5 and 6).

[401] *Pennsylvania Coal*, 416 (1922).

APPENDIX 4-A

A BILL TO BE ENTITLED
AN ACT

relating to the protection of private real property from regulatory takings.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 2007.002, Government Code, is amended by amending Subdivision (5) and adding Subdivision (6) to read as follows:

(5) "Taking" means:

(A) a governmental action or series of actions that affects private real property, in whole or in part or temporarily or permanently, in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or Section 17 or 19, Article I, Texas Constitution; [~~or~~]

(B) a governmental action or series of actions that:

(i) affects an owner's private real property that is the subject of the governmental action, in whole or in part or temporarily or permanently, in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action; and

(ii) is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property, determined by comparing the market value of the property as if the governmental action is not in effect and the market value of the property determined as if the governmental action is in effect; or

(C) a governmental action or series of actions that has the effect of limiting the overall impervious cover of any development or use of an owner's private real property to less than 35 percent of the surface area of the property, excluding any portion of the property that is within the 100-year floodplain as determined by the most recent maps published by the Federal Emergency Management Agency or that slopes more than 35 percent.

(6) "Impervious cover" means impermeable surfaces, such as pavement or rooftops, that prevent the infiltration of water into the soil. The term does not include a rainwater collections system for a domestic water supply.

SECTION 2. Section 2007.003, Government Code, is amended to read as follows:

Sec.2007.003. APPLICABILITY. (a) This chapter applies only to the following governmental actions:

(1) the adoption or issuance of an ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure;

(2) an action that imposes a physical invasion or requires a dedication or exaction of private real property; and

(3) [~~an action by a municipality that has effect in the extraterritorial jurisdiction of the municipality, excluding annexation, and that enacts or enforces an ordinance, rule, regulation, or plan that does not impose identical requirements or restrictions in the entire extraterritorial jurisdiction of the municipality; and~~

[~~(4)~~] enforcement of a governmental action listed in Subdivisions (1) and (2) [~~through (3)~~], whether the enforcement of the governmental action is accomplished through the use of permitting, citations, orders, judicial or quasi-judicial proceedings, or other similar means.

(b) This chapter does not apply to the following governmental actions:

(1) [~~an action by a municipality except as provided by Subsection (a)(3);~~

[~~(2)~~] a lawful forfeiture or seizure of contraband as defined by Article 59.01, Code of Criminal Procedure;

(2) [~~(3)~~] a lawful seizure of property as evidence of a crime or violation of law;

(3) [~~(4) an action, including an action of a political subdivision, that is reasonably taken to fulfill an obligation mandated by federal law or an action of a political subdivision that is reasonably taken to fulfill an obligation mandated by state law;~~

[~~(5)~~] the discontinuance or modification of a program or regulation that provides a unilateral expectation that does not rise to the level of a recognized interest in private real property;

(4) [~~(6)~~] an action taken to prohibit or restrict a condition or use of private real property if the governmental entity proves that the condition or use constitutes a public or private nuisance as defined by background principles of nuisance and property law of this state;

[~~(7) an action taken out of a reasonable good faith belief that the action is necessary to prevent a grave and immediate threat to life or property;~~

(5) [~~(8)~~] a formal exercise of the power of eminent domain;

(6) [~~(9)~~] an action taken under a state mandate to prevent waste of oil and gas, protect correlative rights of owners of interests in oil or gas, or prevent pollution related to oil and gas activities;

[~~(10) a rule or proclamation adopted for the purpose of regulating water safety, hunting, fishing, or control of nonindigenous or exotic aquatic resources;~~

(7) [~~(11)~~] an action taken by a political subdivision[~~:~~

[~~(A) to regulate construction in an area designated under law as a floodplain;~~

[~~(B) to regulate on-site sewage facilities;~~

[~~(C) under the political subdivisions's statutory authority to prevent waste or protect rights of owners of interest in groundwater; or~~

[~~(D)~~] to prevent subsidence;

(8) [~~(12)~~] the appraisal of property for purposes of ad valorem taxation; or

(9) [~~(13) an action that:~~

[~~(A) is taken in response to a real and substantial threat to public health and safety;~~

[~~(B) is designed to significantly advance the health and safety purpose; and~~

[~~(C) does not impose a greater burden than is necessary to achieve the~~

~~health and safety purpose; or~~

[~~(14)~~] an action or rulemaking undertaken by the Public Utility Commission of Texas to order or require the location or placement of telecommunications equipment owned by another party on the premises of a certificated local exchange company.

(c) This chapter does not apply to the following governmental actions, if the actions do not affect building size, lot size, or impervious cover:

(1) an action that is reasonably taken to fulfill an obligation mandated by federal or state law;

(2) an action taken based on reasonable evidence that the action is necessary to prevent a grave and immediate threat to life or property;

(3) an action taken by a political subdivision to regulate construction in an area designated under law as a floodplain;

(4) an action that:

(A) is taken in response to a threat to public health and safety;

(B) is designed to significantly advance the health and safety purpose; and

(C) does not impose a greater burden than is necessary to achieve the health and safety purpose; or

(5) an action taken to prevent waste or protect rights of owners of an interest in groundwater. [~~Sections 2007.021 and 2007.022 do not apply to the enforcement or implementation of a statute, ordinance, order, rule, regulation, requirement, resolution, policy, guideline, or similar measure that was in effect September 1, 1995, and that prevents the pollution of a reservoir or an aquifer designated as a sole source aquifer under the federal Safe Drinking Water Act (42 U.S.C. Section 300h-3(e)).~~]

(d) [~~This chapter applies to a governmental action taken by a county only if the action is taken on or after September 1, 1997~~].

[~~(e)~~] This chapter does not:

(1) limit or otherwise affect the authority of a municipality, a county, another political subdivision, the state, or an agency of the state, with respect to the implementation or enforcement of an ordinance, a rule, or a statutory standard of a program, plan, or ordinance that was adopted under:

(A) the federal Coastal Zone Management Act of 1972 (16 U.S.C. Section 1451 et seq.); or

(B) Subtitle E, Title 2, Natural Resources Code;

(2) apply to a permit, order, rule, regulation, or other action issued, adopted, or undertaken by a municipality, a county, another political subdivision, the state, or an agency of the state in connection with:

(A) the federal Coastal Zone Management Act of 1972 (16 U.S.C. Section 1451 et seq.); or

(B) Subtitle E, Title 2, Natural Resources Code; or

(3) limit or otherwise affect [~~apply to~~] the enforcement or implementation of Subchapter B, Chapter 61, Natural Resources Code, as it existed on September 1, 1995, or to the enforcement or implementation of any rule or similar measure that was adopted under that subchapter and was in existence on September 1, 1995.

(e) This chapter does not apply to an action taken by a political subdivision to ensure compliance with on-site sewage facility regulations promulgated by the Texas Commission on Environmental Quality.

SECTION 3. Section 2007.021(b), Government Code, is amended to read as follows:

(b) A suit under this subchapter must be filed not later than the second anniversary of the later of:

(1) the earliest date on which the ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure on which the suit is based is enforced with respect to the owner's private real property; or

(2) the earliest date on which the ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure on which the suit is based is applied to the owner's private real property with respect to any permit application affecting the real property [~~180th day after the date the private real property owner knew or should have known that the governmental action restricted or limited the owner's right in the private real property~~].

SECTION 4. Section 2007.022(b), Government Code, is amended to read as follows:

(b) A contested case must be filed with the agency not later than the second anniversary of the later of:

(1) the earliest date on which the ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure on which the case is based is enforced with respect to the owner's private real property; or

(2) the earliest date on which the ordinance, rule, regulatory requirement, resolution, policy, guideline, or similar measure on which the case is based is applied to the owner's private real property with respect to any permit application affecting the real property [~~the 180th day after the date the private real property owner knew or should have known that the governmental action restricted or limited the owner's right in the private real property~~].

SECTION 5. Section 2007.023(b), Government Code, is amended to read as follows:

Sec. 2007.023. ENTITLEMENT TO INVALIDATION OF GOVERNMENTAL ACTION.

(b) If the trier of fact in a suit or contested case filed under this subchapter finds that the governmental action is a taking under this chapter, the private real property owner is only entitled to, and the governmental entity is only liable for,:

(1) invalidation of the governmental action or the part of the governmental action resulting in the taking; and

(2) damages as established by Section 2007.024(b)(2).

SECTION 6. Section 2007.024(a) and (b), Government Code, is amended to read as follows:

Sec. 2007.024. JUDGMENT OR FINAL DECISION OR ORDER. (a) The court's judgment in favor of a private real property owner under Section 2007.021 or a final decision or order issued under Section 2007.022 that determines that a taking has occurred shall:

(1) order the governmental entity to rescind the governmental action, or the part of the governmental action resulting in the taking, as applied to the private real property owner not later than the 30th day after the date the judgment is rendered or the decision or order is issued; and

(2) order the governmental entity to pay the private real property owner compensation in an amount equal to the temporary or permanent economic loss sustained while the governmental action was in effect, if the governmental action has ceased or has been rescinded, amended, invalidated, or repealed.

(b) The judgment or final decision or order shall include a fact finding that determines;

(1) the monetary damages suffered by the private real property owner as a result of the taking; and

(2) the temporary or permanent economic loss sustained by the private real property owner while the governmental action was in effect, if the governmental action has ceased or has been rescinded, amended, invalidated, or repealed.

The amount of damages is determined from the date of the taking.

SECTION 7. Section 2007.026(b), Government Code, is amended to read as follows:

(b) The court or the state agency shall award a governmental entity that prevails in a suit or contested case filed under this subchapter reasonable and necessary attorney's fees and court costs if and only if the court determines that the private real property owner brought the suit or contested the case knowing that the suit or case had no merit.

SECTION 8. Section 2007.041(a), Government Code, is amended to read as follows:

(a) The attorney general shall prepare guidelines to assist governmental entities in identifying and evaluating those governmental actions described in Section 2007.003(a)(1) and (2) [~~through (3)~~] that may result in a taking.

SECTION 9. Section 2007.042(a), Government Code, is amended to read as follows:

(a) A political subdivision that proposes to engage in a governmental action described in Section 2007.003(a)(1) or (2) [~~through (3)~~] that may result in a taking shall provide at least 30 days' notice of its intent to engage in the proposed action by providing a reasonably specific description of the proposed action in a notice published in a newspaper of general circulation published in the county in which affected private real property is located. If a newspaper of general circulation is not published in that county, the political subdivision shall publish a notice in a newspaper of general circulation located in a county adjacent to the county in which affected private real property is located. The political subdivision shall, at a minimum, include in the notice a reasonably specific summary of the takings impact assessment that was prepared as required by this subchapter and the name of the official of the political subdivision from whom a copy of the full assessment may be obtained.

SECTION 10. Section 2007.044, Government Code, is amended by amending Subsection (a) and adding Subsection (d) to read as follows:

(a) A governmental action requiring a takings impact assessment is void if an assessment is not prepared in compliance with the evaluation guidelines developed by the attorney general under Section 2007.041. A private real property owner affected by a governmental action taken without the preparation of a takings impact assessment as required by this subchapter may bring suit for a declaration of the invalidity of the governmental action.

(d) A proposed governmental action described by Section 2007.003(a)(1) or (2) that requires a takings impact assessment may be stayed if an assessment is not prepared or if the assessment is not in compliance with the evaluation guidelines developed by the attorney general under Section 2007.041. A private real property owner affected by the proposed governmental

action may bring suit to enforce the preparation of a takings impact assessment in compliance with those guidelines. If the trier of fact in a suit filed under this subchapter finds that the takings impact assessment is not prepared or is not in compliance with the evaluation guidelines, the court shall stay the proposed governmental action.

SECTION 11. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2009.

INTERIM CHARGE FIVE

Wind Resources As Property Rights

Study and evaluate policies held by other states in relation to how they treat wind resources as a property right.

WIND RESOURCES AS A PROPERTY RIGHT

INTERIM CHARGE

"Study and evaluate policies held by other states in relation to how they treat wind resources as a property right."[402]

SCOPE OF REPORT

This section of the Interim Report examines those limited issues involving the concept of wind as property. As such, this section does not examine in any detail the many issues associated with the wind power industry such as generation, transmission, and governmental subsidizations. What this section does attempt to do is answer questions such as whether or not wind is property, what legal theories support the concept of wind as property, what issues arise when wind is classified as property, and how other states treat wind as a property right. This section concludes with the recommendation that the Texas Legislature should abstain from legislating on questions involving the issue of wind as property until and unless there exists some specific and clearly defined problem that must be resolved.

SUMMARY OF COMMITTEE ACTION

Committee Hearing

The House Committee on Land and Resource Management met in a posted public hearing on May 6, 2008, in Austin, Texas. Those who testified were:

Paul Sadler (The Wind Coalition)
Ned Ross (FPL Energy)
Bill Jeffery (Professor of Law)
Lisa Chavarria (Wind Energy Attorney)
Jay Redford (Integra Realty Resources)
Gary McGehee (Texas Farm Bureau)
Bob Turner (Former Member of the Texas House of Representatives)

[402] Rule 3, Section 25(3), of the Rules of The Texas House, grants jurisdiction to the House Committee on Land and Resource Management "over all matters pertaining to . . . governmental regulation of land use . . . ."

Summary of Testimony

Paul Sadler, a former Texas State Representative and the Executive Director of the Wind Coalition, explained to the Committee that wind rights issues (those issues involving the concept of wind as property) involve many complicated and to date uncertain legal matters that are often interwoven with other complex bodies of law. Mr. Sadler advised the members that it was not clear to him whether or not wind is something that can be owned, whether wind is an interest that can be severed from the fee simple estate, or whether or not people are currently reserving or transferring severed wind rights. The primary point made by Mr. Sadler to the Committee was that in his opinion changes in the law regarding wind rights issues should be made by the judiciary in response to actual and specific disputes, not by the legislature in anticipation of some potential future problem. Mr. Sadler argued that the case-driven judicial process is preferable to the legislative process given the complexity of this area of the law and the real potential to create significant harm if not done correctly. However, if the legislature decides to enact provisions involving wind rights issues then it should do so with caution and only in order to resolve a clearly defined and existing specific problem.

Ned Ross, the Director of Regulatory Affairs for FPL Energy, provided general information to the Committee regarding the wind power industry in Texas. He explained to the members that FPL Energy is the largest wind power company in the country and in Texas, with $3 billion already invested in the state's wind power industry. Mr. Ross explained to the Committee that it is generally industry practice for wind power companies to enter into leases with surface estate owners that allow these companies to erect wind turbines and collect the energy generated from them. In return, surface estate holders receive lease payments or royalties from these wind power companies.

Mr. Ross explained to the members that FPL Energy has never been a party to a single contract involving a severed wind right, is not engaged in buying wind rights, and would not agree to a modification of a lease to authorize a severance. Mr. Ross explained to the members that FPL Energy would probably not enter into an agreement involving a severed wind right simply because the company needs continued access to the surface in order to construct and maintain the wind turbines used to capture the wind. In addition, Mr. Ross explained to the Committee that FPL Energy does not and will not encourage any party to sever their wind rights from the surface.

Mr. Ross answered various questions from the Committee on a host of wind related topics. Importantly, Mr. Ross explained that he believes that the legislature should not and does not need to enact legislation regarding wind rights in the state, for the same reasons that were stated by Mr. Sadler. Mr. Ross' opinion is that legislative action has the potential to create significant disturbances in a system that is currently working well.

Bill Jeffrey, an Associate Professor at the Texas Tech University Law School, informed the Committee of his opinions regarding certain wind rights issues, and described to the members

how other states treat wind as a property interest. Professor Jeffrey told the Committee that in his opinion wind possesses the attributes of property (for example, the ability to use, to exclude others from using, and to transfer). The Professor stated that he believes that people do have a right in the wind that blows across their land, and that this right conceivably can be severed. Professor Jeffrey, like the speakers before him, advised the members not to act on wind rights issues unless specific evidence of a real need to act became apparent, given the complexity of this area of the law and the potential to inadvertently create significant problems for landowners and for the wind power industry in the state.

Lisa Chavarria, a practicing wind energy attorney in Austin, answered a number of questions from the Committee regarding the wind power industry in Texas and the complicated set of legal questions and issues that surround it. Ms. Chavarria explained to the members that the general practice in the state is for wind power companies to enter into wind lease agreements with owners of the surface estate. Ms. Chavarria explained to the Committee that she has seen some "wind deeds" by which property owners have attempted to reserve some property interest in the wind after the conveyance of their surface estate. Typically, these deeds involve the reservation of the right to receive royalty payments from wind power companies, though it is not always clear what interests are actually being reserved by such deeds. For instance, it is not always clear whether these deeds sever an independent property right from the surface estate, or whether they merely reserve some ongoing or future interest to receive royalty payments, or authorize the holder to assign future leases, for example.

Based on her experience, Ms. Chavarria advised the Committee that there are no wind rights issues or situations existing in Texas that the legislature needs to address. In fact, Ms. Chavarria explained to the Committee that many wind rights provisions enacted by other states are problematic because they restrict the property rights of landowners (often unreasonably) and have the potential to unnecessarily impede the growth of the wind power industry. Ms. Chavarria is also of the opinion that many of the wind rights issues addressed by other states have already been resolved in this state through industry practices, the mechanism by which in her estimation such issues should be resolved.

Jay Redford, a certified appraiser and a Senior Analyst at Integra Realty Resources, provided the Committee with information regarding the scope and practices of the wind power industry in Texas, along with information and recommendations on how best to treat wind rights issues. As an appraiser who specializes in valuing wind rights, Mr. Redford argued that a wind right is a property interest that is severable from the surface estate, but that careful consideration should be given by landowners when deciding whether or not to split this interest from the rest of the property. Importantly, Mr. Redford explained to the members that the more important question for the legislature to answer is whether or not wind rights should be severable. Mr. Redford advised the Committee that in his opinion there is no wind rights issue or situation at this time that needs to be addressed by the Texas Legislature.

Gary McGehee, a member of the Texas Farm Bureau's Board of Directors, explained to the Committee that the Texas Farm Bureau believes that wind rights are interests in property that landowners should be able to freely lease, convey, sever, and reserve. It is Mr. McGehee's opinion that property owners currently are leasing property to wind power companies and that some have sold their property with the wind rights severed and reserved. Mr. McGehee informed the members that the Texas Farm Bureau is opposed to the types of legislative restrictions enacted by other states regarding wind rights because such restrictions burden the right to own private property and will impede the development of the wind power industry in Texas.

Bob Turner, a former Texas State Representative, described to the Committee his positive experience with the wind power industry in Coleman County, specifically regarding the financial benefits that the area received from the industry. Mr. Turner, as with the other witnesses who testified before the Committee, argued that there is currently no need for the legislature to take action on any wind rights issue, and that it is more appropriate for changes in this area of the law to be made through the judicial process.

BACKGROUND

The Power of Wind[403]

In simplest terms, when the sun's radiation heats the earth it creates hot air. As this hot air rises, the atmospheric pressure at the earth's surface is reduced and cooler air is drawn in to replace it. The result is wind. Since air has mass, when it is in motion it contains the energy of that motion (kinetic energy). Throughout history this kinetic energy has been used to turn the blades of wind mills, converting the kinetic energy of the wind into a mechanical force used to perform basic chores, for instance raising water from its source in the ground.[404] In recent years it has become profitable for wind power companies to engage in the business of harnessing the power of wind and converting its kinetic energy into electricity that can be bought and sold.

According to the American Wind Energy Association, the current wind power generating capacity in the United States is 16,818 megawatts,[405] with wind farms located in thirty-four

[403] *See*, Blair D. Parker, "Capturing the Wind: The Challenges of a New Energy Source in Texas," Texas House Research Organization Focus Report, (July 8, 2008) (examining in some detail the wind power industry in Texas and those issues surrounding it.).

[404] For a brief history of wind power with links to other relevant information, *see*, *Wikepdia*, s.v. "History of Wind Power", http://en.wikipedia.org/wiki/History_of_wind_power (accessed August 18, 2008).

[405] A megawatt is 1,000 kilowatt-hours (1 million watt-hours), or an amount of electricity that would supply the monthly power needs of 1,000 typical homes in the Western United States.

different states across the country.[406] It has been estimated that by the end of 2008 these wind farms will generate forty-eight billion kilowatt-hours of electricity, a number that represents approximately one percent of the country's electricity supply and is enough energy to power the equivalent of 4.5 million homes.[407] In 2007 alone, the industry installed 5,244 megawatts of wind power generating capacity (a forty-five percent increase in total capacity), an expansion that injected over $9 billion into the economy.[408] According to the United States Department of Energy, this rapid growth is the result of governmental subsidization, increased concerns about climate change, and the creation of renewable portfolio standards in many states.[409]

Currently, Texas leads the nation in the production of electricity generated by wind power with its wind farms capable of generating 5,604 megawatts of power, with new projects under construction expected to generate 3,162 additional megawatts of power.[410] The Texas wind power industry was given a needed boost in 1999 with the enactment of the Texas Renewable Portfolio Standard (RPS).[411] The RPS requires retail electric suppliers to increase over time the portion of electricity generated from renewable sources that they provide to their customers. Following the enactment of the RPS in 1999, the state began to experience what continues to be the rapid expansion of the number of wind farms, typically through the creation of wind leases granted to wind power companies from individual property owners.

Most wind farms in Texas range from 2,000 acres to more than 100,000 acres and can include numerous tracts owned by various individual landowners.[412] Only a small percentage of the land within a wind farm is actually occupied by wind turbines and access roads. Most of the land is used simply as a buffer zone between the wind turbines and other structures and adjacent properties. Typically, this buffer land continues to be available for farming, ranching, oil and gas operations, hunting, and other compatible uses.

A typical wind project in Texas involves a lease of the surface estate granted by a landowner to a wind power company for a term of years. This lease of the surface estate authorizes a wind power company to construct and maintain a given number of wind turbines on the property. In return, landowners typically receive a set rental price per turbine installed and sometimes a royalty payment (a small percentage of the gross annual revenue from the project). It is not uncommon for wind lease documents to be one hundred pages or more, specifying the rights and

[406] The American Wind Energy Association. (n.d.). "Fact Sheet: Another Record Year for New Wind Installations." Retrieved from the American Wind Energy Association's website: http://www.awea.org/pubs/factsheets/2008_Market_Update.pdf (accessed August 10, 2008).

[407] *Id*.

[408] *Id*.

[409] United States Department of Energy, "20% Wind Energy by 2030: Increasing Wind Energy's Contribution to U.S. Electricity Supply, " Publication DOE/GO-102008-2567, p. 5 (May, 2008) (finding that it is feasible for wind power to provide twenty percent of the nation's electricity by 2030.).

[410] The American Wind Energy Association. "U.S. Wind Energy Projects - Texas." Retrieved from the American Wind Energy Association's website: http://www.awea.org/projects/projects.aspx?s=Texas (accessed August 10, 2008).

[411] *See*, Senate Bill 7 (Sibley, 76th Leg., 1999) (codifying TEX. UTIL. CODE, § 39.904).

[412] *See*, Parker, "Capturing the Wind," p. 3.

responsibilities of both parties.

Wind Rights -- Legal Issues, Considerations, and Concerns

The law governing the ownership of wind in Texas has not kept pace with the rapid growth and development of the wind power industry. Neither the Texas Legislature nor the courts have formally determined whether or not wind is property, let alone defined the nature of any rights or liabilities created by such a determination. Nevertheless, billions of dollars in wind leases are in place, and there is some evidence that some landowners are reserving or conveying property interests in the wind when they transfer their surface estate, though the testimony given at the May 6, 2008 public hearing suggests that the severance of wind rights is not a common practice in the state. Importantly, given the lack of any specific statutory provisions or case law regarding the property nature of wind, it is unclear exactly what type of property interest in the wind, if any, that these landowners are actually reserving or conveying. What is more certain is that by all indications the wind power industry in the state is running smoothly at this time without governmental intervention or complaints from landowners.

It should be noted from the outset that the vast majority of legal issues concerning wind power in this state do not involve the concept of wind as property. While interesting in theoretical terms, answering questions regarding the property nature of wind is not that important in a practical sense for either landowners or for wind power companies. This is due primarily to the fact that most wind projects involve the lease of the surface estate, not the conveyance of any property interest in the wind itself. As such, disputes that may arise between the parties to a wind lease can be adequately addressed through the application of the existing body of state law regarding property and contracts. Other questions that may need to be resolved between landowners and their neighbors or their local officials, such as whether an individual should be allowed to erect a windmill on his or her property or not, can likewise be settled by the enforcement of the existing law of nuisance or zoning, to name two.

While it appears that many disputes are currently being resolved by existing law, by private agreements, or by industry practices, most observers agree that it is just a matter of time before disputes regarding wind rights issues will arise and will need to be resolved by the state. The members of the Committee listened to witness after witness at the May 6, 2008 public hearing explain to them that the judiciary is the proper body to resolve such disputes when and if they arise, not the state legislature acting sooner in anticipation of some potential and uncertain future problem. These witnesses argued, given the complexity of the legal issues involved and the potential to create significant harm if not done correctly, that the slow and methodical judicial process, driven by specific and existing disputes is preferable to legislative action. However, these witnesses explained that if the legislature decides to enact provisions involving wind rights issues then it should do so with extreme caution and only in order to resolve a clearly defined actual problem, which according to the witnesses does not exist at this time.

At the same time, given the rapid expansion of the wind power industry in Texas, and the inevitability that wind rights issues will arise at some point, it seems prudent for the legislature to at least review and understand the potential wind rights issues that may arise in the future. The legislature should consider such basic questions as whether or not wind is a separate property interest that can be owned apart from other property interests, what rights attach to such a determination (for both holders of the surface estate and the wind estate), and how this determination will affect the property interests held by competing rights holders, such as an owner of a mineral interest in the land. In order to answer such questions, the Committee believes that it is helpful for the Texas Legislature to understand how other states handle these wind rights issues.

DISCUSSION

While not a universal or even widespread practice, some states have addressed wind rights issues either through legislative action or through judicial determinations. The actions of these states generally involves either the severability of wind rights or the creation of a statutory framework regarding wind leases and wind easements. Importantly, the majority of states where wind is currently being converted into electricity have not acted on wind rights issues in any significant way. Before looking at what other states have done in greater detail, there are a number of initial theoretical considerations that should be examined by the Texas Legislature that will shed light on a number of wind rights issues.

Initial Theoretical Considerations

The Conception of Wind as Property

Professor Bill Jeffrey, in his presentation before the Committee on May 6, 2008, suggested that before examining the policies of other states regarding wind rights issues that it is important to first consider how we conceive of wind as property.[413] Judon Fambrough, an attorney at the Texas Real Estate Center in College Station, has framed the question as follows:

> Can [wind] be owned in the traditional sense? It has no physical manifestation equivalent to oil or gas deposits or any substance on which to stake a claim.[414]

Put differently, Lisa Chavarria, a wind energy attorney in Austin, has written:

[413] Bill Jeffrey, "Statement by Bill Jeffrey, Texas Tech University School of Law, May 6, 2008, Regarding Wind Resources as a Property Right," distributed to the members of the Texas House Committee on Land and Resource Management Committee, p. 1 (May 6, 2008).

[414] Judon Fambrough, "Blowin' in the Wind", Texas A & M University Real Estate Center, Publication 1574, p. 1 (July, 2002).

> The concept of wind ownership is difficult to comprehend because one cannot capture or possess the wind to the exclusion of all others. Wind is but the movement of air across property. How can one "possess" or own the movement of air?[415]

Legal experts are quick to remind us that the concept of property is not just about tangible items, but can also include non-tangible things of value.[416] For example, Ms. Chavarria has explained that the notion of property includes such things as "[patented] concepts and methods not just objects that can be physically possessed."[417] Ms. Chavarria offers the following definition of property, which in her estimation includes wind:

> [S]omething is classified as property once the marketplace assigns value to that thing or concept and the law in turn endorses that classification.[418]

In her estimation, the marketplace has assigned value to the wind, as evidenced by the large number of wind leases in the state, even if the law has yet to endorse the classification of wind as property.

Professor Jeffrey explained to the Committee that the concept of property also involves "things" that the title-holder has the right to control.[419] For example, an owner of property has the right to use it, to exclude others from using it, to transfer it to another person, to unbundle the various rights or interests in it, and the immunity from having it taken or harmed by another party.[420] This understanding of the meaning of property is in line with the definition given in Blacks Law Dictionary, which defines property in part as "the unrestricted and exclusive right to a thing; the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it."[421] In Professor Jeffrey's opinion, it is certainly reasonable to conceive of wind as something that a landowner can have a property interest in because an owner can use the wind blowing over his or her property, can exclude others from using it, and can conceivably unbundle the right from other property interests and either reserve it or dispose of it.

The position that wind is property is supported by the only court decision in the country that has held wind rights to be severable from the surface estate. In 1997, the California Court of Appeals, in *Contra Costa Water District v. Vaquero Farms, Inc.*, held that "windpower rights are 'substantial rights' capable of being bought and sold in the market place."[422] Though not statutorily or judicially defined as such by most states, the holding in *Contra Costa* and the

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[415] Lisa Chavarria, "Wind Power: Prospective Issues", 68 TEX. B.J. 832, 834 (2005).

[416] Lisa Chavarria, "Undertaking the Severance of Wind Rights", Presentation at the Wind Energy Institute, Austin, Texas (February 19-20, 2008), p. 1.

[417] *Id.*

[418] *Id.*

[419] Jeffrey, "Statement by Bill Jeffrey," pp. 1-2.

[420] *Id.*

[421] Black's Law Dictionary, 5th ed. (West Publishing, 1979).

[422] *Contra Costa Water Dist. v. Vaquero Farms, Inc.,* 58 Cal.App. 4th 883, 893 (Cal.App. 1997).

arguments made by experts such as Professor Jeffrey and Ms. Chavarria certainly support the concept that wind is property that can be privately owned.

Legal Theories Supporting the Conception of Wind as Property

Terry E. Hogwood, an attorney in Houston, has suggested three separate legal theories by which to designate wind as property and to examine various issues that surround such a determination (such as who owns the wind if it is determined to be property).[423] First, Mr. Hogwood explains that the common law in Texas (under the Unified Fee Ownership Theory) recognizes that the ownership of real property includes not only the surface but also that which lies beneath and above the surface. The ownership of the surface estate extends to the use of the adjacent air.[424] Under this theory, for example, Texas courts have determined that landowners are entitled to the rain falling from the clouds over their property.[425] Under the traditional understanding of this common law rule, the owner of the surface over which any wind blows could rationally be determined to be the owner of that wind.

As a second theory, Mr. Hogwood suggests looking to the common law's treatment of the capture of wild animals as a basis by which to consider wind property. Under the Wild Animal Theory, no person owns indigenous wild animals so long as they remain wild and unconfined in a natural setting.[426] In fact, the state owns such animals in the wild.[427] However, a person may gain ownership of a wild animal when he or she legally captures it. Under this theory, a landowner would be considered to own the wind once he or she has captured it in a legally sufficient manner (under any regulations that the state may choose to put in place). On the other hand, landowners would lose claim to the wind by failing to capture it when it passes across their property.

The final theory that Mr. Hogwood suggests to establish wind as property looks to the body of law regarding water rights, what can be named the Water Jurisprudence Theory. Texas water law recognizes two types of underground water. First, there is water in an underground stream or lake that belongs to the state. A permit is needed to use this water. Second, there is water oozing or slowly moving through the soil that is not part of any underground stream or lake. This water, better known as percolating groundwater, is owned by the landowner, subject to the

[423] Terry E. Hogwood, "Against the Wind", Oil, Gas and Energy Resources Law Section Report, Vol. 26, Number 2, December 2001.

[424] *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex., 1971) (citing *United States v. Causby*, 328 U.S. 256 (1946); *Broughton v. Humble Oil & Refining Co.*, 105 S.W.2d 480 (Tex.Civ.App.--El Paso, 1937); *Schronk v. Gilliam*, 380 S.W.2d 743 (Tex.Civ.App.--Waco 1964). *See also*, *Schronk v. Gilliam*, 380 S.W.2d 743, 744 (Tex.Civ.App.--Waco 1964) (qualifying the common law rule to limit an owner's use of airspace so that the owner's use does not interfere with air travel).

[425] *Southwest Weather Research, Inc. v. Rounsaville*, 320 S.W. 2d 211, 216 (Tex.Civ.App.--El Paso, 1958) (holding that "under our system of government the landowner is entitled to such precipitation as Nature deigns to bestow. We believe that the landowner is entitled, therefore and thereby, to such rainfall as may come from clouds over his own property that Nature, in her caprice, may provide.").

[426] *Jones v. State*, 45 S.W.2d 612, 614 (Tex.Crim.App. 1931).

[427] *State v. Bartee,* 894 S.W.2d. 34, 41 (Tex.Civ.App.--San Antonio 1994).

rule of capture. Mr. Hogwood points to the decision in *Pecos County Water Control and Improvement District No. 1 v. Williams*, a 1954 Texas case in which the court determined that a "landowner owns the percolating water under his land and that he can make a non-wasteful use thereof, and such is based on a concept of property ownership."[428]

The Water Jurisprudence Theory, when applied to wind, allows for alternate answers to the question of who owns the wind. On the one hand, if the state determines that wind should be considered more like water in an underground stream or lake, then the wind belongs to the state. If however, the state finds that wind should be viewed as percolating groundwater, then the wind should be viewed as privately owned prior to its capture, not owned by the state. However, under this theory, the property interest owned is lessened by Texas case law that allows neighboring landowners to take all the percolating water that they can capture under their land, even if it diminishes the amount of water available for their neighbors (absent malice or willful waste).[429] In *Sipriano v. Great Spring Water of America, Inc*, the Texas Supreme Court stated:

> This Court adopted the common-law rule of capture in 1904 in *Houston & Texas Central Railway Co. v. East* . . . . Essentially, the rule provides that, absent malice or willful waste, landowners have the right to take all the water they can capture under their land and do with it what they please, and they will not be liable to neighbors even if in so doing they deprive their neighbors of the water's use.[430]

As applied to wind, the Percolating Water Theory would hold that a landowner owns the wind blowing across his or her property, subject to the rule of capture, meaning that the law would allow an adjacent landowner to erect structures to capture the wind without any liability to his or her neighbors who might suffer a decrease in the amount of wind on his or her property as a result.

As with wild animals and percolating groundwater, some have argued that the wind must be captured in order for it to be something that can be owned. Mr. Hogwood has made the following comments regarding the requirement that wind be captured prior to it being labeled property:

> Strictly speaking, the ownership of wind is a misnomer. Wind in and of itself does not appear to be susceptible of any ownership. It is not like oil and gas in place . . . which can be reduced to possession by one or more mineral owners. . . . Wind itself is more akin to a wild animal or percolating waters which must first be reduced to possession before they have value. To reduce wind to "possession" appears to require that it be focused on driving the fins of a wind [turbine] which

[428] *Pecos County Water Control & Improvement Dist. No. 1 v. Williams*, 271 S.W.2d 503, 505 (Tex.Civ.App. 1954).
[429] *Sipriano v. Great Spring Water of America, Inc.,*1 S.W.3d 75 (Tex. 1999).
[430] *Id.*, at 76.

> turn a generator and ultimately generates electricity. Then and only then can wind a) be reduced to possession and b) have value.[431]

However, Ms. Chavarria has suggested that it is problematic to legally require wind to be converted into electricity in order for it to be considered property.[432] She explains that such a requirement ignores the possibility that a landowner may place greater value on not converting wind into electricity, for example, in order to preserve the natural character of an area by purchasing a neighbor's wind rights, thereby preventing a wind farm from being constructed on an adjacent property.

Under any of Mr. Hogwood's three theories, the Texas Legislature, or the courts in the absence of a legislative determination, could reasonably conclude that wind is the property of the owner of the surface estate over which it blows. It should be noted that the development of wind projects in Texas to this point is based on the presumption that wind belongs to the owner of the surface estate, regardless of which theory is used to validate it.

State Regulation of Wind Use

As with many other wind rights issues, it has yet to be determined whether or not the state can regulate the use of wind, for example by enacting turbine spacing requirements. The Texas Constitution declares natural resources to be public rights and permits the legislature to enact provisions for their conservation and preservation.[433] In *Sipriano*, the Texas Supreme Court placed the duty to preserve the state's natural resources on the legislature, not the courts.[434] If wind is considered to be a natural resource the legislature could reasonably enact legislation to regulate its capture and usage, subject only to a subsequent judicial determination that wind is not a natural resource under the Texas Constitution. In fact, as Ms. Chavarria has explained, if wind is classified as a natural resource then the state "would have an obligation to maximize its development and formulate rules of law that are consistent with the public policy of developing all of the state’s natural resources, particularly those which provide its citizens with a valuable source of energy."[435]

Rights Incident to Wind as Property

If the legislature or the courts determine that wind is property owned by the holder of the surface estate, then it would be reasonable to determine which rights and liabilities attach to this ownership. For example, should the owner of the wind be allowed to sever it from the surface estate and then either reserve it or convey it to another party? If wind is severed and conveyed, what rights attach to the wind estate for the new owner? Finally, how should priorities among

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[431] Hogwood, "Against the Wind", p. 6.
[432] Chavarria, "Undertaking the Severance of Wind Rights", pp. 2-3.
[433] TEX. CONST., art XVI, § 59.
[434] *Sipriano*, at 79 (Tex. 1999).
[435] Chavarria, "Wind Power: Prospective Issues", pp. 837, 840.

competing rights holders, such as an owner of a mineral interest in the land, be defined? As has been stated, there does not appear to be a need for either the courts or the legislature to answer these questions at this time, given the fact that landowners are not severing their interest in the wind in large numbers, and because, by all accounts, the wind power industry is addressing issues as they arise through agreements and modified practices.

On the other hand, the Committee recognizes that it is unclear to what extent landowners are severing their property interest in the wind from the surface estate. Anecdotal evidence indicates that some number of property owners in Texas have severed their wind rights from their surface estate, and that some in the real estate business may be suggesting that property owners reserve their interest in the wind when they convey the surface estate. Mr. Sadler testified that he was uncertain about whether or not individuals were severing wind rights, though he had heard that some perhaps were. Mr. Ross explained that FPL Energy, the largest wind power company in the state, is not a party to a single contract involving a severed wind right, is not engaged in buying wind rights, and would not agree to a modification of a lease to authorize a severance. In addition, Mr. Ross explained to the Committee that FPL Energy does not and will not encourage any party to sever their wind rights from the surface.

Regardless of the frequency with which severances are occurring, the legitimacy of such severances remains in question because there are no statutory provisions or judicial determinations in Texas regarding this issue. Unlike the well established law regarding the severance of the surface estate from the minerals below it, there are no statutory provisions or court rulings that recognize the severance of wind from the surface estate. Jay Redford, in his testimony before the Committee, explained to the members that in his opinion wind rights are severable from the surface estate, but advised them that the more important question for the legislature to answer is whether or not wind rights should be severable at all.

On the one hand, the widespread reservation of severed wind rights could upset the business models of the wind power industry by requiring these companies to negotiate with two parties in order to capture the energy in the wind (the owner of the surface estate and the owner of the wind estate). However, it should be noted that the state could certainly grant to the holders of wind estates the right to use so much of the surface estate as necessary to develop the wind, as is the case regarding holders of mineral estates. In addition, it is possible that wind power companies could experience some degree of inconvenience by having to track down wind estate holders if it becomes commonplace for landowners to sever their wind rights from the surface estate. However, the legislature could certainly require recordation standards that would limit this inconvenience. It should also be noted that if the state chooses to prohibit the severance of the wind estate from the surface estate that landowners could still be parties to legal instruments that would allow them to profit from their interest in the wind when they sell the surface. For example, property owners could certainly reserve the contractual right to receive payments from wind power companies when they convey the surface estate. In fact, North Dakota has enacted as part of its overall package of wind rights provisions language preventing any state law from being construed to "prohibit or limit the right of a seller of real estate to retain any payments

associated with an existing wind energy project."[436]

On the other hand, there is a strong property rights argument to be made against prohibiting the severance of the wind estate from the surface estate. Property rights advocates, such as Mr. McGehee who testified on behalf of the Texas Farm Bureau, argue that it is inappropriate for the legislature or the courts to limit the ability of a landowner to dispose of his or her property in the manner that he or she determines is fitting, including prohibiting the severance of a wind estate from a surface estate. In weighing the pros and cons of prohibiting the severance of wind estates, it is also important to recognize that neither individual landowners nor the wind power companies in the state have expressed any concern to the Committee regarding the issue of severance. In fact, the witnesses at the May 6, 2008 public hearing were universally of the opinion that there is no need for the legislature to act at all regarding the severability of wind rights.

If the state determines that it is appropriate to allow landowners to sever wind rights from surface estates, then the question arises as to what rights should attach to the wind estate once it is severed. Ms. Chavarria suggests looking to the reasoning in California's *Contra Costa* case that viewed wind in the same vein as mineral rights, with similar rights attaching to the severed wind estate. She explains that a severed mineral estate in Texas carries with it the following five essential attributes:[437]

1) The right to develop.

2) The right to lease.

3) The right to receive royalty payments.

4) The right to receive bonus payments.

5) The right to receive delay rentals.

The state could certainly determine that sound public policy supports granting these rights to the holders of wind estates as well as to the holders of mineral estates. In fact, given the need for wind power companies to be able to access the surface to construct and maintain wind turbines, the wind estate would be "useless without an appurtenant right to use so much of the surface estate as necessary to develop and enjoy the wind."[438] In addition, Ms. Chavarria has explained that the justification for the grant of extensive rights and privileges to the holder of mineral estates is that the general public benefits from "policies that protect and foster the development of energy sources."[439] Ms. Chavarria has argued that since "wind power, oil, and gas have the

[436] N.D. CENT. CODE, § 17-04-04.
[437] *Altman v. Blake,* 712 S.W.2d 117, 118 (Tex. 1986).
[438] Chavarria, "Wind Power: Prospective Issues", p. 837.
[439] *Id.*

same ultimate function, each should have the same protections."[440]

If this mineral rights model is adopted by the state, and probably even if it is not, there may come a point where the state will need to define whether the mineral estate or the wind estate is dominant, or whether either of these estates actually needs to hold such a position. Under current Texas law, the rights of the owner of the mineral estate are dominant, meaning that he or she has the right to use the surface estate to the extent reasonably necessary for the exploration, development, and production of the oil and gas under the property. Accordingly, the owner of the mineral estate could block a wind project or could even tear down a wind turbine if required for the exploration, development or production of the mineral under the surface. The legislature or the courts at some point may need to determine whether or not this is the best public policy, or whether another rule would better serve the needs of the public at large.

Policies of Other States

There are a number of states across the country that have created wind rights policies either through legislative action or through judicial determination, primarily in response to the rapid growth of the wind power industry and the general absence of any statutory provisions or case law specifically dealing with wind rights issues or the regulation of the wind power industry.[441] Some of these actions address true wind rights issues (the severability of wind estates from surface estates for example), while others simply attempt to create some order for the expanding industry by tailoring existing legal concepts to the specifics of the wind power industry. For example, some states have enacted provisions that authorize, define, and limit wind easements and wind leases, apparently in an attempt to protect landowners from dishonest wind power developers and in order to prevent such developers from stockpiling wind rights or manipulating renewable energy markets.

Severability of Wind Estates

Currently, California is the only state that has specifically concluded that wind estates are severable from surface estates. In 1997, in *Contra Costa Water District v. Vaquero Farms, Inc.*, the California Court of Appeals reviewed a condemnation valuation dispute between Vaquero Farms and the Contra Costa Water District.[442] In 1984, Vaquero Farms leased a portion of its property to a wind power company and a wind farm was subsequently built by the company on the property. Nine years later, the Contra Costa Water District initiated condemnation proceedings against Vaquero in order to acquire a large portion of Vaquero's property. Although the Water District acquired the fee interest in Vaquero's surface estate, it severed the wind power rights and reserved them to Vaquero. Vaquero argued that, as a matter of law, the wind rights could not be severed from the surface estate and that it should be compensated for the value of its

[440] *Id.*

[441] *See*, Appendix 5-A for the wind rights statutory provisions enacted in Kansas, Minnesota, Oregon, Nebraska, North Dakota, and South Dakota.

[442] *Contra Costa*, (Cal.App. 1997).

lost wind power rights. The Court, ruling against Vaquero, held that the severance of the wind rights from the surface estate was proper based on the notion that "one may have a right to use windpower rights without owning any interest in the land."[443] To date, California is the only state to directly declare that wind is a property interest that can be owned separate from the surface estate.

On the other hand, at least two states have statutorily prohibited the severance of any wind right from the surface estate. South Dakota's prohibition, which reads as follows, specifically prevents the severance from the surface estate of any property interest associated with the production or potential production of energy from wind power:

> § 43-13-19. Severance of wind energy rights limited. No interest in any resource located on a tract of land and associated with the production or potential production of energy from wind power on the tract of land may be severed from the surface estate . . . except that such rights may be leased for a period not to exceed fifty years.[444]

Like officials in South Dakota, the North Dakota Legislature has also determined that it is appropriate to limit the ability of landowners to sever their wind rights from their surface estates. However, unlike South Dakota, the legislature in North Dakota has made an exception for wind easements, which under North Dakota law can be permanently severed from the surface estate.

> § 17-04-04. Severance of wind energy rights limited. Except for a wind easement . . . , an interest in a resource located on a tract of land and associated with the production of energy for wind power on the tract of land may not be severed from the surface estate . . . .[445]

Provisions such as those enacted by the legislatures in South Dakota and North Dakota that prohibit the severance of wind rights from the surface estate appear to be paternalistic in nature. Such prohibitions seem to be governmental attempts to protect landowners whom the state believes do not fully understand the interest that they are conveying, or whom the state believes are being taken advantage of by unscrupulous wind power developers. It is unclear to the Committee whether either of these states have experienced the widespread severance of wind rights, whether wind power developers in these states have taken advantage of landholders, or whether such developers have engaged in the wholesale purchase of wind rights in order to manipulate the wind power market in some way. Regardless, based on testimony given before the Committee on May 6, 2008 that severances are not occurring in large numbers in Texas, the members are of the opinion that there is no need at this time for the Texas Legislature to preemptively prohibit the severance of wind estates from surface estates.

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443 *Id.*, at 893.
444 S.D. CODIFIED LAWS § 43-13-19.
445 N.D. CENT. CODE, § 17-04-04.

Even if a need to prohibit severances does arise in the future, the Committee believes that such a need must be balanced with the fundamental right of the people to own property free from governmental interference. The Committee believes that it is generally not the place of government to limit the ability of landowners to dispose of their property in the manner that they deem appropriate. However, the members do recognize that situations do arise when public policy requires that some limited infringement of the right to own property must occur (the need of government to exercise the power of eminent domain at times, for example). Nevertheless, until and unless there exists a real need in the state to prohibit the severance of wind estates from surface estates, the Committee does not believe that the legislature should prohibit such an action, thereby limiting the ability of the people to retain or convey their property as they choose.

It is important to note that most of the states that have acted on wind rights issues have not in any way prohibited the severance of wind estates from surface estates, perhaps in deference to the belief that their citizens have the capacity and the right to dispose of their property as they see fit. What many of those states have done instead is to enact provisions that define and regulate certain relationships between landowners and wind power companies, such as those relationships stemming from the execution of wind easements and wind leases.

Wind Easements and Leases

Some states have enacted provisions that authorize, define, and limit wind easements and wind leases. It appears that these provisions are aimed at both protecting landowners from wind power developers and at preventing certain developers from stockpiling wind rights or manipulating markets and demands for renewable energy. Regardless of their intent, many of these provisions limit the property rights of landowners and have the potential to discourage the further expansion of the wind power industry.

Some states have attempted to create some sense of order to the law regarding wind rights issues by creating a structure and set of rules regarding wind easements. While a landowner and a wind power company may execute any number of different affirmative easements (right of ways across the surface for example), those relevant state provisions that define and regulate wind easements universally involve those negative easements that prohibit property owners from erecting a structure or engaging in activities that obstruct the free flow of wind across property. In virtually identical language, Minnesota, North Dakota, and South Dakota, define "wind easement" as follows:

> [W]ind easement means a right, whether stated in the form of a restriction, easement, covenant, or condition, in a deed, will, or other instrument executed by or on behalf of an owner of land or airspace for the purpose of ensuring adequate exposure of a wind power system to the winds.[446]

[446] MINN. STAT., § 500.30(1a); N.D. CENT. CODE, § 17-04-02; S.D. CODIFIED LAWS, § 43-13-16.

In comparison, both Nebraska and Oregon define "wind energy easement" to mean "any easement, covenant or condition designed to insure the undisturbed flow of wind across the real property of another." [447]

In Minnesota, North Dakota, and South Dakota, state law authorizes property owners to grant wind easements in the same manner and with the same effect as the conveyance of an interest in real property.[448] Some states also require that certain steps be taken to ensure that wind easements are properly recorded.[449] Minnesota, for example requires that "easements shall be created in writing and shall be filed, duly recorded, and indexed in the office of the recorder of the county in which the easement is granted."[450] Similar to provisions in Minnesota and South Dakota, Oregon requires that an instrument creating a wind easement include the following information:[451]

1) A legal description of the real property benefited and burdened by the easement.

2) A description of the dimensions of the easement sufficient to determine the horizontal space across and the vertical space above the burdened property that must remain unobstructed.

3) The restrictions placed upon vegetation, structures and other objects that would impair or obstruct the wind flow across and through the easement.

4) The terms or conditions, if any, under which the easement may be changed or terminated.

In most states wind easements run with the land that is benefited by the easement and the land that is burdened by it, except that such easements generally terminate upon the conditions stated in the easement.[452] In Oregon, wind easements can be terminated under one of three statutorily

[447] NEB. REV. STAT., 66-909.03; OREG. REV. STAT., § 105.900.

[448] MINN. STAT., § 500.30(2); N.D. CENT. CODE, § 17-04-03; S.D. CODIFIED LAWS § 43-13-17.

[449] *See e.g.*, OREG. REV. STAT., § 105.910; S.D. CODIFIED LAWS, § 43-13-17 (stating that the "easement shall be created in writing and shall be filed, duly recorded, and indexed in the office of the register of deeds of the county in which the easement is granted."); KAN. STAT. § § 58-2221, 58-2272.

[450] MINN. STAT., § 500.30(2).

[451] OREG. REV. STAT., § 105.910; MINN. STAT., § 500.30(3). *See also*, S.D. CODIFIED LAWS, § 43-13-18 (requiring any instrument that creates a wind easement to include: "(1) A description of the real property subject to the easement and a description of the real property benefiting from the wind easement; (2) A description of the vertical and horizontal angles, expressed in degrees, and distances from the site of the wind power system in which an obstruction to the wind is prohibited or limited; (3) Any terms or conditions under which the easement is granted or may be terminated; (4) Any provisions for compensation of the owner of the real property benefiting from the easement in the event of interference with the enjoyment of the easement, or compensation of the owner of the real property subject to the easement for maintaining the easement; and (5) Any other provisions necessary or desirable to execute the instrument."); KAN. STAT. § § 58-2221, 58-2272.

[452] MINN. STAT., § 500.30(2) (stating that "such easements shall run with the land or lands benefited and burdened and shall constitute a perpetual easement, except that an easement may terminate upon the conditions

defined scenarios:[453]

1) Upon the occurrence of the conditions stated in the creating instrument.

2) By judgment of a court based upon abandonment or changed conditions.

3) At any time by agreement of all the owners of the benefited and burdened property.

However, unlike the fairly market friendly durational provision in Oregon, South Dakota has decided to prohibit any wind easement (or wind lease) from lasting longer than fifty years.[454] There do not appear to be any other states that place any kind of a durational limit on the terms of wind easements when wind power is actually being generated as a result of the easement. However, it is common practice in many states to void wind easements if no development of wind power has occurred within a certain period of time, presumably in an attempt to limit speculation in the wind energy market.

For example, in both North Dakota and South Dakota, wind easements and wind leases expire five years from the creation of the easement if no development has occurred.[455] In Minnesota, wind easements and wind leases terminate seven years from the date the easement is created "if a wind energy project on the property to which the easement . . . applies does not begin commercial operation within the seven-year period."[456] These provisions appear to be attempts by state legislatures to prevent developers from stockpiling wind rights or manipulating markets and demand for green energy. As the North Dakota Agriculture Commissioner, Roger Johnson, explained in his 2005 testimony before his state's Senate Judiciary Committee:

> There have been times in other parts of the country where unscrupulous wind energy developers have come in and secured easements with no intention of development, and then use that method to negotiate with legitimate developers to make a profit. By strategically buying up easements, they can effectively tie up some of the best sites for wind energy development.[457]

stated therein . . . .); N.D. CENT. CODE, § 17-04-03 (stating that the "easement runs with the land benefited and burdened and terminates upon the conditions stated in the easement."); OREG. REV. STAT., § 105.905 (stating that a "wind energy easement shall be appurtenant to and run with the real property benefited and burdened by the easement."); S.D. CODIFIED LAWS, § 43-13-17 (stating that any such "easement runs with the land or lands benefited and burdened and terminates upon the conditions stated in the easement, except that the term of any such easement may not exceed fifty years.).

[453] OREG. REV. STAT., § 105.905.

[454] S.D. CODIFIED LAWS, § 43-13-17.

[455] N.D. CENT. CODE, § 17-04-03; S.D. CODIFIED LAWS, § 43-13-17.

[456] MINN. STAT., § 500.30(2).

[457] North Dakota Department of Agriculture, (January 26, 2005). "Testimony of Roger Johnson, Agriculture Commissioner". Retrieved from the North Dakota Department of Agriculture's website: http://www.agdepartment.com/Testimony/2005LegTestimony/SB2239-RelatingToWindOptions.pdf (accessed August 12, 2008).

Ms. Chavarria has argued that such "arbitrary guidelines and restrictions on a private transaction . . . should be governed by the requirements of the landowner and developer."[458] Ms. Chavarria explains that such provisions are either unnecessary or are problematic.[459] For example, she explains that the five-year development deadline for South Dakota wind leases is unnecessary because wind leases generally include a two to five year development deadline. In addition, she argues that imposing a fifty year maximum lease term in South Dakota is problematic because it will discourage development, given the costs associated with large developments and the lifespan of such projects, which she explains as follows:

> Limiting a developer to a one-time, 50-year lease would discourage development. Although the average lifespan of a wind turbine is 25 years, wind development on a specific piece of property can span several decades. [citation omitted] As with any project where the largest expenditures are made at the outset, developers are more likely to invest in property that will provide the best opportunity for long-term revenue.[460]

On the other hand, some have argued that protections such as these for landowners are necessary given the experience that wind developers have in conducting such transactions. Joseph Wilson, in an article in the Iowa Law Review, explained this imbalance as follows:

> While wind power developers likely have taken part in a number of wind rights deals, an individual landowner probably will do so only once in her lifetime. Therefore, the developer has considerable knowledge and background, while the landowner has no comprehensive source of guidance in this field. This information imbalance holds the potential to lead to improvident and unfair contracts between landowners and developers.[461]

While wind rights provisions like those adopted by other states may have been necessary to address real problems in those states, the Committee is of the opinion that there does not exist in this state at this time any wind rights issues that need to be addressed through legislative action. Based on the testimony taken at the May 6, 2008 public hearing, on the absence of any complaints from landowners or wind power companies, and on its respect for the fundamental right of the people to freely transfer their property, the Committee believes that it would be inappropriate and potentially dangerous for the legislature to act on any perspective issue involving wind rights until and unless a specific problem actually arises. However, the Committee also believes that it has the duty to continue to monitor how landowners and the wind power industry in this state address the many legal issues surrounding the concept that wind resources are property rights.

[458] Chavarria, "Wind Power: Prospective Issues", p. 836.
[459] *Id.*
[460] *Id.*
[461] Joseph O. Wilson, "The Answer, My Friends, Is in the Wind Rights Contract Act: Proposed Legislation Governing Wind Rights Contracts", 89 IOWA L.R. 1775, 1777 (2004).

CONCLUSION

The Committee believes that the right to own and to dispose of private property is a fundamental right that should be respected by government. The Committee believes that it is generally not the place for the government to regulate whether or not, and under what terms and conditions, individuals may contractually dispose of or place burdens upon their private property. The Committee believes that it is likely that those problems that will inevitably arise in the growing wind power industry will be resolved contractually or through the modification of industry practices, with a limited number of issues having to be settled in the courts. The Committee believes that the Texas Legislature should abstain from enacting legislation regarding the issue of wind as property until and unless there exists some specific and clearly defined existing problem that must be addressed by the legislature

RECOMMENDATIONS

1) The Texas Legislature should refrain from enacting legislation involving the issue of wind as a property right until and unless there exists some specific and clearly defined problem that public policy requires must be addressed.

2) The Texas Legislature should formally determine that wind is a natural resource that the state has the authority to regulate.

3) The Texas Legislature should continue to monitor how the "market" addresses those issues that may arise regarding wind as property.

APPENDIX 5-A

STATE STATUTORY PROVISION

Kansas Statutes
Chapter 58 -- Personal and Real Property
Article 22 -- Conveyances of Land

58-2221. Recordation of instruments conveying or affecting real estate; duties of register of deeds. Every instrument in writing that conveys:

(a) Real estate;

(b) any estate or interest created by an oil and gas lease;

(c) any estate or interest created by any lease or easement involving wind resources and technologies to produce and generate electricity; or

(d) whereby any real estate may be affected, proved or acknowledged, and certified in the manner hereinbefore prescribed, may be recorded in the office of register of deeds of the county in which such real estate is situated. It shall be the duty of the register of deeds to file the same for record immediately, and in those counties where a numerical index is maintained in the register of deeds' office, the register of deeds shall compare such instrument, before copying the same in the record, with the last record of transfer in the register of deeds' office of the property described. If the register of deeds finds such instrument contains apparent errors, the register of deeds shall not record the instrument until the grantee has been notified, if such notice is reasonably possible.

The grantor, lessor, grantee or lessee or any other person conveying or receiving real property or other interest in real property upon recording the instrument in the office of register of deeds shall furnish the register of deeds the full name and last known post-office address of the person to whom the property is conveyed or such person's designee. The register of deeds shall forward such information to the county clerk of the county who shall make any necessary changes in address records for mailing tax statements.

58-2272. Instruments conveying interest involving wind resources and technologies. Every instrument that conveys any estate or interest created by any lease or easement involving wind resources and technologies to produce and generate electricity shall include:

(a) A description of the real property subject to the easement and a description of the real property benefitting from the wind lease or easement;

(b) a description of the vertical and horizontal angles, expressed in degrees, and distances from the site of the wind power system in which an obstruction to the wind is prohibited or limited;

(c) all terms or conditions under which the lease or easement is granted or may be terminated, except that if the instrument is recorded under K.S.A. 58-2221, and amendments thereto, any compensation received by the owner of the real property may be excluded; and

(d) any other provisions necessary or desirable to execute the instrument.

Minnesota Statutes
Chapter 500 -- Estates in Real Property
Section 500.30 -- Solar or Wind Easements

Subd. 1a. Wind easement. "Wind easement" means a right, whether or not stated in the form of a restriction, easement, covenant, or condition, in any deed, will, or other instrument executed by or on behalf of any owner of land or air space for the purpose of ensuring adequate exposure of a wind power system to the winds.

Subd. 2. Like any conveyance. Any property owner may grant a solar or wind easement in the same manner and with the same effect as a conveyance of an interest in real property. The easements shall be created in writing and shall be filed, duly recorded, and indexed in the office of the recorder of the county in which the easement is granted. No duly recorded easement shall be unenforceable on account of lack of privity of estate or privity of contract; such easements shall run with the land or lands benefited and burdened and shall constitute a perpetual easement, except that an easement may terminate upon the conditions stated therein or pursuant to the provisions of section 500.20. A wind easement, easement to install wind turbines on real property, option, or lease of wind rights shall also terminate after seven years from the date the easement is created or lease is entered into, if a wind energy project on the property to which the easement or lease applies does not begin commercial operation within the seven-year period.

Subd. 3. Required contents. Any deed, will, or other instrument that creates a solar or wind easement shall include, but the contents are not limited to:

(a) a description of the real property subject to the easement and a description of the real property benefiting from the solar or wind easement; and

(b) for solar easements, a description of the vertical and horizontal angles, expressed in degrees and measured from the site of the solar energy system, at which the solar easement extends over the real property subject to the easement, or any other description which defines the three dimensional space, or the place and times of day in which an obstruction to direct sunlight is prohibited or limited;

(c) a description of the vertical and horizontal angles, expressed in degrees, and distances from the site of the wind power system in which an obstruction to the winds is prohibited or limited;

(d) any terms or conditions under which the easement is granted or may be terminated;

(e) any provisions for compensation of the owner of the real property benefiting from the easement in the event of interference with the enjoyment of the easement, or compensation of the owner of the real property subject to the easement for maintaining the easement;

(f) any other provisions necessary or desirable to execute the instrument.

Subd. 4. Enforcement. A solar or wind easement may be enforced by injunction or proceedings in equity or other civil action.

Subd. 5. Depreciation, not appreciation counted for taxes. Any depreciation caused by any solar or wind easement which is imposed upon designated property, but not any appreciation caused by any easement which benefits designated property, shall be included in the net tax capacity of the property for property tax purposes.

Nebraska Revised Statutes
Chapter 66 -- Oils, Fuels and Energy

66-901. Legislative findings. The Legislature hereby finds and declares that the use of solar energy and wind energy in Nebraska:

(1) Can help reduce the nation's reliance upon irreplaceable domestic and imported fossil fuels.

(2) can reduce air and water pollution resulting from the use of conventional energy sources;

(3) requires effective legislation and efficient administration of state and local programs to be of greatest value to its citizens; and

(4) is of such importance to the public health, safety, and welfare that the state should take appropriate action to encourage its use. As the use of solar energy and wind energy devices increases, the possibility of future shading and obstruction of such devices by structures or vegetation will also increase. The Legislature therefor declares that the purpose of sections 66-901 to 66-914 is to promote the public health, safety, and welfare by protecting access to solar skyspace and wind energy as provided in sections 66-901 to 66-914.

66-909.01. Wind energy, defined. Wind energy shall mean the use of wind to produce electricity through the use of a wind energy conversion system.

66-909.02. Wind energy conversion system, defined. Wind energy conversion system shall mean any device, supporting structure, mechanism, or series of mechanisms that uses wind for the production of electricity or a mechanical application.

66-909.03. Wind energy easement, defined. Wind energy easement shall mean any easement, covenant, or condition designed to insure the undisturbed flow of wind across the real property of another.

66-910. Solar skyspace easement; wind energy easement; how executed; effect. Any property owner may grant a solar skyspace easement or wind energy easement in the same manner and with the same effect as a conveyance of any other interest in real property. The easement shall be created in writing and shall be filed, duly recorded, and indexed in the office of the register of deeds of the county in which the real property subject to the easement is located. No duly recorded easement shall be unenforceable on account of lack of privity of estate or privity of contract. Such easements shall run with the land or lands benefited and burdened and shall constitute a perpetual easement, except that a solar skyspace easement or wind energy easement may terminate upon the conditions stated therein or by agreement of the owners of the lands benefited and burdened.

66-911. Easement; document that creates; contents. Any deed, will, or other instrument that creates a solar skyspace easement or wind energy easement shall include, but the contents are not limited to:

(1) A description of the real property subject to the solar skyspace easement or wind energy easement and a description of the real property benefiting from the easement;

(2) A description of

(a) the vertical and horizontal angles, expressed in degrees and measured from

the site of the solar energy system, at which the solar skyspace easement extends over the real property subject to the solar skyspace easement,

(b) the dimensions of the wind energy easement sufficient to determine the horizontal space across and the vertical space above the burdened property that must remain unobstructed, or

(c) any other description which defines the three-dimensional space or the place and times of day in which an obstruction to solar energy or wind energy is prohibited or limited;

(3) Any terms or conditions under which the easement is granted or may be terminated;

(4) Any provisions for compensation of the owner of the real property benefiting from the easement in the event of interference with the enjoyment of the easement or compensation of the owner of the real property subject to the easement for maintaining the easement; and

(5) Any other provisions necessary or desirable to effect the purpose of the instrument.

66-911.01. Solar energy system; wind energy conversion system; wind measuring equipment; leases; requirements. An instrument creating a lease or an option to lease real property or the vertical space above real property for a solar energy system or for a wind energy conversion system shall be created in writing and shall be filed, duly recorded, and indexed in the office of the register of deeds of the county in which the real property subject to the easement is located. An instrument creating a lease or an option to lease real property or the vertical space above real property for wind measuring equipment may be created in writing and may be filed, duly recorded, and indexed in the office of the register of deeds of the county in which the real property subject to the easement is located. Such lease or lease option document shall include, but the contents are not limited to:

(1) The names of the parties;

(2) A legal description of the real property involved;

(3) The nature of the interest created;

(4) The consideration paid for the transfer; and

(5) The terms or conditions, if any, under which the interest may be revised or terminated.

North Dakota Codified Laws
Chapter 17 -- Wind Energy Property Rights

17-04-01. Wind option agreement - Definition - Termination. A wind option agreement is a contract in which the owner of property gives another the right to produce energy from wind power on that property at a fixed price within a time period not to exceed five years on agreed terms. A wind option agreement is void and terminates if development to produce energy from wind power has not occurred on the property that is the subject of the agreement within five years after the wind option agreement commences.

17-04-02. Wind easement - Definition. For purposes of sections 17-04-03 and 17-04-04, the term wind easement means a right, whether stated in the form of a restriction, easement, covenant, or condition, in a deed, will, or other instrument executed by or on behalf of an owner of land or airspace for the purpose of ensuring adequate exposure of a wind power system to the winds.

17-04-03. Wind easements - Creation - Term - Development required. A property owner may grant a wind easement in the same manner and with the same effect as the conveyance of an interest in real property. The easement runs with the land benefited and burdened and terminates upon the conditions stated in the easement. However, the easement is void if no development to produce energy from wind power associated with the easement has occurred within five years after the easement is created.

17-04-04. Severance of wind energy rights limited. Except for a wind easement created under section 17-04-03 and as otherwise provided in this section, an interest in a resource located on a tract of land and associated with the production of energy for wind power on the tract of land may not be severed from the surface estate. However, nothing in this section may be construed to prohibit or limit the right of a seller of real estate to retain any payments associated with an existing wind energy project.

17-04-05. Wind energy leases - Termination. A lease for wind energy purposes is void and terminates if development to produce energy from wind power has not occurred on the leasehold within five years after the lease commences.

Oregon Revised Statutes
Section 105.900- 915 -- Wind Energy Easements

105.900. "Wind energy easement" defined. As used in ORS 105.905 and 105.910, "wind energy easement" means any easement, covenant or condition designed to insure the undisturbed flow of wind across the real property of another.

105.905. Wind energy easement appurtenant; termination.

(1) A wind energy easement shall be appurtenant to and run with the real property benefited and burdened by the easement.

(2) A wind energy easement shall terminate:

(a) Upon occurrence of the conditions stated in the creating instrument;

(b) By judgment of a court based upon abandonment or changed conditions; or

(c) At any time by agreement of all the owners of the benefited and burdened property.

105.910. Requirements for easement creation by instrument; recordation.

(1) An instrument creating a wind energy easement shall include:

(a) A legal description of the real property benefited and burdened by the easement;

(b) A description of the dimensions of the easement sufficient to determine the horizontal space across and the vertical space above the burdened property that must remain unobstructed;

(c) The restrictions placed upon vegetation, structures and other objects that would impair or obstruct the wind flow across and through the easement; and

(d) The terms or conditions, if any, under which the easement may be changed or terminated.

(2) The instrument creating a wind energy easement shall be recordable under ORS 93.710. If recorded, the instrument shall be recorded as a transfer of the easement from the owner of the burdened property to the owner of the benefited property.

105.915. Instrument creating lease or lease option of real property for wind energy conversion system may be recorded; requirements.

(1) An instrument creating a lease or an option to lease real property or the vertical space above real property for a wind energy conversion system or for wind measuring equipment shall be recordable under ORS 93.710.

(2) An instrument described in subsection (1) of this section shall contain:

(a) The parties' names;

(b) A legal description of the real property involved;

(c) The nature of the interest created;

(d) The consideration paid for the transfer; and

(e) The terms or conditions, if any, under which the interest may be revised or terminated.

(3) As used in this section, "wind energy conversion system" means any device, supporting structure, mechanism or series of mechanisms that uses wind for the production of electricity or a mechanical application.

South Dakota Codified Laws
Chapter 43-13 -- Easements and Servitudes

43-13-16. Wind easement defined. For purposes of §§ 43-13-17 to 43-13-19, inclusive, the term, wind easement, means a right, whether or not stated in the form of a restriction, easement, covenant, or condition, in any deed, will, or other instrument executed by or on behalf of any owner of land or air space for the purpose of ensuring adequate exposure of a wind power system to the winds.

43-13-17. Creating and granting wind easements -- Filing written agreement -- Maximum term -- Development of energy potential required. Any property owner may grant a wind easement in the same manner and with the same effect as a conveyance of an interest in real property. The easement shall be created in writing and shall be filed, duly recorded, and indexed in the office of the register of deeds of the county in which the easement is granted. Any such easement runs with the land or lands benefited and burdened and terminates upon the conditions stated in the easement, except that the term of any such easement may not exceed fifty years. Any such easement is void if no development of the potential to produce energy from wind power associated with the easement has occurred within five years after the easement began. Any payments associated with the granting or continuance of any such easement shall be made on an annual basis to the owner of record of the real property at the time the payment is made.

43-13-18. Required terms and provisions of wind easements. Any deed, will, or other instrument that creates a wind easement shall include:

(1) A description of the real property subject to the easement and a description of the real property benefiting from the wind easement;

(2) A description of the vertical and horizontal angles, expressed in degrees, and distances from the site of the wind power system in which an obstruction to the wind is prohibited or limited;

(3) Any terms or conditions under which the easement is granted or may be terminated;

(4) Any provisions for compensation of the owner of the real property benefiting from the easement in the event of interference with the enjoyment of the easement, or compensation of the owner of the real property subject to the easement for maintaining the easement; and

(5) Any other provisions necessary or desirable to execute the instrument.

43-13-19. Severance of wind energy rights limited. No interest in any resource located on a tract of land and associated with the production or potential production of energy from wind power on the tract of land may be severed from the surface estate as defined in §45-5A-3, except that such rights may be leased for a period not to exceed fifty years. Any such lease is void if no development of the potential to produce energy from wind power has occurred on the land within five years after the lease began. The payment of any such lease shall be on an annual basis.

INTERIM CHARGE SIX

Municipal Regulatory Authority

Examine recent attempts by municipalities to exert regulatory authority beyond city limits and extraterritorial jurisdiction. Evaluate the current relationship between and possible conflicts related to regulatory authority expressly given to state agencies by the legislature and regulatory authority delegated to home-rule municipalities. (Joint Interim Charge with the House Committee on County Affairs)

MUNICIPAL REGULATORY AUTHORITY

INTERIM CHARGE

"Examine recent attempts by municipalities to exert regulatory authority beyond city limits and extraterritorial jurisdiction. Evaluate the current relationship between and possible conflicts related to regulatory authority expressly given to state agencies by the legislature and regulatory authority delegated to home-rule municipalities. (Joint Interim Charge with the House Committee on County Affairs)."[462]

SCOPE OF REPORT

This section of the Interim Report briefly examines the authority of municipalities to enact and enforce ordinances that apply to areas beyond their corporate and extraterritorial jurisdictional boundaries, especially in light of recent attempts by some municipalities to exert their regulatory authority beyond their jurisdictional limits. This section examines the current relationship between local, state and federal authorities regarding regulatory matters, and attempts to determine what the proper role of these entities should be in relation to one another.

SUMMARY OF COMMITTEE ACTION

Committee Hearing

The House Committee on Land and Resource Management and the House Committee on County Affairs (Joint Committee) met in a scheduled public hearing on March 28, 2008, in Deer Park, Texas. Those who testified were:

Wayne Riddle (Mayor, City of Deer Park)
Julian Grant (Office of the Texas Attorney General)
Alton E. Porter (Mayor, City of La Porte)
Stephen Don Carlos (Mayor, City of Baytown)
Jan Lawler (President, Economic Alliance Houston Port Region)
Don Empfield (President, East Harris County Manufacturing Association)
John Esparza (President, Texas Motor Transportation Association)
Michael Stewart (President, Texas Aggregates & Concrete Association)
Ned Munoz (Texas Association of Builders)
Michael Honeycutt (Texas Commission on Environmental Quality)
Matthew Tejada (Galveston Houston Association of Smog Prevention)

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[462] Rule 3, Section 25(3), of the Rules of The Texas House, grants jurisdiction to the House Committee on Land and Resource Management "over all matters pertaining to annexation . . . ."

Summary of Testimony

Wayne Riddle, the Mayor of the City of Deer Park, explained to the Joint Committee the steps that his municipality takes to protect air quality and a healthy business environment in his and neighboring communities. The Mayor described to the members the role that the Community Advisory Council (composed of local officials, emergency management officers, health officials, and plant managers) plays in protecting the community against possible harm from air pollutants. Mayor Riddle also advised the Joint Committee that he has good working relationships with the Harris County Pollution Control Department and Texas Commission on Environmental Quality (TCEQ) and can always turn to them for guidance and conflict resolution when disagreements arise between his community and other municipalities in the region.

Julian Grant, an Assistant Attorney General at the Texas Attorney General's Office, provided the Joint Committee with background information regarding the historical evolution of municipalities, the types of municipalities that exist in the state, and the authority that these differing types of municipalities have within their corporate and extraterritorial jurisdictional boundaries. Mr. Grant also highlighted for the members some examples of conflicts that have arisen between municipal and state governing bodies over the years. In response to questions from the members regarding the legal issue of preemption, Mr. Grant informed them that generally home rule municipalities have the ability to regulate within their boundaries so long as such regulations are consistent with state and federal law.

Alton E. Porter, the Mayor of the City of La Porte, focused his comments to the Joint Committee on the need for regional cooperation between municipalities and the problematic nature of allowing municipalities to exert their regulatory influence within the corporate limits of other municipalities. Mayor Porter explained to the members that, in his opinion, the processes and activities of the Community Advisory Council described by Mayor Riddle are working properly.

Stephen Don Carlos, the Mayor of the City of Baytown, focused his testimony to the Joint Committee on the issue of municipal sovereignty, arguing that municipal governing bodies do not have the authority to impose their will upon those citizens residing outside of their jurisdiction. Mayor Don Carlos reiterated to the members that the current system for controlling air emissions is appropriate and working well.

Jan Lawler, the President of the Economic Alliance Houston Port Region (EAHPR), explained to the Joint Committee the work that the EAHPR (a nonprofit entity funded by sixteen local communities and various chambers of commerce) performs in attracting international businesses to Harris County. Ms. Lawler's testimony to the members focused on the need for consistency among the many sets of laws governing the area, given that consistency is the number one factor that businesses look for when determining whether or not to invest in the region.

Don Empfield, the Chairman of the East Harris County Manufacturing Association (EHCMA), explained to the Joint Committee the negative affects that inconsistent and burdensome regulations have on those businesses that comprise the EHCMA. Mr. Empfield advised the members that these businesses are at a disadvantage when compared to companies in other regions of the country when such inconsistent and burdensome conditions exist. Given the negative affects on local business, Mr. Empfield advised the Joint Committee that it is crucial

that there be uniformity in the regulation of businesses and that municipalities respect the jurisdictional boundaries of their neighboring communities.

John Esparza, the President of the Texas Motor Transportation Association (TMTA), explained to the Joint Committee a situation that the TMTA has recently been involved in regarding the City of Houston's attempt to exert its regulatory authority in an area that has historically been regulated by the state. According to Mr. Esparza, the City of Houston has discussed enacting an ordinance that would require drivers to obtain local permits for oversized and overweight trucks, a permit that is currently issued by the Texas Department of Transportation (TxDOT). Mr. Esparza explained to the members that the TMTA requested an informal Texas Attorney General Opinion on the legality of the municipality's plan, which when released, held that municipalities do not have the authority to issue vehicular permits, especially when the state has its own permit scheme in place.

Michael Stewart, the President of the Texas Aggregates & Concrete Association (TACA), described to the Joint Committee a controversy that the TACA has recently been involved in with the City of Houston. According to Mr. Stewart, the City of Houston has recently enacted ordinances regarding the location of rock crushers and facilities that handle aggregates that are stricter than the standards set by the TCEQ. Mr. Stewart explained to the members that these restrictions are burdensome on business and inappropriate because the state is more qualified and has greater expertise than municipalities when it comes to creating these types of restrictions.

Ned Munoz, speaking on behalf of the Texas Association of Builders, described to the Joint Committee the current body of law that home builders must comply with when building homes and acknowledged that municipalities have the ability to amend building codes to make them more or less stringent. In addition, Mr. Munoz answered a number of questions from the members regarding home construction in municipal extraterritorial jurisdictions and the changes made to state law during the 80th Texas Legislative Session.

Michael Honeycutt, the Director of the Toxicology Division at the TCEQ, answered many questions from the Joint Committee regarding air quality in the state. Dr. Honeycutt informed the members that the Toxicology Division is staffed by fourteen people (six of whom have earned Doctorate of Philosophy degrees) whose primary responsibility is to monitor almost two hundred different chemicals in the state. When asked by the members about air quality improvements in the region, Dr. Honeycutt stated that there have been significant decreases in air pollutants but that greater decreases can still be accomplished.

Matthew Tejada, speaking on behalf of the Galveston Houston Association of Smog Prevention, explained to the Joint Committee that more needs to be done in the region to improve air quality and commended the City of Houston for its efforts in protecting the health of its residents. In response to questions from the members regarding which governmental body should establish air quality standards, Mr. Tejada stated that he believes that the standards set by TCEQ are not stringent enough and that in such cases it is up to local officials to set appropriate standards.

BACKGROUND

In February 2007, Houston Mayor Bill White proposed using the municipality's nuisance ordinance as a tool to reduce the amount of benzene in Houston's air. The Mayor suggested amending the municipality's nuisance ordinance so that Houston could levy fines against industrial facilities located outside of its corporate and extraterritorial jurisdictional boundaries. The ordinance would have allowed the municipality to fine such facilities up to $2,000 per day for violations of the ordinance. Importantly, the ordinance would have treated benzene more stringently than it is treated by either the state or the federal governments. Mayor White has explained that his proposal was one of last resort, one that he brought to the table only following the failure of the Texas Commission on Environmental Quality (TCEQ) to adequately address the issue.[463]

Mayor White's proposal has been controversial since its introduction. Almost immediately, the mayors of the City of La Porte, the City of Baytown, the City of Pasadena, and the City of Deer Park (municipalities where most of the affected facilities are located) argued that Mayor White had overstepped his authority and that his proposal would harm their communities. As a direct response to such concerns, legislation was filed during the 80th Texas Legislative Session aimed at prohibiting the use of nuisance ordinances for such purposes.[464] Senate Bill 1317 by Senator Mike Jackson was passed favorably by the Senate and by the House Committee on Environmental Regulations, but the legislative session ended before the bill could be placed on a house calendar.

More recently, Houston officials agreed to refrain from amending their municipal nuisance ordinance while the Houston Regional Air Quality Task Force (a group sponsored by the Greater Houston Partnership) studied alternatives. In September 2007, the Task Force released its report recommending eighteen measures aimed at reducing toxic chemicals such as benzene and chlorine in Houston's air.[465]

DISCUSSION

Questions Raised by Houston's Proposal

The principal question raised by Mayor White's proposal is whether or not municipalities should

[463] Mayor White's proposal and the controversy surrounding it have been covered widely by the Houston press and is a reasonable starting point when attempting to understand this issue. *See e.g.* Dina Cappielo, "Mayor's Proposal Would Let City Sue Polluters," *Houston Chronicle*, February 3, 2007; Cindy Horswell, "Emissions Plan has Mayors Miffed at White," *Houston Chronicle*, March 7, 2007; Dina Cappielo, "Bills Filed to Block White's Clean Air Campaign," *Houston Chronicle*, March 10, 2007; Kristen Mack, "White Takes his Pollution Fight to Senate Panel," *Houston Chronicle*, April 18, 2007; Eric Berger, "Houston Mayor Sets 6-month Pollution Deadline," *Houston Chronicle*, November 6, 2007.

[464] *See*, Senate Bill 1317 (Jackson, 80th Leg. 2007); House Bill 3592 (Smith, Wayne, 80th Leg. 2007).

[465] Houston Regional Air Quality Task Force, (September 7, 2007), "Houston Regional Air Quality Task Force Report". Retrieved from the Greater Houston Partnership's website: http://www.houston.org/pdfs/PP/AirQualityTaskForceReporttoMayor.pdf (accessed August 28, 2008).

be allowed to enforce local ordinance provisions that affect entities beyond the municipality's corporate and extraterritorial jurisdictional boundaries. Secondary to this question is the issue of whether or not it is good public policy to allow local entities to define and enforce air quality regulations that are broader than those of the state and federal governments. A proper analysis of these questions involves determining what authority municipalities have under current law, and whether or not, from a public policy standpoint, municipalities should be allowed to regulate air quality in the manner proposed by Mayor White.

Present Municipal Authority

Texas law generally prohibits municipalities from exercising their powers beyond their corporate boundaries. However, exceptions do apply to this general rule, and a question exists as to the length of the reach of municipal enforcement powers under local nuisance ordinances.

It is a rule of law that home rule municipalities are authorized to do anything that the legislature could have authorized them to do, so long as such actions are not inconsistent with their charters, the constitution, or the general laws of the state.[466] However, municipalities may exercise these powers only within their corporate limits unless otherwise authorized to by the constitution or by the legislature.[467] The legislature has granted municipalities extended authority in various situations, most notably in regards to a municipality's extraterritorial jurisdiction and in the case of nuisance abatement, where a home rule municipality is authorized to define and prohibit any nuisance within 5,000 feet of the municipality's limits.[468]

The Law of Public Nuisance

The law of "public" or "common nuisance" involves questions surrounding unreasonable interferences with rights common to the general public.[469] Texas law recognizes a myriad of places, conditions, and actions to be nuisances, generally those involving interferences with the public health or public order, or those that constitute an obstruction of public rights. For example, provisions in the Texas Civil Practice & Remedies Code (sometimes referred to as the "Texas Nuisance Abatement Statutes") authorize local officials to abate various "public order" nuisance by closing property involved in illegal activities such as prostitution, obscenity, gambling, organized criminal activity, or discharge of a firearm, to name a few.[470]

Texas law also recognizes various "public health" nuisances that may, and in some cases must, be abated by local officials. For example, the Texas Health and Safety Code defines certain places, actions, or conditions to be "public health" nuisances. Among these are "a condition or

[466] *See*, TEX. CONST., art 11, § 5 (providing that "no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State.").

[467] *See*, *City of Austin v. Jamail*, 662 S.W.2d 779 (Tex, App.--Austin 1983); *City of West Lake Hills v. Westwood Legal Defense Fund*, 598 S.W.2d 681 (Tex. Civ. App.--Waco 1980).

[468] *See*, TEX. LOC. GOV'T CODE, § 42.001 (stating that the purpose of extraterritorial jurisdictions is to "promote and protect the general health, safety, and welfare of persons residing in and adjacent to the municipalities"); *Id.*, § 217.042(a).

[469] *See*, *Jamail v. Stoneledge Condominium Owners Ass'n*, 970 S.W.2d 673, 676 (Tex. App.--Austin 1998, no pet.).

[470] *See* TEX. CIV. PRAC. & REM. CODE, §§ 125.001 *et seq*.

place that is a breeding place for flies . . .", "spoiled or diseased meats intended for human consumption", "sewage, human excreta, wastewater, garbage, or other organic wastes deposited, stored, discharged, or exposed in such a way as to be a potential instrument or medium in disease transmission . . .", and "a place or condition harboring rats in a populous area."[471]

Texas municipalities may define and abate nuisances within their boundaries under the common law as part of their police powers. In addition, the legislature has granted municipalities fairly broad nuisance abatement powers through statute. For example, the Texas Local Government Code authorizes Type A General Law Municipalities to "abate and remove" nuisances, and requires Type B General Law Municipalities to "prevent to the extent practicable any nuisance within the limits of the municipality."[472]

Important to this discussion is the construction of the general nuisance statute for home rule municipalities. This provision authorizes such entities to not only prohibit any nuisance within the limits of the municipality and within 5,000 feet outside the limits, but to define such nuisances as well.[473] While this provision appears clear on its face, questions have been raised regarding the reach of home rule municipalities under this provision. Specifically, some have argued that a nuisance occurs where the injury takes place, not where the condition giving rise to the injury originates. Under such a construction, a municipality could abate any nuisance anywhere, so long as an injury from the condition occurs within the municipality or within 5,000 feet outside its corporate limits.

Policy Issues

"Sovereignty"

When the action of a municipality affects parties beyond the municipality's corporate and extraterritorial jurisdictional boundaries, even when such an action is based on a well-developed area of the law such as the law of nuisance, basic questions of municipal independence (what some throughout this debate have called "sovereignty") are raised.

"Sovereignty" is defined by Black's Law Dictionary to be the "supreme, absolute, and uncontrollable power by which an independent state is governed."[474] Since municipalities are political subdivisions of the state, and as such are subject to the authority of the state, they can not accurately be described as sovereigns. Nevertheless, the use of the word "sovereignty" by the critics of Mayor White's proposal certainly encompasses the feeling that is engendered when one municipality attempts to legislate and then enforce prohibitions or limitations on what occurs within the boundaries of another municipality. What is really at stake is the independence of municipalities in relation to one another.

As a general rule, public policy favors the enactment and retention of laws that protect the independence of a municipality (and consequently its residents) against the actions of neighboring municipalities. This nation's republican form of government generally dictates that

[471] TEX. HEALTH & SAFETY CODE, § 341.011.
[472] TEX. LOC. GOV'T CODE, §§ 217.002, 217.022.
[473] *Id.*, § 217.042(a).
[474] Black's Law Dictionary, 5th ed. (West Publishing, 1979).

a citizen not be subjected to the decisions of a governmental body unless that citizen is represented by a member of that body.[475] In fact, this basic principle is one upon which this nation was founded. This principle is supported by an understanding that because local officials are more knowledgeable of their community, they are most capable of balancing the true costs of the enactment of a governmental measure. In addition, since these same officials are also vested in, and accountable to, their community, they will be much more likely to make appropriate choices for that community and its members. Finally, state law certainly should discourage such jurisdictional controversies simply to avoid the sorts of jealousies and angers that inevitably will occur if one municipality attempts to regulate entities located within another.

Authority Over Air Quality

The responsibility of implementing and administering federal air quality standards has generally been delegated by the federal government to the states. As a result of this delegation, in 1989 the 71st Texas Legislature enacted the Clean Air Act (CAA)[476] and delegated to the TCEQ the responsibility for administering its provisions.[477] The CAA grants municipalities the power to both abate a nuisance (which air pollution may be considered under the common law), and to enact and enforce an ordinance for the control and abatement of air pollution, so long as such an ordinance is consistent with the CAA and the TCEQ's rules and orders.[478]

The actions of the City of Houston have raised questions regarding not only the "consistency" of Mayor White's proposal with state law, but also the question of whether it is good public policy to allow local entities to define and enforce air quality regulations that are broader than those of the state and federal governments. It can be argued that it is not helpful to allow each local community to set their own air quality standards. While the courts may determine that such local standards are "consistent" with state policy, it would be bad public policy to allow such communities to adopt standards that conflict with one another, given the transient nature of pollutants in the air. It can also be argued that local entities are less qualified than their federal and state counterparts to define and regulate air quality in a prudent manner. Some have explained that the degree of complexity of air quality issues requires an amount of specialized knowledge and experience that local entities do not posses. As such, many have argued that the decisions of the TCEQ and the federal Environmental Protection Agency should trump those made by local entities.

CONCLUSION

While all parties involved with the City of Houston case agree that Mayor White's goal of reducing hazardous air pollutants is admirable, many believe that the means he has employed has actually worsened the situation in the region, and will probably have little or no effect on reducing pollutants in the air. Given the fact that exertions of authority such as that proposed by

[475] This rule is not uniform throughout the state's body of law as evidenced by a municipality's unilateral ability to annex unrepresented citizens into its jurisdiction.
[476] *See*, TEX. HEALTH & SAFETY CODE, §§ 382.001 *et. seq*.
[477] *Id.*, § 382.011(a).
[478] *Id.*, § 382.113.

the City of Houston have the potential to create significant harms to a given region of the state (jurisdictional disputes, inconsistency of laws, litigation, etc.), coupled with the fact that both the state and federal government have the authority, resources, and expertise to appropriately handle such matters, the Joint Committee is generally of the opinion that the political subdivisions of the state should exert their authority in a manner that respects the sovereignty of other political subdivisions.

RECOMMENDATION

1) The Texas Legislature should continue to monitor the actions of municipalities when they attempt to exert regulatory authority beyond their corporate and extraterritorial jurisdiction boundaries.

INTERIM CHARGE SEVEN

Monitor Agencies and Programs

Monitor the agencies and programs under the committee's jurisdiction.

MONITOR AGENCIES AND PROGRAMS

INTERIM CHARGE

"Monitor the agencies and programs under the committee's jurisdiction."[479]

SCOPE OF REPORT

This section of the Interim Report examines the responsibilities and the actions of the four governmental bodies over which the Texas House Committee on Land and Resource Management has jurisdiction. Accordingly, the Committee has reviewed the duties and the activities of the Texas General Land Office, the School Land Board, the Coastal Coordination Council, and the Board for Lease of University Lands. While these entities are entrusted with many important duties that require action, this report focuses only on the more significant or controversial duties or activities of these governmental bodies.

SUMMARY OF COMMITTEE ACTION

Committee Hearing

The House Committee on Land and Resource Management (Committee) met in a posted public hearing on May 5, 2008, in Austin, Texas. The Committee heard the testimony of six invited witnesses. Those who testified were:

Jerry Patterson (Commissioner, Texas General Land Office)
Bill Wellman (Superintendant, Big Bend National Park)
Carter Smith (Executive Director, Texas Parks and Wildlife Department)
Luke Metzger (Environment Texas)
Andy Jones (The Conservation Fund)
David Anderson (Texas Education Agency)

Summary of Testimony

Texas General Land Office (GLO) Commissioner Jerry Patterson provided a detailed presentation to the Committee regarding those entities, programs, and responsibilities that are under his supervision. Commissioner Patterson explained to the Committee that the mission of GLO, in the simplest terms, is to make money for the Permanent School Fund (PSF), to protect the Texas coast, and to provide certain benefits for our state's veterans. The Land Commissioner

[479] Rule 3, Section 25(5), of the Rules of The Texas House, grants jurisdiction to the House Committee on Land and Resource Management "over all matters pertaining to . . . the School Land Board, the Board for Lease of University Lands, the Coastal Coordination Council, and the General Land Office."

discussed several coastal issues that the GLO, the School Land Board (SLB), and the Coastal Coordination Council are involved with, such as coastal erosion and the enforcement of the Texas Open Beaches Act. Commissioner Patterson explained to the Committee that the GLO will most likely request the next Texas Legislature to create a dedicated funding source for the Coastal Erosion Planning and Response Act (CEPRA) Program. The Land Commissioner argued that the sporting goods sales tax makes the most sense as a permanent funding source for the CEPRA Program, given that Texas beaches are in essence public parks. The Land Commissioner also provided the Committee with background information and the current status of the SLB's controversial decision to dispose of the Christmas Mountains, a PSF property located in West Texas.[480] Commissioner Patterson informed the members that he is not opposed to transferring the property to the National Parks Service (NPS), preferably as a national preserve, if firearms and hunting are allowed, if certain issues regarding the minerals on the property are addressed, and if funding and access issues can be resolved.

Bill Wellman, the Superintendant of Big Bend National Park (BBNP), explained to the Committee that the NPS would like the Christmas Mountains to be added to BBNP and that he is willing to take whatever steps are necessary to appropriately manage the land. Mr. Wellman explained to the members that there are several advantages to the ownership of the land by the NPS, primarily that the area would be permanently protected, that public access would be assured, and that BBNP has the resources required to properly manage the area in accordance with the conservation easement that is currently in place.

Carter Smith, the Executive Director of the Texas Parks and Wildlife Department (TPWD), informed the Committee that the TPWD is not interested in acquiring or managing the Christmas Mountains. Mr. Smith explained to the members that TPWD acquisitions are directed by the State Land and Resources Plan, a legislatively mandated strategic document that establishes acquisition priorities for the TPWD. Under this document, the Christmas Mountains are not considered a property that the TPWD should acquire.

Luke Metzger, the Executive Director for Environment Texas, expressed to the Committee his organization's concerns with the SLB's attempts to transfer the Christmas Mountains outside of the public trust. His primary objection to the sale of the tract to a private party is the chilling affect that such a transfer will have on future philanthropic gifts to the state. In addition, Mr. Metzger explained to the members that his group believes that the NPS is the best public entity to both own and manage the property.

Andy Jones, the Texas Director of The Conservation Fund, explained to the Committee that it was the intent of the Mellon Foundation when they donated the Christmas Mountains to the state in 1991 that it be set aside as part of the public trust. He informed the members that the relationship between the Mellon Foundation and the state has been damaged as a result of the proposed sale, and that other potential donors are less interested in donating land to the state as a result of the actions of the SLB and the GLO.

[480] The controversy surrounding the proposed sale of the Christmas Mountains is discussed in greater detail on pages 176-177 of this report.

BACKGROUND

Texas General Land Office[481]

The Texas General Land Office (GLO) was established on December 22, 1836, by the First Congress of the Republic of Texas. The GLO was originally responsible for collecting and keeping land records, providing maps and surveys, and issuing land titles. On entering the Union in 1845, the Texas Constitution charged the GLO with the supervision and management of the state's millions of acres of public lands. Since that time the GLO's duties have evolved, but its core mission remains managing the state's lands and mineral-right properties.

The state land and mineral-right properties managed by the GLO and the School Land Board include institutional acreage, grazing lands in West Texas, timberlands in East Texas, and commercial sites throughout the state, as well as the beaches, bays, estuaries, and other submerged lands out to 10.3 miles in the Gulf of Mexico.[482] The proceeds from the sale and lease of these properties remain part of the Permanent School Fund (PSF) and are ultimately used to help fund public education in the state.

In addition to its management of state lands and mineral rights properties, the GLO is responsible for a wide range of programs involving the protection of the state's coastal resources. For example, GLO staff administer the Coastal Erosion Planning and Response Act, the Coastal Management Program, the Coastal Impact Assistance Program, and the Oil Spill Prevention and Response Program, just to name a few.

Unlike many executive branch agencies that are headed by appointed officials, the GLO is run by the Land Commissioner, an elected official who must stand for office every four years.[483] The Land Commissioner has many duties, among which are overseeing the activities of the GLO and serving as the chairman of the School Land Board,[484] the Coastal Coordination Council,[485] the Board for Lease of University Lands,[486] and the Veteran's Land Board.[487]

School Land Board[488]

The School Land Board (SLB) was created by legislative enactment in 1939 when the legislature

[481] For a brief history of the GLO, *see*, *Handbook of Texas Online*, s.v. "General Land Office", http://www.tshaonline.org/handbook/online/articles/GG/mcg1.html (accessed February 12, 2008). The official website for the Texas General Land Office may be accessed at: http://www.glo.state.tx.us/ (accessed May 28, 2008).

[482] In 1953 the United States Congress passed the *Submerged Lands Act* that relinquished to coastal states all rights of the United States to the navigable waters of these coastal states. Following prolonged litigation, the United States Supreme Court in 1960 affirmed Texas' historic three marine leagues (10.35 miles) seaward boundary. The lands lying within this area are now part of the corpus of the PSF.

[483] *See*, TEX. CONST., art IV, §§ 1, 2, 23.

[484] TEX. NAT. RES. CODE, § 32.014.

[485] *Id.*, § 33.204(b).

[486] TEX. EDUC. CODE, § 66.62(c).

[487] TEX. NAT. RES. CODE, § 162.062.

[488] For a brief history of the SLB, *see*, *Handbook of Texas Online*, s.v. "School Land Board", http://www.tshaonline.org/handbook/online/articles/SS/mds4.html (accessed May 23, 2008).

set apart and dedicated to the PSF the mineral estate in the state's riverbeds and channels, and the areas within the tidewater limits of the state (including islands, lakes, bays, and the bed of the sea).[489] The SLB is chaired by the Land Commissioner and has one member appointed by the governor and one appointed by the Texas Attorney General.[490] The Asset Management Division of the GLO is responsible for administering the management, leasing, and sale of PSF properties, subject to the supervision of the Land Commissioner and the approval of the SLB.

The primary duty of the SLB is to manage and control a broad range of PSF real property assets. Specifically, the legislature has granted to the SLB and to the Land Commissioner the "sole and exclusive management and control" of:

> Any land, mineral or royalty interest, real estate investment, or other interest, including revenue received from those sources, that is set apart to the permanent school fund under the constitution and laws of this state together with the mineral estate in riverbeds, channels, and the tidelands, including islands . . . .[491]

The legislature has granted broad authority to the SLB to manage these properties and interests, specifically to:

> [A]cquire, sell, lease, trade, improve, maintain, protect, or otherwise manage, control, or use land, mineral and royalty interests, real estate investments, or other interests, including revenue received from those sources, that are set apart to the permanent school fund in any manner, at such prices, and under such terms and conditions as the board finds to be in the best interest of the fund.[492]

In recent years the legislature has expanded both the funding sources and the authority needed for the SLB and the GLO to significantly enlarge the real estate holdings of the PSF. This is evidenced by the fact that during the 2000 fiscal year, only $1.6 million in PSF assets were used by the SLB to acquire interests in real property, compared with approximately $381 million in 2007. The increased acquisition of interests in real property, along with the expanded authority to engage in real estate transactions, is discussed in greater detail in Charge One of this interim report.

<u>Coastal Coordination Council</u>

In 1991, the Texas Legislature determined it to be a policy of the state to "provide for more effective and efficient management" of coastal areas.[493] Under provisions in the Coastal Coordination Act of 1991,[494] this policy is implemented through a number of means, primarily through the review of coastal problems, the coordination of coastal programs, and by making "all coastal management processes more visible, accessible, coherent, consistent, and accountable to

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[489] *See,* TEX. NAT. RES. CODE, § 11.041.
[490] *See*, *Id.*, § 32.012(a).
[491] *Id.*, § 51.011(a).
[492] *Id.*, § 51.011(a-1).
[493] *Id.*, § 33.202(a).
[494] *Id.*, §§ 33.201 *et. seq.*

the people of Texas."[495]

The Coastal Coordination Council (CCC) was created in 1991 to serve as the state body responsible for coordinating state, federal, and local programs and activities involving the Texas coast. The CCC is charged with adopting uniform goals and policies to guide the decision-making process of all entities regulating or managing natural resources on the coast. The CCC is also responsible for reviewing governmental actions that affect the coast, and certifying that such actions are consistent with the Texas Coastal Management Plan (CMP).[496]

The CCC is an eleven member body comprised of the representatives of seven state agencies and four appointed members who represent various coastal stakeholder groups.[497] The CCC is chaired by the Land Commissioner, and is assisted in the performance of its duties by employees of the GLO's Coastal Protection Division who serve as the staff of the CCC and administer the CMP.

Board For Lease of University Lands

On December 20, 1838, President Mirabeau Lamar, in an address to the Third Congress of the Republic of Texas, urged the legislature to establish the foundations for a system of public education. On January 26, 1839, fifty leagues (approximately 220,000 acres) of land were set aside from the public domain by the Republic of Texas for the establishment and endowment of a university.

The Texas Constitution of 1876 appropriated one million acres of land for the establishment of the Permanent University Fund (PUF), and an additional one million acres was added in 1883.[498] These lands constitute the bulk of what are referred to as PUF lands, now totaling approximately 2.1 million acres. Since the dedication of these lands to the PUF, $4.41 billion have been deposited from oil and gas royalties, lease bonuses, and rentals generated from the exploration and development of these university lands.

The Board for Lease of University Land (BLUL) was created in 1929 and was given authority over the leasing of oil and gas on PUF lands. The primary responsibility of the BLUL is to "lease university lands for oil and gas exploration and development on terms, at times, and in the manner it may determine."[499] The BLUL is chaired by the Land Commissioner and includes two members of the board of regents of the University of Texas System, and one member of the board of regents of the Texas A&M University System.[500]

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[495] *Id.*, § 33.202(b).

[496] The CMP is discussed in greater detail on pages 181-182 of this report.

[497] The seven state agencies represented on the CCC are the Texas Parks and Wildlife Commission, the Texas Natural Resource Conservation Commission, the Railroad Commission of Texas, the Texas Water Development Board, the Texas Transportation Commission, the State Soil and Water Conservation Board, and the Texas A&M University Sea Grant Program. The governor's appointees include a city or county elected official who resides in the coastal area, an owner of a business located in the coastal area, a coastal area resident, and a representative of agriculture.

[498] *See,* TEX. CONST., art VII, § 11.

[499] TEX. EDUC. CODE, § 66.64(a).

[500] *Id.*, § 66.62.

DISCUSSION

Permanent School Fund Issues

The Permanent School Fund (PSF) is a perpetual endowment for the benefit of the public schools in Texas.[501] The PSF was created with a $2 million appropriation by the Texas Legislature in 1854, expressly for the benefit of the public schools.[502] Additional real property and investment assets have been added to the corpus of the PSF over the years and the fund is now valued at approximately $26.8 billion.[503] The School Land Board (SLB) and the Texas General Land Office (GLO) control and manage the real property interests held by the PSF,[504] while the State Board of Education is responsible for, among other things, managing the investment assets of the PSF.[505] The Asset Management Division of the GLO is responsible for the administration of the management, leasing, and sale of PSF properties, subject to the supervision of the Land Commissioner and the approval of the SLB.

Christmas Mountains

In 1991 the Richard King Mellon Foundation (through the Conservation Fund) deeded the Christmas Mountains, a 9,269 acre tract of land near Big Bend National Park (BBNP), to the state for the benefit of the PSF. A conservation easement was drafted into the deed that contains seventeen provisions limiting how the land can be used.[506] The intent of these easement provisions is to ensure the conservation and protection of the tract for enjoyment by future generations. These restrictions generally provide that there can be no development, no alteration of natural conditions, no introduction of non-native plants or animal species, no construction of utilities or telecommunications systems, and no farming or livestock grazing on the land.[507] Importantly, the deed also provides that the land can not be sold by the state unless both the state and federal park systems first refuse to purchase the land, and then only with permission from the donor.[508]

In 2007, Land Commissioner Jerry Patterson announced that the SLB would accept bids to sell the Christmas Mountains to the highest bidder. The sale was authorized by the Land Commissioner in order to meet the fiduciary duties of the SLB and the goals of the conservation easement. Commissioner Patterson argued that selling the land was necessary to accomplish the

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[501] *See,* TEX. CONST., art VII, § 2; TEX. EDUC. CODE, § 43.001. For a brief history of the Permanent School Fund, *see*, *Handbook of Texas Online*, s.v. "Permanent School Fund", http://www.tshaonline.org/handbook/online/articles/PP/khp1.html (accessed May 23, 2008).

[502] These funds were available as a result of a $10 million payment from the United States government in exchange for giving up claims to western lands claimed by the former Republic of Texas.

[503] *See, e.g.*, TEX. CONST., art VII, § 2, § 4, § 5; TEX. EDUC. CODE, § 43.001(a); *See also*, Texas Education Agency, "Annual Report, Fiscal Year Ending August 31, 2007: Texas Permanent School Fund," publication number FS08 110 01, p. 4 (2008) (estimating the fund balance to be $26.8 billion).

[504] TEX. CONST., art VII, § 4; TEX. NAT. RES. CODE, § 51.011.

[505] TEX. CONST., art VII, § 5; TEX. EDUC. CODE, § 43.003.

[506] The Conservation Fund, (n.d.). "Gift Deed". Retrieved from the Texas General Land Office's website: http://www.glo.state.tx.us/ast_mgmt/sales/2007/Christmas%20Mountains/Exhibit%20B%20-%20Gift%20Deed.pdf (accessed May 28, 2008).

[507] *Id.*, pp. 2-4.

[508] *Id.*, p. 4. Commissioner Patterson has repeatedly argued that this provision is unenforceable.

goals of the original gift, being to preserve the Christmas Mountains and to provide public access. The Land Commissioner also explained that the state could not invest the hundreds of thousands of dollars needed to fence the land to protect it from poachers and to replenish wildlife (as a fiduciary to the PSF, the GLO must earn a return from all PSF properties and may not invest money in a property that is not expected to earn a return). Importantly, and in accordance with the terms of the deed, Commissioner Patterson (on two separate occasions in 2004 and 2005) had offered the tract to both the National Parks Service (NPS) and to the Texas Parks and Wildlife Department, both of whom declined the offers. The Mellon Foundation opposed the sale and demanded that the land either be maintained by the state in accordance with the terms of the donation, or returned.

The following chronology highlights the more significant events regarding the proposed sale of the Christmas Mountains. Throughout this process, the public's interest in the proposed sale of the Christmas Mountains has continued to grow and to be reported by the press.[509] On September 18, 2007, the SLB rejected six bids to purchase the property following a heated public hearing because of a technical error in the map used in the bid specifications.[510] On October 12, 2007, the NPS informed the GLO that it was interested in acquiring the Christmas Mountains. On November 6, 2007, the SLB postponed awarding a bid on the property in order to give the NPS ninety days to put together a proposal to meet or exceed the existing qualifying bids.[511] On January 31, 2008, the Land Commissioner received the NPS's management plan for the property. On February 5, 2008, the SLB voted to not accept either of the two private conservation bids.[512] Most recently, the GLO has placed a permanent easement on the tract that allows public access from BBNP.[513]

Commissioner Patterson explained to the Committee on May 5, 2008, that he is not opposed to transferring the property to the NPS, preferably as a national preserve, if firearms and hunting are allowed, if certain issues regarding the minerals on the property are addressed, and if funding and access issues are resolved. At the present time it is unclear whether Commissioner Patterson and the NPS will be able to reach an agreement that will result in the voluntary transfer of the land.

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[509] Environment Texas, an environmental advocacy organization, has been the primary force leading the opposition to the Commissioner's proposal. The official website for Environment Texas may be accessed at: http://www.environmenttexas.org (accessed May 13, 2008). In addition, this controversy has been widely covered by the print media, and editorial boards have universally taken the side of the opponents of the proposal (editorials in the *Austin American Statesman* fairly represent those printed by other newspapers). *See e.g.* Editorial, "Texas a Grinch for Putting Christmas Mountains for Sale," *Austin American Statesman*, (September 11, 2007); Editorial, "State Land Sale: Forget About It," *Austin American Statesman*, (September 19, 2007); Editorial, "Stop Hunting for Buyers for Christmas Mountains," *Austin American Statesman*, (October 16, 2007); Editorial, "Give Park Service Fair Shot to Acquire Christmas Mountains," *Austin American Statesman*, (November 6, 2007).

[510] *See*, Texas General Land Office Press Release, "Technical error delays sale of Christmas Mountains: Wrong map in bid specifications forces rejection of all bids," (September 18, 2007).

[511] *See*, Texas General Land Office Press Release, "Land Board delays bids for Christmas Mountains, commissioner seeks plan from NPS and support of Conservation Fund: School Land Board delays bids to sell Christmas Mountains for 90 days," (November 6, 2007).

[512] *See*, Texas General Land Office Press Release, "Christmas Mountains to remain in Texas hands: School Land Board votes to allow two private bids for West Texas land to expire," (February 5, 2008).

[513] *See*, Texas General Land Office Press Release, "Christmas Mountains now open to Big Bend visitors: Land Commissioner signs permanent easement to allow public access via park," (April 9, 2008).

House Bill 3699

Proceeds from the sale and use of PSF lands have until recently been placed into the Special Fund Account of the PSF, recently renamed the Real Estate Special Fund Account (RESFA).[514] In 2007, the 80th Texas Legislature enacted House Bill 3699 that, among other things, authorized the SLB to move PSF funds from the RESFA directly to the Available School Fund (ASF) or the PSF.[515] On October 11, 2007, State Board of Education (SBOE) Chairman Don McLeroy filed a request with the Texas Attorney General for an opinion regarding the constitutionality of this and other provisions found in House Bill 3699.[516] The SBOE argued that the Texas Constitution does not allow the SLB to release these funds directly to the ASF. The GLO, in a brief to the Attorney General argued that it legally has the authority to release these funds in the manner prescribed by House Bill 3699.

On April 9, 2008, the Attorney General released his opinion of the questions raised by the SBOE's request and found that the provision in question "appears to be inconsistent with the Texas Constitution article VII, sections 4 and 5."[517] This Attorney General's Opinion seems to settle for the moment the question of whether or not the SLB may directly release funds to the ASF.

Conn Brown Harbor

In 1944, then Land Commissioner Bascom Giles conveyed approximately 9,644 acres of state owned submerged land in and near Conn Brown Harbor to the City of Aransas Pass (City). In the years following the transfer, the City made significant and costly improvements to the land that included dredging the harbor and using the fill to create an uplands area. A 1999 Attorney General's Opinion found that the Land Commissioner did not have authority to transfer submerged land.[518] Moreover, submerged land, or an interest therein, could not have been validly conveyed to the City without compensation to the PSF.[519]

The 79th Texas Legislature enacted House Bill 1740 in an attempt to facilitate a trade between the state and the City of the Conn Brown Harbor area and a city-owned tract. The GLO and the City agreed to a timeline for survey and appraisal, which were completed in January 2006, and March 2006, respectively.

On February 20, 2008, the state transferred title to the area to the City, and the City agreed to pay the state $6 million and to trade eighty-nine acres for four tracts in Conn Brown Harbor.[520] This voluntary transfer settles the long-standing and delicate problem involving the equity issue of who should own Conn Brown Harbor.

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[514] *See*, House Bill 3699 (McCall, 80th Leg., 2007) (amending TEX. NAT. RES. CODE, § 51.401).
[515] *See*, *Id.,* (adding TEX. NAT. RES. CODE, § 51.413).
[516] *See*, ATTY. GEN. REQ. RQ-0638-GA (2007).
[517] TEX. ATT'Y GEN. OP. JC-0617 (2008).
[518] TEX. ATT'Y GEN. OP. JC-0069 (1999).
[519] *Id*.
[520] *See*, Texas General Land Office Press Release, "Patterson resolves dispute over Conn Brown Harbor: Long-delayed development may now begin without title questions," (February 20, 2008).

Coastal Issues

Texas has the third longest coastline in the United States, with 367 miles of gulf beaches and more than 3,300 miles of bay shoreline. Many of the state's responsibilities regarding the management and protection of the coast's resources, both natural and manmade, have been assigned by the legislature to the GLO, the SLB, and the CCC. The many day-to-day administrative functions involving coastal issues and programs are performed by the employees of the GLO's Coastal Protection Division, under the supervision of the Land Commissioner.

Coastal Erosion Planning and Response Act

The Texas coast suffers from one of the highest rates of coastal erosion in the country.[521] On average, 235 acres per year of land along the Texas gulf coast and land along the state's bays, estuaries, and navigation channels is lost due to coastal erosion. Sixty-three percent of the Texas gulf shoreline has an historical erosion rate of more than two feet per year, with some locations eroding more than ten feet per year. Coastal erosion directly impacts the infrastructure, quality of life, and economies of local coastal communities, not to mention the state's coastal wildlife populations and habitats. As such, the legislature has determined that it is important for the state to be involved in the study and prevention of coastal erosion, and the remediation of damages caused by it.[522]

In 1999, the 76th Texas Legislature enacted the Coastal Erosion Planning and Response Act (CEPRA) in an effort to assist the GLO in the protection of the state's coastal resources.[523] The CEPRA Program works as a collaboration between the GLO, the federal government, local governments, and the residents of coastal communities. CEPRA funds are used for a variety of coastal projects, including beach nourishment, dune restoration, shoreline protection, and habitat restoration. CEPRA funds consist primarily of general revenue dollars appropriated by the legislature,[524] money from the Coastal Protection Fund (commonly referred to as the Oil Spill Account),[525] and funds generated from the state sales tax on sporting goods.[526]

The Texas Legislature has appropriated varying amounts of money to the CEPRA Program during each of its five funding cycles. As a result, the number and scope of CEPRA projects has fluctuated as well. During the first two funding cycles, beginning in 1999 and ending in 2003, the legislature approved a total of $30 million for the program. During the 2004-05 biennium, the legislature appropriated $7.32 million to the program, and during the 2006-07 biennium, $7.3

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[521] The Bureau of Economic Geology at the University of Texas tracks erosion rates along the Texas coast. The Bureau's Texas Shoreline Change Project is aimed at developing a modern shoreline-monitoring and shoreline-change analysis program that will help guide coastal-erosion and storm-hazard-mitigation projects along bay and Gulf shorelines. Information regarding coastal erosion rates and the work of the Bureau may be viewed by visiting their website: http://www.beg.utexas.edu/coastal/intro.htm.

[522] For a detailed discussion of the causes of coastal erosion, *see*, "Causes of Coastal Erosion," http://www.glo.state.tx.us/coastal/erosion/causes/index.html (accessed May 23, 2008).

[523] *See*, Senate Bill 1690 (Bernsen, 76th Leg. 1999) (codified as TEX. NAT. RES. CODE, § 33.601 *et. seq*.).

[524] *See*, TEX. NAT. RES. CODE, § 33.604(b).

[525] *See*, *Id*., § 40.152(9).

[526] For the 2007-2008 biennium, $25 million in revenue from the state sporting goods sales tax will be credited to the CEPRA Program. While the revenue from this tax was appropriated by the legislature to the Texas Parks and Wildlife Department (TPWD), the TPWD was directed to send $25 million to the CEPRA Program.

million was appropriated for projects.

In 2007, the 80th Texas Legislature appropriated $17.3 million to fund the CEPRA Program for the 2008-09 biennium. In October, 2007, Land Commissioner Jerry Patterson approved a list of thirty-eight CEPRA "priority projects" for funding from a list of eight-four proposed projects. These thirty-eight projects include, to name a few, erosion response feasibility studies to determine erosion processes, bulkhead construction projects to protect local infrastructure, preliminary engineering and permitting projects for future construction, and various beach re-nourishment projects.[527] One such beach re-nourishment project will restore at least three miles of eroded Galveston beaches west of the Seawall.[528] This project will create a 200-foot wide beach from the end of the Galveston Seawall to Spanish Grant subdivision.

The Texas Legislature has unsuccessfully attempted to create a dedicated funding source for the CEPRA Program in the recent past. In both 2004 and 2006, the House Committee on Land and Resource Management formally recommended that a dedicated funding source of $30 million per biennium should be created for the CEPRA Program. As a result of this recommendation, a number of "fee" bills were introduced during the 79th Regular Legislative Session aimed at creating such a dedicated source.[529] The Committee, in conjunction with the GLO, various stakeholders, and members of the coastal legislative delegation worked to find a compromised solution, but were ultimately unsuccessful, due in large part to the resistance of potential stakeholders to accept any new fees that would impact their businesses. The Committee ultimately voted in favor of a compromised bill that created a single fee to pay for the program.[530]

Commissioner Patterson explained to the Committee on May 5, 2008, that the GLO will most likely request the 81st Texas Legislature to create a dedicated funding source for the CEPRA Program. The Land Commissioner argued that the sporting goods sales tax makes the most sense as a permanent funding source, given that Texas beaches are in essence public parks.

Coastal Coordination Council Meetings

Section 33.204(b) of the Natural Resources Code requires the Coastal Coordination Council (CCC) to meet quarterly, even when there is no business for it to consider. Such perfunctory meetings occur with some regularity and are an improper and wasteful use of staff time and taxpayer dollars. The GLO has suggested amending Section 33.204(b) to require the CCC to meet at least once per year, and more often subject to the call of the chairman. The GLO has estimated that the CCC would meet twice per year to discuss coastal grants, and as needed for other business.

[527] The General Land Office, (n.d.). "CEPRA Cycle 5 Project Descriptions". Retrieved from the General Land Office's website: http://www.glo.state.tx.us/coastal/erosion/cycle05/ProjectDescriptions.pdf (last accessed May 28, 2008).

[528] *See*, Texas General Land Office Press Release, "Patterson announces biggest beach project in Texas history: Three-miles of Galveston beaches — and maybe more — set for renourishment," (October 23, 2007).

[529] *See, e.g.,* House Bill 3128 (Eiland, 79th Leg. 2005); House Bill 3248 (Ritter, 79th Leg. 2005).

[530] *See*, House Bill 3128 (Eiland, 79th Leg. 2005) (proposing a fee of .75¢ for each new automobile or truck tire sold in the state).

Coastal Management Program

The federal Coastal Zone Management Act of 1972 (CZMA)[531] allows coastal states to submit individual coastal management plans to the federal government for approval. Federal approval of a state plan makes the state eligible to receive federal grant funds for coastal projects and enables the state to review federal actions and permits for consistency with their coastal plan. Texas has an approved coastal management plan that was developed, adopted, and is currently implemented by the CCC, with the assistance of the staff of the GLO's Coastal Management Division.[532]

The purpose of the state's Coastal Management Program (CMP) is to coordinate and improve the management of the state's natural coastal resources, ensure the long term ecological and economic productivity of the coast, and to make more effective and efficient use of public funds by, among other things, linking federal, state, and local planning, projects, and spending along the coast.

As a result of the state's compliance with the CZMA, Texas receives $2.2 million each year in federal CZMA dollars that are used by the state and local entities to implement appropriate coastal projects.[533] Currently, 90% of the CZMA dollars that are received by the state are sent directly to local coastal communities in the form of coastal enhancement grants.[534] The state, through the CMP, is authorized to pass on to coastal communities two types of federal funds. "306 Administrative Funds" may be used for non-construction projects such as Geographic Information Systems development and mapping, planning and research, and education and outreach programs.[535] "306A Coastal Resource Improvement Funds" may be used for construction and land acquisition projects, such as the preservation or restoration of coastal natural resource areas, the enhancement of access to public beaches and other coastal areas, and the development of a coordinated process for aquaculture facilities.[536]

The CCC has created the following categories of projects to provide guidance to applicants on the types of 306 and 306A projects that are eligible for funding under the CMP:[537]

1) Coastal Natural Hazards Response.

2) Critical Areas Enhancement.

3) Shoreline Access.

4) Waterfront Revitalization and Ecotourism Development.

[531] *See*, 16 U.S.C. § 1451 *et. seq.*
[532] *See*, TEX. NAT. RES. CODE, §§ 33.052 - 33.055.
[533] *See,* Texas General Land Office, (n.d.), "Texas Coastal Management Program." Retrieved from the Texas General Land Office's website: http://www.glo.state.tx.us/coastal/grants/index.html (accessed May 28, 2008).
[534] *See, Id.*
[535] *See*, 16 U.S.C. § 1455.
[536] *See*, 16 U.S.C. § 1456.
[537] *See,* Texas General Land Office, "Texas Coastal Management Program."

5) Permit Streamlining/Assistance and Governmental Coordination.

6) Information and Data Availability.

7) Public Education and Outreach.

8) Water Quality Improvement.

In addition to funding coastal projects, the CMP also operates a Permit Service Center that serves as a technical advisor and as a clearinghouse for coastal permitting activities on the lower Texas coast by individuals, small businesses and local governments.

Coastal Impact Assistance Program

The Coastal Impact Assistance Program (CIAP) was enacted by the United States Congress to assist coastal states and communities that are impacted, either directly or indirectly, by oil and gas exploration and development activities on the Outer Continental Shelf. Many of these impacts are felt onshore through the increased need for production and support facilities, potential air and water quality issues, and increased demand for infrastructure, to name just a few. The federal government has authorized CIAP funds to be used for any of the following purposes:

1) Conservation, protection or restoration of coastal areas, including wetlands.

2) Mitigation of damage to fish, wildlife, or natural resources.

3) Planning assistance and the administrative costs to comply with the CIAP.

4) Implementation of a federally approved marine, coastal or comprehensive conservation management plan.

5) Mitigation of the impact of the Outer Continental Shelf activities through funding of onshore infrastructure projects and public service needs.

The CIAP is funded by federal royalties that have been generated from offshore oil and gas leases. During each fiscal year from 2007 through 2010, $250 million in CIAP funds are scheduled to be divided among six coastal states, including Texas. The state of Texas was allocated $48,591,202 in CIAP funds for fiscal year 2007. Of this amount, $31,584,281 was awarded directly to the state and $17,006,921 was awarded to the eighteen Texas coastal counties. Before these funds can be distributed, the state is required to submit a coastal impact assistance plan that must be approved by the federal government.

On January 26, 2006, Governor Rick Perry established a three-member Coastal Land Advisory Board (CLAB) to create the coastal impact assistance plan required to receive CIAP funds. The CLAB is comprised of three members and is chaired by the Land Commissioner. On November 6, 2007, the CLAB submitted a draft plan to Governor Perry that included thirty-nine proposed

projects that represent nearly $31.6 million in proposed coastal CIAP grants.[538] On June 4, 2008, the state submitted its Texas Coastal Impact Assistance Plan to the federal government for approval. Currently, the GLO is working with the federal government in hopes that the state's CIAP funds will be available by the end of 2008.

Open Beaches Act

The Texas Open Beaches Act (OBA)[539] declares it to be the policy of the state that the public have "free and unrestricted right of ingress and egress" to and from public beaches, and makes it an offense for any person to "create, erect, or construct any obstruction, barrier, or restraint that interferes with this right."[540] Generally, the area constituting a public beach extends from the line of mean low tide to the line of vegetation bordering the Gulf of Mexico.[541] The OBA requires the Texas Attorney General or any county attorney, district attorney, or criminal district attorney (upon request of the Land Commissioner) to file suit to remove any barrier to the public's right to access and use of a public beach, and requires the Land Commissioner to "strictly and vigorously enforce the prohibition against encroachments on, and interferences with, the public beach easement."[542]

In 2003, the 78th Texas Legislature authorized the Land Commissioner to establish a two-year moratorium on removing structures that had, as the result of coastal erosion, become seaward of the line of vegetation.[543] The two-year period was intended to allow time for the natural line of vegetation to grow back so that those privately owned structures would not have to be removed.

On June 6, 2004, Commissioner Patterson issued moratorium orders for 116 homes that had become barriers to public beach access.[544] The orders provided a two-year prohibition against removing these structures from the public beach. The moratorium expired on June 6, 2006, and by statute could not be extended. At that time Commissioner Patterson made $1.3 million in state funds available to remove qualified houses from the public beach in an attempt to mitigate the impact on the private property rights of those affected by his enforcement of the OBA.[545]

Strict enforcement of the OBA through the removal of private structures from the beach raises important policy questions regarding the proper balance between the right of the public to access state beaches and the interests of property owners whose homes end up on the public beach as the result of coastal erosion. Commissioner Patterson, in testimony before the Committee on May 5, 2008, suggested that the GLO is working on a more equitable solution to this problem that will be presented to the legislature in 2009.

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[538] *See*, Texas General Land Office Press Release, "Coastal Land Advisory Board votes on $31.6 million in grants: Proposed list of projects moves on to Gov. Perry for approval," (November 6, 2007).

[539] TEX. NAT. RES. CODE, §§ 61.001 *et. seq*.

[540] *Id.*, § 61.011(a), § 61.013.

[541] *Id.*, § 61.001(8).

[542] *See*, *Id.*, § 61.018, § 61.011(c).

[543] *See*, House Bill 1457 (Eiland, 78th Leg. 2003) (adding TEX. NAT. RES. CODE, § 61.0185).

[544] *See*, Texas General Land Office Press Release, "Patterson takes action to enforce Texas Open Beaches Act: Land Commissioner announces two-year plan to protect access to public beaches, assist homeowners," (June 8, 2004).

[545] *See*, Texas General Land Office Press Release, "Patterson announces $1.3 million to move homes off beach: Patterson's plan for Texas Open Beaches calls for new approach to an old problem," (June 7, 2006).

Coastal Oil Spill Prevention and Response

In 1991, the Texas Legislature enacted the Oil Spill Prevention and Response Act (OSPRA) to address the dangers posed by the spills, discharges, and escapes of oil and petroleum type products.[546] At that time the legislature determined that:

> Spills, discharges, and escapes of crude oil, petroleum, and other such substances . . . endanger the coastal environment of the state, public and private property on the coast, and the well-being of those deriving their livelihood from marine-related activity in coastal waters.[547]

The OSPRA designates the GLO as the lead state agency for preventing and responding to oil spills in the waters of Texas,[548] and authorizes the Land Commissioner to:[549]

1) Prevent spills and discharges of oil by requiring and monitoring preventive measures and response planning.

2) Provide for prompt response to abate and contain spills and discharges of oil and ensure the removal and cleanup of pollution from such spills and discharges.

3) Administer a fund to provide for funding these activities and to guarantee the prompt payment of certain reasonable claims resulting from spills and discharges of oil.

The OSPRA Program centers around preventative and response initiatives and activities paid for from a fund created for these purposes. The prevention component of the OSPRA Program includes such things as public outreach programs, increased harbor and port patrols, and an unannounced audit program designed to measure the readiness level of all sectors of the oil handling community.

The response component of the OSPRA is directed at stopping, containing, and cleaning up oil spills. In a typical year, GLO employees respond to between 850 and 1,000 reported oil spills. The OSPRA Program employs twenty-nine response officers who perform such functions as coordinating spill response strategies, deploying response equipment, investigating spills to determine the cause and responsible parties, and conducting follow-ups to ensure that appropriate corrective actions have been taken.

The OSPRA Program is primarily funded by a 1⅓ cents per barrel fee on crude oil that is loaded or off-loaded in Texas ports.[550] This fee, along with funds from various other sources, is deposited to the credit of the Coastal Protection Fund.[551] Coastal Protection Fund monies may be used for such things as responding to spills, purchasing response equipment, the Small Spill

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[546] *See,* TEX. NAT. RES. CODE, §§ 40.001 *et. seq.*
[547] *See, Id.*, § 40.001(a).
[548] *See, Id.*, § 40.004.
[549] *See, Id.*, § 40.001(c).
[550] *See, Id.*, § 40.154, § 40.155.
[551] *See, Id.*, § 40.151.

Education Program, plugging or abandoned or orphaned submerged wells, administrative and operating expenses, and certain coastal erosion projects.[552]

CONCLUSION

The Land Commissioner and the staff of the Texas General Land Office (GLO), School Land Board (SLB), Coastal Coordination Council (CCC), and the Board for Lease of University Land (BLUL), have professionally managed the responsibilities that have been delegated to them by the constitution and the laws of this state. Though the Committee may not always agree with every decision made by the Land Commissioner and his staff, the Committee believes that the Land Commissioner and his staff consistently fulfill those responsibilities that have been assigned to them. The Committee recognizes that the Land Commissioner is an elected official who has been entrusted by those people that have elected him to perform the duties that have been delegated to him. While the Committee believes that it is important for it to monitor the decisions and activities of the GLO, SLB, CCC, and the BLUL, it does not believe that it is appropriate for it to micro-manage these entities considering the fact that they are supervised by an elected official.

RECOMMENDATIONS

1) The School Land Board should retain on behalf of the Permanent School Fund the tract of state-owned land known as the Christmas Mountains until and unless all of the parties interested in its transfer agree upon how to best transfer the property.

2) In the spirit of Texas Attorney General Opinion GA-0617, and in the best interest of the Permanent School Fund and the children that it serves, the School Land Board and the State Board of Education should fully cooperate with one another in the coordination of Permanent School Fund investments.

3) A stable dedicated funding source should be established to fund the Coastal Erosion Prevention and Response Act Program.

4) Section 33.204(b), Natural Resources Code, should be amended to require the Coastal Coordination Council to meet at least once per year, with any other meetings subject to the call of the chair.

5) The Legislature should continue to encourage the state's congressional delegation to promote further federal funding of Texas coastal management and projects through programs like the state's Coastal Management Program and the Coastal Impact Assistance Program.

[552] *See, Id.*, § 40.152(a).