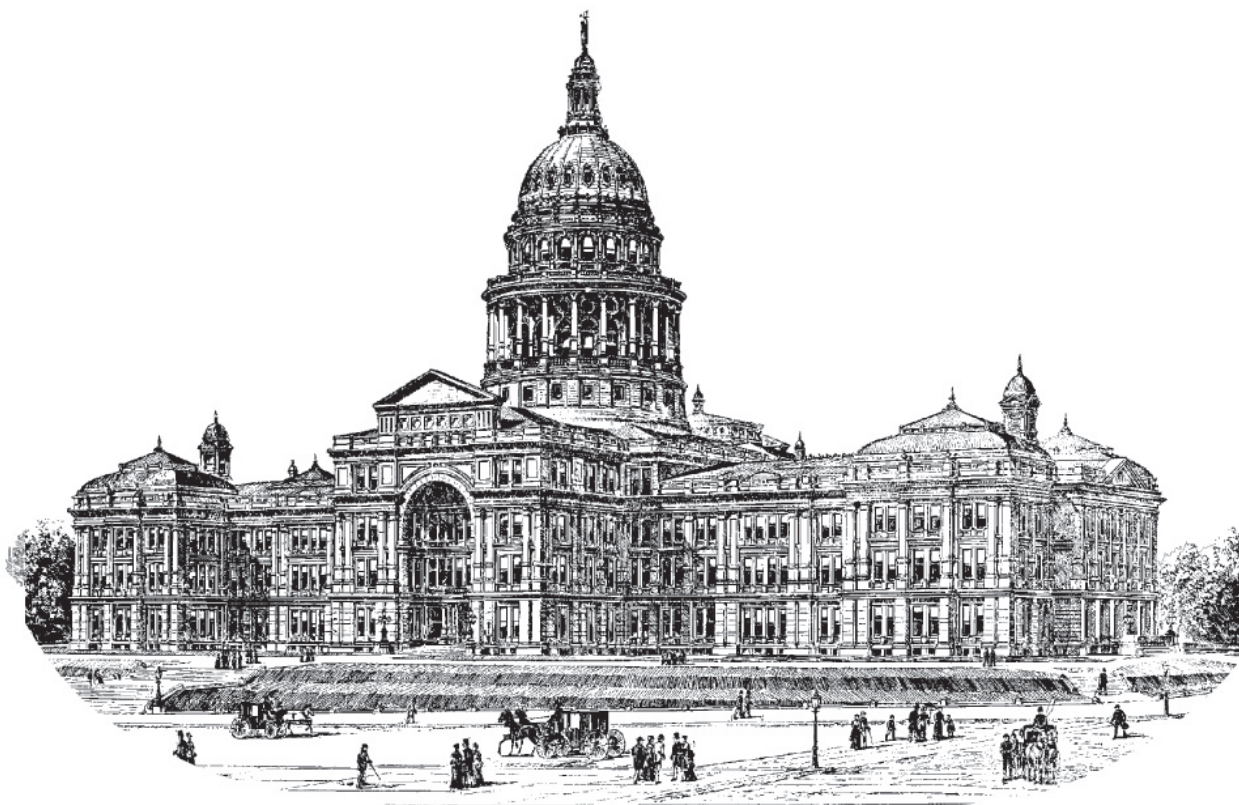




INTERIM REPORT

TO THE 83RD TEXAS LEGISLATURE



HOUSE COMMITTEE ON
LAND & RESOURCE MANAGEMENT
DECEMBER 2012

**HOUSE COMMITTEE ON LAND AND RESOURCE MANAGEMENT
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2012**

**A REPORT TO THE
HOUSE OF REPRESENTATIVES
83RD TEXAS LEGISLATURE**

**RENÉ OLIVEIRA
CHAIRMAN**

**COMMITTEE CLERK
JAMIE DURHAM BURCHFIELD**



Committee On
Land and Resource Management

December 19, 2012

René Oliveira
Chairman

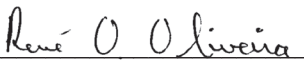
P.O. Box 2910
Austin, Texas 78768-2910

The Honorable Joe Straus
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:

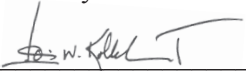
The Committee on Land and Resource Management of the Eighty-second Legislature hereby submits its interim report including recommendations and drafted legislation for consideration by the Eighty-third Legislature.

Respectfully submitted,

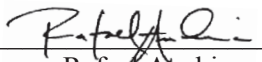

René Oliveira

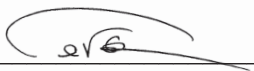

Tim Kleinschmidt, Vice Chair

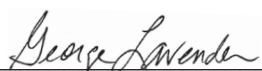
Rodney Anderson

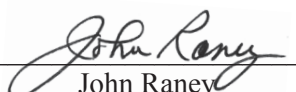

Lois Kolkhorst


Dee Margo


Rafael Anchia


John Garza


George Lavender


John Raney

Tim Kleinschmidt
Vice-Chairman

Members: Rafael Anchia, Rodney Anderson, John Garza, Lois Kolkhorst, George Lavender, Dee Margo, John Raney

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INTRODUCTION

At the beginning of the 82nd Legislature, the Honorable Joe Straus, Speaker of the Texas House of Representatives, appointed nine members to the House Committee on Land and Resource Management (the Committee). The Committee membership included the following appointees: René Oliveira, Chair; Tim Kleinschmidt, Vice Chair; Rafael Anchia, Rodney Anderson, Fred Brown, John Garza, Lois Kolkhorst, George Lavender, and Dee Margo. During the interim, John Raney was appointed to fill the position vacated by Fred Brown who resigned from the Legislature in 2011.

Pursuant to House Rule 3, Section 23 (82nd Legislature), the Committee shall have jurisdiction over all matters pertaining to:

- 1) the management of public lands;
- 2) the power of eminent domain;
- 3) annexation, zoning, and other governmental regulation of land use; and
- 4) the following state agencies: the School Land Board, the Board for Lease of University Lands, the Coastal Coordination Council, and the General Land Office.

During the interim, Speaker Joe Straus issued five interim charges to the Committee to study and report back with facts, findings, and recommendations. The House Committee held two public hearings on July 23, 2012 and September 24, 2012 to study the charges. The Committee also accepted written testimony and research from the public in the course of compiling this report. Appreciation is extended to those who testified before the Committee and those that submitted written materials during this time.

HOUSE COMMITTEE ON LAND AND RESOURCE MANAGEMENT

INTERIM STUDY CHARGES

1. Examine the Cabin Program managed by the General Land Office. Review the history of the program, the current fee structure, and the renewal process and whether the program is achieving the goals for which it was created. Make appropriate legislative recommendations.
2. Monitor and examine the ongoing litigation of *Severance v. Patterson* and its impact on the Texas Open Beaches Act.
3. Examine the effectiveness of the Texas Private Real Property Rights Preservation Act (Chapter 2007, Government Code).
4. Examine current regulatory authority available to municipalities in their extraterritorial jurisdiction. Make necessary legislative recommendations to ensure a proper balance between development activities and municipal regulations.
5. Monitor the agencies and programs under the committee's jurisdiction and the implementation of relevant legislation passed by the 82nd Legislature.

Charge 1

Examine the Cabin Program managed by the General Land Office. Review the history of the program, the current fee structure, and the renewal process and whether the program is achieving the goals for which it was created. Make appropriate legislative recommendations.

Background

Cabins and "fishing shacks" have existed along the Texas coast for more than a century. Sport and commercial fishermen, and duck hunters first began building these cabins between 1900 and 1920 on small islands or shell outcroppings in the bays. All of these cabins are only accessible by water. Once the dredging of the Intracoastal Waterway by the United States Army Corps of Engineers was completed in 1949, the number of cabins grew as people began building on the new spoil islands created by the dredging.

After determining that these fishing shacks needed oversight, the Texas Legislature enacted Chapter 33 of the Texas Natural Resources Code in 1973 which charged the School Land Board, acting through the General Land Office (GLO), with the management of these fishing cabins. The legislation considered all cabin structures existing on state land to be fully owned by the State of Texas. All existing cabins, as of August 27, 1973, were given the opportunity to register the structure with the Board. These cabins could be for recreational use only. If the cabin was not registered, the person who constructed the cabin would lose any claim and the structure could be removed by the State. In the initial registration period, 619 cabin permits were registered and permits were issued for those cabins. Permit holders are required to clearly mark their permit number on the exterior of the cabin. The General Land Office has managed the coastal Cabin Program since that time.

There are certain statutory requirements laid out for the Cabin Program in Chapter 33 of the Texas Natural Resources Code. Specific references include the following:

- | | |
|--------------|--|
| TNRC §33.119 | The board may issue permits authorizing limited continued use of previously unauthorized structures on coastal public land if the use is sought by one who is claiming an interest in the structure but is not incident to the ownership of littoral property. |
| TNRC §33.127 | Cabin permit terms may not exceed 5 years and may be renewed at the discretion of the board. |
| TNRC §33.128 | Permits may be used for noncommercial, recreational purposes only. |
| TNRC §33.131 | Structures associated with the cabin permit are property of the state of Texas. |
| TNRC §33.130 | Major repairs or rebuilding of the cabin structure require approval by the board. |

TNRC §33.126 If the terms of the permit are broken, the permit may be terminated by the board.

Current Cabin Program

According to the General Land Office, there are currently 407 cabins located in nine counties along the Texas Coast. Two hundred and eighty seven of these cabins are located along the Laguna Madre and 77 are located in the Upper Coast, the remainder are spread along other parts of the Texas coast. Permit holders come from all areas of Texas with the greatest number coming from the San Antonio and Houston metro areas. Michael Lemmonds, Director of Commercial Leasing and Special Projects for the General Land Office testified that the sizes, colors, and configurations of existing structures are as varied as the permit holders. Some cabins have been reconstructed and expanded over the years, but just as many have the same aesthetic look that they had 40 years ago.

Permits for these cabins are issued for five-year terms for recreation purposes only (statute prohibits using the cabins for commercial purposes). Once the five-year term comes to an end, if the cabin and permit holder are in compliance with all rules and guidelines, the cabin permit may be renewed for another five years. The cabin renewal process begins during the fourth year of the lease. This renewal is subject to approval by the School Land Board. The School Land Board must also approve any amendment to the cabin or the transfer of the cabin permit to another party. Out of the 407 current cabin permits, 37 are held by either the original permit holder or family members/heirs of an original permit holder. The average permit is held for 9 years.¹

There are three ways to become a part of the cabin program: transfer of the lease, partnering with an existing permit holder, or cabin bid offerings. With approval from the board, permits can be transferred from one interested party to another. All fees must be current and there is an on-site inspection of the cabin prior to approval. According to the GLO, an average of 16 transfers is approved by the board each year. Currently, the GLO does not require any additional fees in order to facilitate a permit transfer.

The second way to participate in the cabin program is to partner with an existing permit holder. Because of the remote locations of these cabins and exposure to weather, the cabins require constant maintenance to remain in compliance. Most permit holders will have several partners associated with the cabin permit in order to ease the high cost of maintaining the cabin. The primary permit holder is listed on the permit application and signs the contract. Partners with vested interest are listed in the GLO's database, and currently do not pay any additional fees for access to the cabin permit.²

¹ Written testimony provided by the General Land Office, July 23, 2012.

² Testimony provided by Amy Nuñez, General Land Office, July 23, 2012.

In response to increased demand and inquiries into the cabin program, starting in 2005, the GLO instituted a third way to become active in the cabin program: a sealed bid offering for permits. The GLO offers the opportunity for interested parties to obtain a cabin permit by bid offerings. The sites are selected based on minimizing impacts to natural resources and proximity to other cabins to improve management efficiency. The bid winner is still required to build a state-owned cabin at their own expense, which immediately becomes state-owned. This is a significant expense because these sites are only accessible by boat, there is no potable water or utilities, and in most instances are located miles from populated areas.³

Between 2005 and 2011, a total of 10 permits were offered for bid. The GLO has been conservative in offering sites for bid, and has focused on what is best for the program and less on generating significant amounts of revenue. There have been a total of 18 bidders to participate in this process. In 2005, there were six bids for five permits. There were nine bids for two permits in 2007. In 2009 there were two bids for two permits and there was one bid for one permit in 2011. This process has brought in a total of \$288,720 to the Cabin Program with the lowest bid of \$17,090 in 2009 and the highest bid of \$48,518 in 2007.⁴

Cabin Program Revenue

There are three categories for money collected in association with the cabin program: deposits, fees, and rent. Fees are deposited into the General Fund which is utilized by the State of Texas. Rent is collected and deposited into a special account called Fund 450 that solely supports the Cabin Program. The General Land Office makes a point to keep the fees and rent associated with this program in order to encourage permit holders to invest time and money into the maintenance of the cabin.⁵ The following is a breakdown of the three categories:

Category	Amount	Notes
Deposit	\$200.00	One time, refundable, for new contract issuance or transfer of interest approved by the School Land Board
Fee	\$375.00	New contract issuance or transfer of interest approved by the School Land Board.
	\$175.00	Contract Renewal
Rent	\$0.60/sq. ft.	\$175.00 minimum, bonus rent can be collected under this category for cabin permits obtained through the sealed bid process.

³ Testimony by Michael Lemmonds, General Land Office, July 23, 2012.

⁴ Written testimony provided by the General Land Office, July 23, 2012.

⁵ Testimony by Amy Nuñez, General Land Office, July 23, 2012.

In 2011, the annual revenue (rent) for the Cabin Program was \$290,000. The average permit holder pays an average of \$606 annually in rent, and approximately \$45,000 of the revenue came from what the agency calls "bonus rent", which is additional revenue collected by the sealed bid process. The GLO projects that the revenue for the Cabin Program will remain relatively constant as they anticipate that any contracts scheduled to expire will either be renewed or reissued.

Historically, any walkways, docks, and piers associated with the cabin have been considered ancillary structures with no rent allocated for these structures. In early 2012, the GLO staff began exploring an additional rent category to be associated with these structures and was recently granted preliminary authorization by the School Land Board for a fee change that includes a \$0.20 per square foot additional fee for walkway, pier and dock structures associated with the cabin permit. This additional rent could generate \$60,000 per year if implemented.⁶

Historical revenues deposited into Coastal Public Lands Management Account Fund 450 from 2004-2011 are as follows:

Year	Deposit
2004	\$209,853
2005	\$360,458
2006	\$225,570
2007	\$337,716
2008	\$210,256
2009	\$297,294
2010	\$257,031
2011	\$290,216

As of July 17, 2012 the revenues deposited into the Coastal Public Lands Management Account Fund 450 for 2012 are \$209,484.

The GLO offered permit sites for bid 2005, 2007, 2009, and 2011. The bonus rent collected for those years is as follows:

Year	Permits Offered	Bonus Rent
2005	5	\$112,501
2007	2	\$97,037
2009	2	\$34,180
2011	1	\$45,002
Total	10	\$288,720

⁶ Testimony provided by Michael Lemmonds, General Land Office, July 23, 2012.

Annually, the GLO is appropriated \$202,510 out of Fund 450. Any revenues received in excess of this amount remain in the account and support the subsequent year's appropriation. The current fund balance is \$385,461.⁷

Cabin Program Management

For efficiency, the GLO utilizes existing staff and resources for the management of the Cabin Program. The Cabin Program is fully self-sufficient and receives no additional funding for management. The money collected by annual rent and bonus rent deposited into the Fund 450 is used to fund staff and necessary equipment, such as boats, to effectively manage the program. The GLO has approximately 12 field staff employees and 3 Austin staff employees who work with the Cabin Program. There are no employees who work solely with the Cabin Program, they all have various other responsibilities with the GLO.⁸

The GLO has implemented four strategies for the Cabin Program which has helped to increase efficiency. First, the GLO maintains low fees for the use of state land. One point the agency is particularly proud of is that the fees associated with the program have remained relatively low since the inception of the program. The low fees also work as an incentive for permit holders to invest in the maintenance of their cabins in order to keep them in working order and up to the standards set forth by the GLO. Second, the GLO implemented a leveling plan which distributes the number of permit renewals each year. This has reduced the workload and allows for agency staff to organize, plan, and manage the program effectively. Third, the agency has identified preferred locations for cabins and when possible, cabins are relocated to these areas. This helps to minimize the costs associated with field inspections, and helps with time management when conducting the inspections. Finally, the GLO utilizes electronic communication via e-mail and the agency's website when corresponding with cabin permit holders.

The Cabin Connection newsletter is a yearly publication that is sent to each cabin lessee and published on the GLO's website. This publication gives permit holders the opportunity to share photos and stories and experiences with the program. The newsletter also provides the GLO with an outlet to share common violations, new program requirements, boater safety, habitat protection practices, and any other relevant information with cabin program participants.⁹

The GLO is also committed to ensuring that the Cabin Program is an environmentally conscious program. Staff coordinates with state and federal agencies, non-profit organizations, and cabin permit holders to ensure that the Texas coast is preserved and clean and not harmed by this

⁷ Written testimony provided by the General Land Office, July 23, 2012.

⁸ *Id.*

⁹ Testimony provided by Michael Lemmonds, General Land Office, July 23, 2012.

program. Some specific examples include waste disposal, debris clean-up, and minimizing impacts to critical habitats.

Under the Waste Disposal Policy for cabin permits, under no circumstances can human waste be disposed of in the water or on State Land. Each cabin permit holder is required to have a waste system that is entirely self-contained and portable, allowing for removal at any time. The GLO requires all permit holders to sign an affidavit regarding this policy and provide information on the compliant system that will be used. Permit holders are also required to remove all debris from the cabin site as part of the permit compliance. Any construction or reconstruction of piers associated with cabins must comply with current rules and guidelines established by Texas statute. Agency staff works with permit holders to ensure that impact to natural resources, such as seagrass, is minimized as much as possible.

In addition to these requirements, the GLO has also worked with the U.S. Fish and Wildlife Service and the Audubon Society to relocate cabin structures from rookery islands to less sensitive areas. So far, more than 25 cabins have been relocated. The agency also works to ensure that any remaining cabins on rookery islands are managed to minimize disturbance to nesting birds.¹⁰

Two common concerns are most often associated with the cabin program. First, existing cabins and leases are held almost in perpetuity. As noted earlier, almost 10 percent of leases are still held by the same person or family which was originally granted the lease almost 40 years ago. The average permit is held for 9 years. Rarely, however, is the cabin relet by the state. Usually a transfer of the lease is arranged privately, which is the second concern with the program. These privately arranged transfers, often net the leaseholder tens of thousands of dollars, yet the state transfers the lease at no charge. These transfers exclude the general public from any opportunity to bid to lease the cabins.

With respect to the long-term holding of leases, these leaseholders continue to abide by the rules of the program, which is often a considerable expense. Storms have destroyed many of the cabins, and the leaseholder must collect the debris, then reconstruct the cabin. Because the land is only accessible by boat, rebuilding is a time consuming and expensive undertaking. Still, holding leases for such long periods may exclude others from enjoying the lease.

The GLO says it keeps close track of inquiries about the program, and it does not feel there is a great deal of pent up demand for additional leases. While it was able to secure relatively high prices in 2007 for new leases, by 2009, with the negative impact of the recession, prices had dropped sharply. The GLO often finds that those who inquire lose interest once they understand the financial obligations that come with the program. Few can afford to build a cabin that

¹⁰ Written testimony provided by the General Land Office, July 23, 2012.

immediately becomes state-owned, maintain it, and be prepared to gather debris and rebuild if a hurricane hits.

Concerning the transfer of leases, the right to transfer a leasehold interest is generally inherent in a lease, as long as the lessor agrees. The GLO acknowledges that lessee's often make some return when they arrange a transfer of the lease, and seldom has the GLO rejected a transfer. Some question whether the GLO is failing to secure additional money for the state. They posit that GLO should let the lease terminate, then relet in a competitive bid process. The GLO is concerned that some leaseholders might abandon their leases and their obligations prematurely, causing safety issues and a financial obligation for the GLO to remediate a site, if the lessees are prohibited from arranging transfers and recouping some of their costs.

Overall, the desirability and value of leases are determined by location. Leases nearest the best fishing spots and relatively easily accessible are worth more than remote leases. Thus, the GLO's concerns appear valid for some sites for which there would be little demand, but less valid for sites for which there might be considerable demand.

Recommendations:

The GLO should take a more market-based approach to the management of leases.

Because the desirability and value of leases covers a very broad range, the GLO should use its property valuation and management expertise set varying terms and conditions across the spectrum of these properties, rather than relying on one set of rules that covers all the properties. There may be occasions when the GLO feels it can earn more for the state by denying a transfer, and reletting through a public bid process. For other properties, it may be more efficient to transfer the lease. The GLO, with its real estate expertise, is uniquely qualified to make decisions about how to handle each individual lease.

The committee does not believe any legislation is necessary to implement this recommendation, and requests the GLO make the rules changes it deems necessary maximize the financial, recreational, and environmental benefits of the program.

Charge 2

Monitor and examine the ongoing litigation of *Severance v. Patterson* and its impact on the Texas Open Beaches Act.

Background

There are over 600 miles of shoreline in the State of Texas. In order to protect the public's right to access these beaches, the Texas Legislature passed the Open Beaches Act in 1959. The Open Beaches Act (OBA) found in Texas Natural Resources Code §61.011(a) states:

It is declared and affirmed to be the public policy of this state that the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or if the public has acquired a right of use or easement to or over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico.

The public may use all the land seaward of mean high tide, known as the "wet beach." All the sand/property landward of mean high tide, known as the "dry beach," may be privately owned. Beach that is not accessible by a public road or public ferry is not included. Through erosion and other natural forces, the area making up the wet beach shifts over time.

In 2005, Carol Severance, a California resident, purchased three properties in Galveston that bordered the public beach. She received notice that if the public beach moves to where a home is located, the owner can be sued by the state and ordered to remove the structure. All purchasers of coastal property in Texas receive this notice. Following Hurricane Rita in 2005, the beach shifted. The General Land Office notified all property owners in Galveston whose homes were on the public beach easement of the encroachment, and offered monetary incentive to move their homes. In response, Ms. Severance filed suit through the Pacific Legal Foundation, arguing that the possible enforcement of the Open Beaches Act, by removing her home, violated her constitutional rights, specifically her 4th, 5th and 14th amendment rights. According to David Land, Director of the coastal law group of the Legal Services Division of the General Land Office, who testified to the Committee, Ms. Severance argued that the imposition of the rolling beach easement which put her house on the beach was an unreasonable seizure of her property and also constituted a governmental taking of private property without just compensation. Both claims were dismissed by the Southern District of Texas Federal Court in May 2007.

Following the dismissal, Ms. Severance appealed to the United States Court of Appeals for the Fifth Circuit Court in New Orleans, LA. Oral argument was heard in June 2008. A three judge panel unanimously dismissed the 5th amendment right of taking, because the state had not taken her property yet. Some questions arose concerning Texas Law and the 4th amendment claim. The court sent three questions to the Texas Supreme Court which were:

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1. Does Texas recognize a rolling public beach front easement, i.e. an easement in favor of the public that allows access to and use of the beaches on the Gulf of Mexico, the boundary of which migrates solely according to natural changes caused in the location of the vegetation line without proof of otherwise establishing an easement by prescription by dedication or other customary rights.
 2. If Texas recognizes such a rolling beach easement, was that easement derived from common law doctrines or from the construction of the Open Beaches Act itself.
 3. To what extent, if any, would the landowner be entitled to receive compensation under Texas Law or the Constitution for limitations on her private property usage affected by the landward migration of the rolling easement onto her property, to which no public easement had been found previously by dedication, prescription, or custom.¹¹

In November 2010 the Texas Supreme Court ruled that there is a rolling easement in regards to natural movement. They recognized that a beach is not a static entity and that it does move gradually. However, they did not recognize the dramatic movement caused during an "avulsive" event such as a hurricane or tropical storm.

The state disagreed with the court's ruling and asked for a rehearing in the Texas Supreme Court. They also asked the court to rule the case was moot after Ms. Severance sold her rental property to the city of Galveston. The court ruled that Ms. Severance could still be liable for penalties, so the lawsuit would remain. The state was granted a rehearing which was granted in March 2011, and oral arguments were heard in April 2011. In March 2012, the Supreme Court issued a ruling that was essentially the same as the November 2010 ruling.

The Court of Appeals sent the case back to the Southern District of Texas Federal Court for trial on Ms. Severance's 4th Amendment unreasonable seizure claim. In June of 2012, the State filed a Joint Petition for Rehearing en Banc, asking the entire panel of Fifth Circuit Judges to rehear the Severance case. At the time of this report, the State is currently awaiting a decision from the Court of Appeals on its petition.¹²

Issues

The Texas Supreme Court's opinion in the *Severance* case has created considerable uncertainty regarding the 53 years of law established by the Open Beaches Act. It further created uncertainty over how the General Land Office determines the extent of the public beach easement in the future. The decision will prompt further litigation. This will also greatly hinder the state from

¹¹ Testimony provided by David Land, General Land Office to the Committee on July 23, 2012.

¹² Written Testimony provided by the General Land Office to the Committee on July 23, 2012.

investing public money to protect what may be private beaches and delay coastal cleanup after a big storm as administrators sort out what is public and what is private. This may result in the public being unable to access a public beach affected by a storm. It is important to note that the first opinion did not rule that there is no public beach easement and it did not invalidate the Open Beaches Act.

Recommendation

The broad policy implications of the case on well-established law and its impact on public lands is of great concern. The committee will continue to monitor any developments in the *Severance v. Patterson* case and will make any necessary recommendations based on any final conclusion from the court.

Charge 3

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

Background

The Private Real Property Rights Preservation Act (Act) was adopted by the Texas Legislature in 1995. The Act is directed at governmental takings which are defined as "governmental actions affecting private real property, whole or in part or temporarily or permanently as required by the Fifth and Fourteenth Amendments to the United States Constitution and Article I of the Texas Constitution."¹³ The act requires compensation when governmental regulations cause a reduction of 25 percent or more in real property value. The act also requires government to prepare a Takings Impact Assessment when the adoption or issuance of an ordinance, rule, regulatory requirement, resolution, policy, guideline or similar measure imposes a physical invasion or requires dedication or exaction of private real property. The impact assessment must describe the specific purpose of the proposed action as well as the burdens and benefits of the government action. It must also describe reasonable alternative actions that could accomplish the specified purpose.¹⁴

Jim Allison, with the County Judges and Commissioners Association of Texas testified to the Committee that the act has accomplished what the Legislature intended without being too big of a burden on governmental agencies. There are two primary objectives of the act. First, the act was designed to require political subdivisions and state agencies to assess the impact of their actions on private property owners. This requirement forces the entities to consider whether their actions will reflect negatively on private property owners before they act. Second, if the entity does take an action that has a negative impact on the property owner to the extent of diminishing the value of their property by 35% or more, then the property owner has a statutory remedy by which they can seek redress to either roll back the governmental action or to obtain compensation for that governmental taking.

Counties only have the ability to exercise authority that the Legislature has enacted in statute, unlike cities who have the ability to create ordinances, except for action prohibited by the Legislature. Generally, Mr. Allison feels like counties are very conservative stewards of government power and only exercise power over private property when only absolutely necessary, and often this power improves the property value. However, when there is a loss in the property value, this Act gives property owners a vehicle and avenue by which they can seek redress for any damages that may have been caused by a taking.¹⁵

The most notable exemption from the Private Real Property Rights Preservation Act is cities. Most of the testimony provided to the Committee focused on this exemption. Some argue that this exemption greatly impacts the effectiveness of this act because municipalities utilize

13 Government Code §2007.001

14 Written Testimony provided by the Texas Public Policy Foundation on September 24, 2012.

15 Oral Testimony provided by Jim Allison, County Judges and Commissioners Association of Texas on September 24, 2012.

regulatory takings the most. Others argue that municipalities need to remain exempt because a change would drastically alter the way in which cities exercise their authority to regulate land use. This report will outline testimony heard for removing this exemption and testimony heard for keeping this exemption as well as other recommendations made by witnesses.

Removing the City Exemption

During the hearing on the Texas Real Private Property Rights Preservation Act, the committee heard testimony from several associations, property owner groups, and practicing attorneys in takings cases about why the Legislature needs to remove the city exemption from the act.

One reason for removing the city exemption is that as we continue to see growth in Texas, population wise, the footprint of cities and municipalities is only going to get larger, according to Seth Terry with the Texas Farm Bureau. As cities and municipalities grow, they will continue to annex surrounding land and more property owners will fall under the regulatory authority of the city or municipality.

Scott Norman with the Texas Association of Builders testified that if it recognizes that a regulatory taking that decreases the market value of a property is a problem, the state should not exempt cities that impose more regulations than any others. A city determines a regulatory action that is needed for the benefit of the whole community and they pass that regulation. A property owner should not have to carry that burden instead of all of the citizens of the city. If it is in the best interest of the city to change zoning or land use, then it should be the burden of the city to compensate the one agreed landowner.

There are also specific public notices in this act that cities do not have to comply with. Cities are also exempt from the Takings Impact Analysis so they do not have to examine what the market value impact of this taking will be. The Takings Impact Analysis could serve at least as a deterrent to have cities really consider a taking before implementing a regulation. This is important, especially when it comes to affordable housing. In takings cases with cities, individual lots are not affected as much as developments of raw land or large subdivisions. These regulatory rules are decreasing the value of the property and making the property less marketable especially for entry level housing.¹⁶ Mr. Norman recommended that if cities were not included in the entire act, then perhaps the Legislature should look to expanding the act to at least cover affordable housing developments.

Dan Wheelus, an attorney who represents a number of private property owners in takings cases testified that when cities are allowed to regulate in this extreme fashion, they circumvent the

¹⁶ Oral Testimony provided by Scott Norman, Executive Director of the Texas Association of Builders on September 24, 2012.

protections of eminent domain. The land is taken by regulations. It can circumvent the duty of a city to serve. When a municipality annexes land, they are required to provide certain services to that land. However, if the use of the land is almost entirely diminished, the city does not have to provide services like water and sewage or police and fire protection.¹⁷ Cities need to either be included in the act or the Legislature needs to create a set of parameters in the local government code that simply say that cities cannot regulate outside a regulatory box which protects property owners from having cities impose regulatory authorities outside of that box.

The Texas Public Policy Foundation contends that the municipal exemption significantly narrows the scope of the statute which basically renders it ineffective. This exemption disproportionately punishes Texans living in urban areas by exposing them to local governmental takings authority not permitted in rural areas. Bill Peacock testified that property owners should have just compensation when the value of their property is diminished. The Act should guard against the ability of local governments to arbitrarily devalue a citizen's private property.

Keeping the City Exemption

The Texas Municipal League provided testimony to the Committee that cities are, in large part, exempt from the act as a matter of public policy. When people move to cities, there is an expectation that their property will be protected for the good of the city as a whole. Cities regulate private real property in a number of ways including: subdivision and platting, zoning, building codes, and environmental controls. These regulations create a "reciprocity of advantage", meaning that the value of private real property is maintained by the city's regulations. Cities must also regulate property in order to maintain the health and safety of its inhabitants because people work and live closely together.

If the act was broadly applicable to cities then the city would have to respond to a claim by a property owner in one of three ways. First, they could pay the alleged damages. Second, they could pay the costs to litigate the claim. Or third, they could waive the regulations. In many cases, the city would be forced to waive the regulations because they would be unable to afford to litigate or pay the claim.

Often times, a city's land use regulations work to protect the good of the whole and maintain property values of the whole. Removing this exemption would remove land use control from the hands of the community and grant the authority to decide what is best for everyone living in a city to individual developers.

An argument can also be made that if a city is acting within its authority, the legislature should not dictate what land use regulations are or are not appropriate in a particular community,

¹⁷ Oral Testimony provided by Dan Wheelus on September 24, 2012.

especially if the citizens of the community support these regulations such as environmental protections regulations.¹⁸ A significant expansion of the act in regard to cities could eradicate city authority to regulate land use, leaving the safety of city inhabitants and the value of their property in jeopardy.

Other Changes Recommended

While most of the testimony centered on the city exemption, there were also other changes to the act recommended by some of the witnesses. Seth Terry with the Texas Farm Bureau would like to see the loser pay provision eliminated from the act. The Bureau believes this provision has prevented some property owners from responding to a regulatory taking because they often have limited resources. This provision could be eliminating the ability to test the real effectiveness of the act.

Similarly, the Texas Public Policy Foundation would like to see a reduction in the amount of loss necessary for compensable takings. They argue that a taking is a taking whether it devalues property by 10 percent or by 90 percent and that the 25 percent reduction is an arbitrary number. The act is a barrier to the less wealthy property owner pursuing his rights in the courts. The Foundation also recommends allowing a political subdivision to issue a waiver of enforcement. This would grant the authority to municipalities to waive the application of the regulation on a property-by-property basis if the city determines the cost of compensation to be too high. Finally, the Foundation recommends that municipalities be required to complete a Takings Impact Assessment when seeking to impose restrictions on private property owners. This describes the specific purpose of the proposed action and examines the benefits, burdens and alternatives to the regulation, which would provide more transparency in takings proceedings by municipalities.

Recommendation

While the Legislature and the committee greatly value the rights of private property owners in Texas, when the act was originally passed in 1995, the Legislature exempted municipalities from inclusion. Since that time, little has changed to believe the Legislature would reverse its position that the Private Real Property Rights Preservation Act include municipalities. We remain cautious of the unintended consequences on municipalities using legitimate public policy oriented regulations.

¹⁸ Written Testimony provided by Shanna Igo, Deputy Executive Director of the Texas Municipal League on October 12, 2012.

Charge 4

Examine current regulatory authority available to municipalities in their extraterritorial jurisdiction. Make necessary legislative recommendations to ensure a proper balance between development activities and municipal regulations.

Background

The extraterritorial jurisdiction (ETJ) of a city is generally an area of land surrounding the city outside the city limits, over which the city has some limited authority. This area may vary depending on the size of the city, and can include a range of anywhere from one-half mile to five miles outside of the city's full purpose, corporate limits. The legislature has given cities limited jurisdiction to regulate in the ETJ and has expressly granted authority to enact and enforce regulations only when it is necessary to provide some minimal level of protection to city residents and ETJ inhabitants.

The concept of extraterritorial jurisdiction was created in the Municipal Annexation Act which was passed into law in 1963. Texas Local Government Code § 42.001 sets out the policy purpose underlying the concept:

The legislature declares it the policy of the state to designate certain areas as the extraterritorial jurisdiction of municipalities to promote and protect the general health, safety, and welfare of persons residing in and adjacent to municipalities.

Margaret Wallace, with the City of Houston, whose ETJ is the largest in the state and encompasses parts of five neighboring counties, testified that when regulating development in the ETJ, the city primarily deals with subdivision platting requirements and major thoroughfare planning and that what authority the city does have is expressly granted by Texas statute.

Testimony

Ned Muñoz with the Texas Association of Builders testified that great caution should be exercised by cities when making regulations that expand to their extraterritorial jurisdiction. When the ETJ was created by statute, the main purpose was to allow pipes and roads to mesh in future annexations.¹⁹ Property owners within the ETJ do not have a remedy to battle over-reaching ordinances mandated by city governments because they do not have a vote in city elections and they do not receive city services. Over the years, various cities have attempted to misapply their authority over the ETJ and the legislature has had to intervene and remove those ordinances.

The Builders contend that if the activities in the ETJ are so paramount to the city and its needs, then the city has the ability to annex that property or utilize limited purpose annexation. With limited purpose annexation the city may apply all of its land use rules, including zoning, in that ETJ in exchange for those individuals being able to vote in city elections. The city would eventually have to annex that land in three years.

¹⁹ Oral Testimony provided by Ned Muñoz, Texas Association of Builders on September 24, 2012.

Mr. Muñoz stated that abuses of regulatory authority in the ETJ through over-reaching ordinances can increase the cost of housing because developers are unable to develop small lots or have to comply with costly regulations. This could lead to greater urban sprawl, requiring builders to develop land outside of a city's ETJ.

Most of the testimony provided to the committee focused on a specific tree ordinance in the city of San Antonio. Proponents of this ordinance contend that the restrictions provide many benefits to the city and citizens of the ETJ, while opponents discussed the negative ramifications the ordinance has had on development due to the costs associated with compliance. Opponents also argue that the ordinance unnecessarily infringes on the rights of property owners and developers located outside of the city.

John Jacks, Assistant Development Services Director for the City of San Antonio says the city understands that there needs to be a balance between growth and development and the protection of the quality of life of its residents. About half of all new subdivisions in San Antonio are located in the ETJ. Mr. Jacks contends that the tree ordinance falls under the city's regulatory authority in the ETJ because trees are a part of infrastructure as they manage stormwater, stabilize soils, reduce urban heat island effects and promote air quality.²⁰ In addition, County Commissioners adopted the tree requirements through the interlocal agreement on platting, the requirements do not affect established single-family homes or new single-family homes after the builder resells the properties to individual buyers, and agricultural, timber or ranching operations are exempt from the requirements. Basically, the tree preservation ordinance really only applies to builders and developers during the development stage.

The San Antonio ordinance also has provisions that allow for up to 65% of the protected trees to be removed without any mitigation, and there are options when mitigation is required including preserving additional trees, preservation of tree clusters, preservation of naturally vegetated areas or preservation of environmentally sensitive areas such as floodplains or steep slopes which are generally undevelopable. Additionally, the city has adopted various programs such as tree giveaways available for citizens in the ETJ, tree rebates available to CPS Energy customers, municipal plantings and has sought to purchase land for conservation through propositions which were widely approved by voters.²¹

Col. John Lamoureux, Commander of the 502d Mission Support Group testified on behalf of the Joint Base San Antonio-Fort Sam Houston which includes Fort Sam Houston, Lackland, Randolph and Camp Bullis in San Antonio. He specifically spoke to the benefits this tree

²⁰ Written testimony provided by John Jacks, Assistant Development Services Director for the City of San Antonio on September 24, 2012.

²¹ *Id.*

ordinance has provided Camp Bullis, which was established about a hundred a years ago with no surrounding development. Now, due to the growth of San Antonio and the surrounding communities, the base has experienced encroachment. Fortunately, San Antonio and the surrounding communities have been instrumental in resolving any issues that have arisen over the past few years due to this encroachment.

Lamoureux says the tree ordinance is an example of this cooperative effort, as it helps Camp Bullis in four ways. First, the ordinance helps Camp Bullis from becoming the "lone island of refuge" for the endangered golden-cheeked warbler. Without the ordinance, many restrictions would be triggered on Camp Bullis under the federal Endangered Species Act. Second, the trees buffer light from development which helps in aiding night training missions and the use of night vision goggles. Third, the trees also buffer noise coming from the installation which assists in reducing noise complaints due to the installation's firing ranges and aviation activities. Finally, the trees help the San Antonio area to be in attainment for EPA ozone standards.²² Mr. Jacks with the city of San Antonio also testified that this EPA attainment has brought jobs to San Antonio by being a contributing factor as to why Toyota Manufacturing chose the city for one of their plants.

James Leonard with the San Antonio Builders Association testified that since the early 90s in the city of San Antonio, approximately two dozen ordinances passed that effect the homebuilding industry. That's more than one ordinance a year that impacts the industry. Generally, it takes two years from the time that a developer acquires a piece of property, takes it through the planning process, and applies for plat approval to until he's ready to deliver home sites to a builder. Any grandfathering from a new ordinance does not occur until that point, so developers are constantly facing new ordinances while in the development phase of their projects.

Mr. Leonard was a participant in a stakeholder committee for the tree ordinance consisting of approximately 20 different groups within the city and testified that San Antonio has the most restrictive tree ordinance in the United States. Two thresholds of heritage trees: a large species tree which is a tree exceeds 24 inches in diameter measured at chest height. Smaller trees measuring in the twelve inches in diameter at chest height. These smaller trees are measured combining the multiple trunks of the tree. The fee to remove a large heritage tree is \$600 per caliber inch and \$200 per caliber inch for a small heritage tree. You do have the ability to buy your way out of the tree ordinance, but the cost can be up to \$15,000 to remove a tree that falls under the heritage tree category.²³ Developers also have the option of planting more trees to cover the loss of a heritage tree at a three to one ratio, which is not usually possible on most lots

22 Written testimony provided by Col. John Lamoureux, on behalf of the Joint Base in San Antonio on September 24, 2012.

23 Testimony provided by James Leonard, member of the San Antonio Builders Association on September 24, 2012.

that are being developed. The cost of complying with the ordinance and the cost to the planning can increase the cost of a property in the ETJ in an excess of \$1,000.

The money collected through these removals is deposited into the city's tree fund which can be used to plant more trees or litigate against violators of the tree ordinance. However, it should be noted that the city only plants trees within the city's full purpose limits and does not use money collected by the removal of trees in the ETJ to plant any trees in the ETJ. According to the Tree Coalition, San Antonio tree's fund is currently \$2.4 million dollars.

The military is a strong component of employment in San Antonio and the Builders agree that the United States Military should have everything at their disposal to carry out their mission. However, the area around Camp Bullis makes up a very small percentage of the city's ETJ and this ordinance affects the entire ETJ and perhaps an ordinance with a more narrow scope is in order.

While the committee acknowledges the stated benefits of this ordinance, the committee has to wonder whether the ordinance impedes too heavily the rights of property owners and developers away from the military base. The purpose of enforcing the unified development code in the ETJ is to bring together utilities so that if at a point in time the city annexes the area, they know they have utilities that are in compliance with code. The city should not use their regulatory authority to have an impact on the housing that is built and the use of private property in the ETJ.²⁴

Recommendation

The committee does have concerns regarding excessive and abusive regulations which impede or deny property owners their right to develop land as they see fit. However, the committee feels these regulations should be addressed with targeted, local bills brought by members who represent the area affected by the regulations. Any statewide solution could have unintended consequences on communities other than those imposing unreasonable regulations.

²⁴ *Id.*

Charge 5

Monitor the agencies and programs under the committee's jurisdiction and the implementation of relevant legislation passed by the 82nd Legislature.

Common Carrier Pipeline Status

In the 2011 Legislative Session, the committee passed SB 18 which was ultimately signed into law. The legislation provided comprehensive reform and stronger protection for private property owners regarding eminent domain practices in Texas. This reform includes requiring governmental entities interested in acquiring private property to first make a bona fide offer in writing and based on an appraisal, requiring condemnation petitions to specifically state the public use for which the land is needed, as well as clarifying that property taken through eminent domain may only be used for public use. The legislation also requires a governmental entity that takes land to first have a record vote which states which land will be acquired and for what project it is being acquired. Entities must also provide all appraisals of the property that have been done during negotiations. Finally, landowners have the ability to repurchase the land at the price they were paid for it if no actual progress is made toward the project in 10 years or if the property becomes unnecessary for the project for which it was taken.

In March 2012, the Texas Supreme Court issued a significant ruling regarding common carrier pipelines which under Texas law, have the ability to use eminent domain when acquiring property for pipeline construction. The Denbury Green decision caused considerable uncertainty for the oil and gas industry, and for Texas property owners as well. While the court did not rule specifically whether Denbury Green is a common carrier pipeline, it did rule that the method by which this common carrier status, and thereby eminent domain power, is granted to pipeline companies by the Texas Railroad Commission is insufficient. This report will outline the Denbury Green case, highlight the issues brought forth by the Supreme Court, detail testimony taken by the committee and make legislative recommendations.

Texas Rice Land Partners, Ltd v. Denbury Green Pipeline, LLC

Denbury Green owns a naturally occurring CO₂ reserve in Mississippi known as Jackson Dome and desired to build a pipeline from there to Texas oil wells to inject CO₂ into oil wells for increased oil production. Some evidence was admitted into the lower court record that Denbury might purchase man-made or "anthropogenic" CO₂ from third parties and transport it in the pipeline.

In March 2008, Denbury Green applied with the Railroad Commission to operate a CO₂ pipeline in Texas. In the one-page Form T-4 permit application, there are two boxes for the applicant to indicate whether the pipeline will be operated as "a common carrier" or "a private line." Denbury Green placed an "x" in the common-carrier box. In April 2008, the Commission granted the T-4 permit. In November 2008, Denbury Green filed a tariff with the Commission setting out terms for the transportation of gas in the pipeline. The administrative process for granting the permit was conducted without a hearing or without notice to landowners along the proposed pipeline.

Texas Rice Land Partners, Ltd. owns two tracts along the pipeline route. When Denbury Green came to survey the land in preparation for condemning a pipeline easement, Texas Rice Lands and lessee, Mike Latta refused entry. Denbury Green sued Texas Rice Land for an injunction to allow access to the tracts. The trial court rendered a summary judgment in favor of Denbury Green, finding that Denbury is a common carrier and has the power of eminent domain. The court of appeals affirmed the decision. One justice dissented, believing genuine issues of material fact precluded summary judgment. The case was then appealed to the Supreme Court of Texas.

Issues

The Supreme Court's ruling found that Denbury Green's "Unadorned assertions of public use are constitutionally insufficient. Merely registering as a common carrier does not conclusively convey the extraordinary power of eminent domain or bar landowners from contesting in court whether a planned pipeline meets statutory common-carrier requirements. Nothing in Texas law leaves landowners so vulnerable to unconstitutional private takings." The court of appeals' judgment was reversed and remanded to the district court for further proceedings consistent with their Opinion.

The Court brought forth a few issues that are most relevant to this Committee. Those issues are that the T-4 Permit granted by the Railroad Commission does not conclusively establish eminent-domain power, nor is there a test for common carrier status. The court also expresses the importance that a carrier is not a common carrier if it transports its own gas. The carrier must prove that there is a reasonable probability that an unaffiliated entity will be a future customer.

In the first issue, the court determined that nothing in statute indicates that the Railroad Commission's decision to grant a common-carrier permit carries conclusive effect, preventing landowners from disputing in court a pipeline company's assertion of public use. They also found that there is no effort to confirm that the applicant's pipeline will be for public rather than private use based on the record, current rules and statutes.

The court further states that when applying for a T-4 permit, the registrant simply submits a form indicating its desire to be classified as a common or private carrier. There is no notice given to affected parties, no hearing held, no evidence presented, and no investigation conducted. The commission performs a clerical rather than adjudicative act by accepting the entity's paperwork. With respect to the core constitutional concern, the pipeline's public versus private use, there is no regulation or enabling legislation directing the commission to investigate and determine whether a pipeline will in fact serve the public. The court concluded that based on the scant legislative and administrative scheme, it cannot be conceived that the Legislature intended the

granting of a T-4 permit alone to prohibit a landowner, who was not notified or involved in the permitting process, from challenging in court the eminent-domain power of a permit holder.

In order to qualify as a common carrier with the power of eminent domain, the pipeline must serve the public and not be built only for the builder's exclusive use. It was the contention of Denbury Green that making the pipeline available for public use is sufficient enough to confer common-carrier status. The court disagreed because the argument is inconsistent with the wording of Section 111.002(b) of the Texas Natural Resources Code, which states that a common carrier owns or operates a CO₂ pipeline "to or for the public for hire, but only if such person files with the commission a written acceptance" agreeing to become "a common carrier subject to the duties and obligations conferred or imposed by this chapter." The court contends that an entity must meet both of these requirements in order to confer common carrier status. It is also a concern of the court that a company could apply for a permit as a ruse in order to obtain eminent-domain power when a landowner refuses to allow access. Therefore, the court holds that in order for a person building a CO₂ pipeline to qualify as a common carrier under Section 111.002(b), a reasonable probability must exist that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas or sell it to parties other than the carrier.

The court concluded that while pipeline development is indisputably important to our state, given the fast-growing energy needs, economic dynamism and freedom itself also demand strong protections for individual property rights. They found that a private entity cannot acquire unchallengeable condemnation power merely by checking boxes on a one-page form and self-declaring its common carrier status. The Texas Legislature has enacted a regime that is protective of landowners. If a landowner challenges an entity's common-carrier designation, the company must present reasonable proof of a future customer in order to demonstrate that the pipeline will indeed transport "to or for the public for hire" and is not for private use.

Testimony

On July 23, 2012, the committee met in Austin to hear testimony from the oil and gas industry as well as property owners and property owners rights protection groups. Their concerns regarding common carrier status and their recommendations varied, but most agree that the oil and gas industry is an integral part of the Texas economy and a balance must be struck in protecting the rights of Texas property owners while also not hindering economic growth for such a vital industry for the state.

The Texas Farm Bureau is grassroots organization with a mission to be the "voice of Texas Agriculture." The Bureau maintains a Legal Defense fund which assists its members, who are private property owners, with various legal proceedings including cases involving the use of

eminent domain. Regan Beck, Assistant General Counsel for the Texas Farm Bureau testified that they agree with the Supreme Court's ruling that "simply checking a box and having the Railroad Commission process the form does not confer the power of eminent domain. Property owners must retain the right to challenge common carrier status in our courts."²⁵ Clayton Henry with the Texas and Southwestern Cattle Raisers Association asserts that "because it is so personal to property owners both the government and condemner should expect to be graded hard on whether the condemnation is for a public purpose and whether the condemnation process is fair, equitable, and upholding the letter and spirit of the law."²⁶

Private property owner, Julia Trigg Crawford, who is currently involved in a legal battle with another pipeline company over eminent domain, testified that there needs to be a system of real checks and balances when it comes to something as important as the condemnation of land. In the current system, common citizens are doing the work that should be shouldered by state agencies who administer the rules and procedures.²⁷ There is also a concern that many property owners do not have the means to pursue what can be a long and expensive court battle with a pipeline company when it comes to eminent domain proceedings.

While testifying, Debra Medina, Executive Director of We Texans, a non-partisan and non-profit grass roots organization, acknowledged the crucial role that industry makes to the economy of Texas and how it enriches the lives of Texans. She feels, however, that the Supreme Court's decision recognizes the abuses of eminent domain and that there must be an objective measure in place to determine whether a common carrier is in compliance.²⁸ Medina encouraged the committee to find a fair and just policy to reign in abuses to eminent domain practices by pipeline companies. She also noted the importance of investigating the quick-take procedures in Texas, as Texas property owners need to be properly and justly compensated for their condemned property. Medina stated that "The impaling of private property demands extreme care and legislation and a thorough investigation of the underlying factual situation."

Josiah Neeley, policy analyst for the Texas Public Policy Foundation testified that landowners and pipeline companies need clear rules to remove any uncertainty about which pipelines qualify as a common carrier. Landowners need to have a mechanism whereby they can seek redress when their rights are being violated. But this process needs to be as simple and streamlined as possible to prevent valuable pipeline projects from getting stuck in legal limbo. And it should be made clear, either through legislation or agency regulation, exactly what sorts of evidence are sufficient to prove common carrier status. Neeley also noted that while the Supreme Court found the existing Railroad Commission practice is inadequate to prove common carrier status, he does

25 Testimony provided by Regan Beck, Assistant General Counsel for the Texas Farm Bureau on July 23, 2012.

26 Testimony provided by Clayton Henry, Texas and Southwestern Cattle Raisers Association on July 23, 2012.

27 Testimony provided by Julia Trigg Crawford on July 23, 2012.

28 Testimony provided by Debra Medina, Executive Director of We Texans on July 23, 2012.

not feel that the court concluded that no commission action could be adequate. The commission could conduct an actual investigation or examination of the available evidence and provided the affected landowners with notice and an opportunity to contest the application. This process could meet the constitutional strictures required by Denbury while imposing the least possible burden on builders.²⁹

Phil Gamble with the Texas Gas Processors Association testified that the energy industry in Texas is dependent upon a predictable regulatory environment. The Denbury case could significantly impact the development of pipeline infrastructure in Texas which would significantly impact the drilling of new oil and gas wells in the state. In order to establish some degree of certainty in the common carrier process, Gamble recommended a two part solution. First, enhance the common carrier application review process at the Railroad Commission and second, grant exclusive jurisdiction to the Railroad Commission to hear those matters. The commission could apply the standards established by the Legislature as laid out in the statutes and make a determination of whether or not a pipeline qualified as a common carrier. Pursuant to the Administrative Procedures Act, findings of fact and conclusions of law would be taken at the hearing, this would provide the right of appeal for any party who disagreed with the Commission's decision. The appeal would go from the Railroad Commission to the District Court in Travis County to the Third Court of Appeals, and if necessary, the Texas Supreme Court. Gamble also testified that the hearing at the Railroad Commission should be limited to only the common carrier question, as there are other forums for discussions regarding route, product, and safety.³⁰

In his testimony, Bill Stevens with the Texas Alliance of Energy Producers stated that there is no more important tenant in our law than private property rights. The ability to abridge those rights must be limited and must be warranted. It carries with it an enormous responsibility to serve the public good. Stevens believes there should be upfront scrutiny and verification in the T-4 process that a pipeline is intended to be run for the public good should be a larger part of the process in granting the common carrier designation. The Alliance believes that more transparency in the process is a good thing and will benefit both the pipeline companies and private property owners.³¹

The Denbury decision changed overnight over twenty five years of case law that the oil and gas industry had been dependent upon, according to James Mann with the Texas Pipeline Association. He believes we now have a fact finding process instead of a legal conclusion. A concern from Mann is that if the fact finding process is not consolidated to one entity, there could be literally hundreds of different decisions by county and district courts in Texas as to

29 Testimony provided by Josiah Neeley, policy analyst for the Texas Public Policy Foundation on July 23, 2012.

30 Testimony provided by Phil Gamble, Texas Gas Processors Association on July 23, 2012.

31 Testimony provided by Bill Stevens, Texas Alliance of Energy Producers on July 23, 2012.

whether a pipeline is a common carrier or not along a pipeline route. That kind of uncertainty is extraordinarily damaging to the pipeline building process. Without being able to tell lenders that a pipeline will be able to be built, pipeline companies will not be able to secure the financing needed to build the infrastructure to support the growing oil and gas industry. Mann believes the only way to answer the questions that have arisen from Denbury is to have one hearing process with appeals in place and that the most logical forum and agency to conduct this process is at the Railroad Commission.

The Railroad Commission oversees the oil and gas industry. It regulates drilling, production, pollution remediation, and pipeline safety. Criticism continues to be leveled at the agency for the appearance of conflicts of interest. The latest Sunset Advisory Commission Staff Report details the nature of various issues contributing to the appearance of conflicts of interest. For the purposes of determining whether a pipeline company should be granted common carrier status, and thereby the extraordinary power of eminent domain, the influence political contributions can have on commissioners and the influence those commissioners can, in turn, exert on agency staff is of particular concern, especially when an increasing majority of campaign funds are coming from the regulated community. The influence of contributions was of such concern last session that the House added a provision to the Sunset Bill that would have prohibited a commissioner from knowingly accepting a contribution from a party with a contested case before the commission.

In addition to recommending campaign fundraising reforms for Railroad Commissioners, the Sunset Report explains that "the need for neutral, independent staff to preside over contested enforcement and gas utility cases remains critical to ensure the fair and unbiased treatment of all parties." A previous Sunset Advisory Commission report recommended moving gas utility cases and enforcement cases to the State Office of Administrative Hearings (SOAH) to "ensure outside objectivity." The cases were not moved from the Railroad Commission because the Sunset Bill failed to pass.

The latest Sunset Report details the concerns:

Having in-house attorneys hear the cases at the Railroad Commission can give the appearance of a conflict of interest, as these staff must preside as a neutral entity independent of the other Commission staff participating in the contested case as one of the parties. The hearing staff also answer to the elected Commissioners who receive campaign contributions from many of the industry parties in these cases. This relationship can create the perception of bias towards the industry and can lead to public mistrust in the Commission, even if no conflict exists.

In reevaluating this issue, Sunset staff found the Commission has taken steps to separate technical staff with party status and staff involved with the decision making in administrative hearings into different divisions. While reducing the

potential for inadvertent ex-parte communications, in-house hearings examiners remain subject to the overall pressures of working within the agency. Thus, the reasons for transferring these hearings to SOAH have not changed. Despite industry claims of additional costs and time delays, Sunset staff could find no evidence to support these allegations, and even to the extent these concerns have merit, they would not outweigh the need for an impartial hearings officer.

The Railroad Commissioners responded to this criticism in a November 20, 2012 letter:

The Commission disagrees with this recommendation. The Commission's gas utility rate cases were heard at SOAH for a brief period beginning in 2001. Gas utility consumers did not realize any appreciable benefits from having SOAH conduct gas utility hearings, while the Railroad Commission was burdened with unnecessary administrative obligations. The hearings returned to the Commission in 2003.

During the period when gas utility cases were heard by SOAH, neither the Commission, the gas utilities, nor the gas utility customers experienced any improvement in the manner in which cases were processed and decided. The cases were not processed more quickly or efficiently, the legal analysis performed by the SOAR administrative law judges was not more thorough or of greater quality, and the proposals for decision that were issued by SOAH were not better products than those historically produced by RRC hearings examiners. The transfer of gas utility contested rate cases did not represent an improved, more efficient, or better process, just a different and more costly one.

The current recommendation by Sunset Staff would transfer all contested enforcement cases and all contested gas utility rate cases to SOAR. The RRC has enormous in-house expertise among its technical staff, attorneys, and hearings examiners that is absolutely critical to the effective administration and enforcement of its various regulatory programs. Such in-house expertise allows the RRC to allocate and channel its resources as necessary to address significant regulatory issues and fulfill its regulatory responsibilities in the most efficient and proficient manner possible, including through the conduct of contested-case hearings, to best serve the citizens of the state of Texas and ensure protection of the environment. The contested-case hearing processes in place at the Commission protect the fundamental rights of all stakeholders, provide an equal opportunity to fully participate in contested-case proceedings, and ensure that Commission decisions are in fact fair, evidenced-based and lawful. Of particular importance is the ease of access afforded by the Commission's process that allows individual consumers or small business operators to represent themselves through the hearing process. Should the process transfer to SOAH, it is likely that

individuals currently representing themselves would require legal counsel to navigate the SOAH process.

Gas utility rate cases are not ideal comparisons to cases determining whether a pipeline company should be a common carrier, and thereby granted eminent domain powers. Rate cases deal with disputes between a willing seller and the willing customer, though they may disagree over the details of how much one will charge the other. Eminent domain cases, by their very nature, deal with an unwilling seller and interference with his or her property rights.

If one thing is clear from the Denbury ruling and this committee's hearing and study, it is that the state must aggressively and thoroughly investigate and evaluate the evidence a pipeline company submits when applying for common carrier status. The burden of contesting common carrier status should not fall on landowners who are subject to eminent domain action. The state should vet every proposed pipeline requesting common carrier status, and thereby eminent domain power, to ensure that there is a reasonable probability the pipeline will be for "public use."

One of the first statutory tests for granting eminent domain power is that the pipeline company will, more likely than not, be a common carrier. The analysis of the relevant evidence should be conducted independent and impartial hearing examiners, free from any appearance of a conflict of interest, to protect the integrity of the finding and the legitimacy of a qualifying pipeline company's authority to exercise eminent domain.

Recommendations

The Legislature should adopt a statutory framework for establishing what evidence constitutes a "reasonable probability" that a pipeline company applying for common carrier status will serve the public, as prescribed by the Texas Supreme Court's ruling in *Texas Rice Land Partners, Ltd. and Mike Latta v. Denbury Green Pipeline-Texas*.

To protect the integrity of the process of granting common carrier status and the legitimacy of a qualifying pipeline company's authority to exercise eminent domain, the Legislature should mandate an aggressive and thorough investigation of all the relevant evidence regarding the probability that a pipeline company will be a common carrier. Public notice and public hearings in the area of the proposed pipeline should be part of the process. The evaluation of that evidence and the determination to grant common carrier status should be conducted by an independent and impartial hearing examiner.

APPENDIX A

IN THE SUPREME COURT OF TEXAS

No. 09-0901

TEXAS RICE LAND PARTNERS, LTD. AND MIKE LATTA, PETITIONERS,

v.

DENBURY GREEN PIPELINE-TEXAS, LLC, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

Argued April 19, 2011

JUSTICE WILLETT delivered the opinion of the Court.

We deny the motion for rehearing. We withdraw our opinion of August 26, 2011 and substitute the following in its place.

The Texas Constitution safeguards private property by declaring that eminent domain can only be exercised for “public use.”¹ Even when the Legislature grants certain private entities “the right and power of eminent domain,”² the overarching constitutional rule controls: no taking of property for private use.³ Accordingly, the Natural Resources Code requires so-called “common

¹ TEX. CONST. art. I, § 17(a); *see also infra* note 13 and accompanying text.

² TEX. NAT. RES. CODE § 111.019(a).

³ This restriction also bars “the taking of property . . . for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues.” TEX. CONST. art. I, § 17(b).

carrier” pipeline companies to transport carbon dioxide “to or for the public for hire.”⁴ In other words, a CO₂ pipeline company cannot wield eminent domain to build a *private* pipeline, one “limited in [its] use to the wells, stations, plants, and refineries of the owner.”⁵ A common carrier transporting gas for hire implies a customer other than the pipeline owner itself.

This property-rights dispute asks whether a landowner can challenge in court the eminent-domain power of a CO₂ pipeline owner that has been granted a common-carrier permit from the Railroad Commission. The court of appeals answered no, holding that (1) a pipeline owner can conclusively acquire the right to condemn private property by checking the right boxes on a one-page form filed with the Railroad Commission, and (2) a landowner cannot challenge in court whether the proposed pipeline will in fact be public rather than private. We disagree. Unadorned assertions of public use are constitutionally insufficient. Merely registering as a common carrier does not conclusively convey the extraordinary power of eminent domain or bar landowners from contesting in court whether a planned pipeline meets statutory common-carrier requirements. Nothing in Texas law leaves landowners so vulnerable to unconstitutional private takings. We reverse the court of appeals’ judgment and remand to the district court for further proceedings consistent with this opinion.

I. Background

Denbury Resources, Inc. is a publicly traded Delaware corporation that owns all of Denbury Operating Company. Denbury Operating Company has no employees or physical assets, but owns

⁴ TEX. NAT. RES. CODE § 111.002(6).

⁵ *Id.* § 111.003(a).

all the stock of two subsidiaries—Denbury Green Pipeline-Texas, LLC (Denbury Green) and Denbury Onshore, LLC. Denbury Resources and its affiliates (collectively Denbury) share corporate officers and are all located in the same offices in Plano, Texas.

Denbury is engaged in tertiary recovery operations that involve the injection of CO₂ into existing oil wells to increase production. Denbury owns a naturally occurring CO₂ reserve in Mississippi known as Jackson Dome, and desired to build a CO₂ pipeline from Jackson Dome to Texas oil wells to facilitate tertiary operations on the wells. The record contains some evidence that, in the future, Denbury might purchase man-made or “anthropogenic” CO₂ from third parties and transport it in the pipeline.

In March 2008, Denbury Green applied with the Railroad Commission to operate a CO₂ pipeline in Texas. This pipeline would be a continuation of a pipeline originating at Jackson Dome in Mississippi and traversing Louisiana. Denbury Green’s portion of the pipeline would extend from the Texas-Louisiana border to the Hastings Field in Brazoria and Galveston counties. The one-page permit application, designated a Form T-4, has two boxes for the applicant to indicate whether the pipeline will be operated as “a common carrier” or “a private line.” Denbury Green placed an “x” in the common-carrier box. Separately and also relevant to common-carrier status, applicants are directed to mark one of three boxes if the pipeline will not be transporting “only the gas and/or liquids produced by pipeline owner or operator.” Of the three boxes, indicating the gas will be “[p]urchased from others,” “[o]wned by others, but transported for a fee,” or “[b]oth purchased and transported for others,” Denbury Green marked the box for “[o]wned by others, but transported for a fee.” Denbury Green also submitted a letter, pursuant to Section 111.002(6) of the Natural

Resources Code,⁶ stating that it “accepts the provisions of Chapter 111 of the Natural Resources Code and expressly agrees that it is a common carrier subject to duties and obligations conferred by Chapter 111.”

In April 2008, eight days after Denbury Green filed its application, the Commission granted the T-4 permit. In July 2008, the Commission furnished a letter to Denbury Green, stating:

This letter is to confirm the fact that [Denbury Green] has been granted a permit to operate a pipeline (Permit No. 07737) and has made all of the currently necessary filings to be classified as a common carrier pipeline for transportation of carbon dioxide under the provisions of [Section 111.002(6)] and as otherwise required by the [Commission].

In November 2008, Denbury Green filed a tariff with the Commission setting out terms for the transportation of gas in the pipeline. The administrative process for granting the permit was conducted without a hearing and without notice to landowners along the proposed pipeline route.

Texas Rice Land Partners, Ltd. has an ownership interest in two tracts along the pipeline route. When Denbury Green came to survey the land in preparation for condemning a pipeline easement, Texas Rice Land Partners and a lessee, rice farmer Mike Latta (collectively Texas Rice), refused entry. Denbury Green sued Texas Rice for an injunction allowing access to the tracts.⁷ On cross-motions for summary judgment, the trial court rendered judgment in favor of Denbury Green. The trial court found that Denbury Green “is a ‘common carrier’ pursuant to Section 111.002(6) of the Texas Natural Resources Code” and “has the power of eminent domain/authority to

⁶ TEX. NAT. RES. CODE § 111.002(6). Unless otherwise indicated, all statutory references below are to the Natural Resources Code, Chapter 111 of which governs common carriers of CO₂ and other substances.

⁷ Denbury Green filed a separate suit in county court to condemn a pipeline easement. The parties state in their briefing that the county court suit was stayed pending the outcome of the case before us, but Denbury Green stated at oral argument that the pipeline has been completed.

condemn/right-to-take pursuant to Section 111.019 of the Texas Natural Resources Code.” The court permanently enjoined Texas Rice from (1) interfering with Denbury Green’s “right to enter and survey” its proposed pipeline route across Texas Rice’s land, and (2) harassing Denbury Green or its agents and contractors while conducting the surveys.

The court of appeals affirmed, concluding that Denbury Green had established as a matter of law its common-carrier status.⁸ The court relied on the fact that the pipeline “will be available for public use from the outset of its operation.”⁹ One justice dissented, believing genuine issues of material fact precluded summary judgment.¹⁰ The dissent reasoned that eminent-domain power cannot extend to the taking of property for private use and that “[m]erely offering a transportation service for a profit does not distinguish a private use from a public use.”¹¹

II. Discussion

A. Common Carriers and the Power of Eminent Domain

The Natural Resources Code regulates CO₂ pipelines serving as common carriers. Three Code provisions are particularly relevant.

Section 111.002(6) states a person is a common carrier if he:

owns, operates, or manages, wholly or partially, pipelines for the transportation of carbon dioxide . . . to or for the public for hire, but only if such person files with the commission a written acceptance of the provisions of this chapter expressly agreeing

⁸ 296 S.W.3d 877, 878, 881.

⁹ *Id.* at 881.

¹⁰ *Id.* at 881, 884 (Gaultney, J., dissenting).

¹¹ *Id.* at 883.

that, in consideration of the rights acquired, it becomes a common carrier subject to the duties and obligations conferred or imposed by this chapter.

Section 111.003(a) states:

The provisions of this chapter do not apply to pipelines that are limited in their use to the wells, stations, plants, and refineries of the owner and that are not a part of the pipeline transportation system of a common carrier as defined in Section 111.002 of this code.

Section 111.019 states in part:

- (a) Common carriers have the right and power of eminent domain.
- (b) In the exercise of the power of eminent domain granted under the provisions of Subsection (a) of this section, a common carrier may enter on and condemn the land, rights-of-way, easements, and property of any person or corporation necessary for the construction, maintenance, or operation of the common carrier pipeline.

While these provisions plainly give private pipeline companies the power of eminent domain, that authority is subject to special scrutiny by the courts. The power of eminent domain is substantial¹² but constitutionally circumscribed. Article 1, Section 17 of the Texas Constitution provides, “No person’s property shall be taken . . . for or applied to public use without adequate compensation” This provision not only requires just compensation to the property owner, but also “prohibits the taking of property for *private* use.”¹³

¹² See *Incorporated Town of Hempstead v. Gulf States Utils. Co.*, 206 S.W.2d 227, 229 (Tex. 1947) (noting “extraordinary power of eminent domain” granted to private utilities).

¹³ *Maher v. Lasater*, 354 S.W.2d 923, 924 (Tex. 1962). Denbury and certain amici curiae supporting Denbury contend that their positions are buttressed by the passage of Senate Bill 18 in the last session. Act of May 6, 2011, 82d Leg., R.S., ch. 81, 2011 Tex. Gen. Laws 354. This bill amended various statutory provisions relating to eminent domain, including Section 2206.001 of the Government Code. That section previously provided that “[a] governmental or private entity may not take private property through the use of eminent domain if the taking . . . confers a private benefit on a particular private party through the use of the property” or “is for a public use that is merely a pretext to confer a private benefit on a particular private party.” This provision is consistent with our view, stated above, that the taking of property for private use is constitutionally proscribed. Section 2206.001 was amended to add a new subsection providing that a government or private party may not take private property if the taking “is not for a public use,” and S.B. 18 replaced references to “public purpose” in several provisions with “public use,” again consistent with our above-stated view. As

The legislative grant of eminent-domain power is strictly construed in two regards. First, strict compliance with all statutory requirements is required.¹⁴ Second, in instances of doubt as to the scope of the power, the statute granting such power is “strictly construed in favor of the landowner and against those corporations and arms of the State vested therewith.”¹⁵

B. The T-4 Permit Granted By the Railroad Commission Does Not Conclusively Establish Eminent-Domain Power

The parties dispute whether Denbury Green was entitled to summary judgment on the issue of whether it is a common carrier. We hold at the outset that the T-4 permit alone did not conclusively establish Denbury Green’s status as a common carrier and confer the power of eminent domain.

Nothing in the statutory scheme indicates that the Commission’s decision to grant a common-carrier permit carries conclusive effect and thus bars landowners from disputing in court a pipeline company’s naked assertion of public use. As stated above, the right to condemn property

before, Section 2206.001(c) states that the entirety of Section 22.6.001 does not apply to certain entities including common carrier pipelines. However, S.B. 18 added Section 2206.002 to the Government Code, which increases the rights of property owners subject to pipeline easements by providing that the owner can build roads over the easement. S.B. 18 also added procedural protections for property owners, now set out in Sections 2206.051–.053 and elsewhere, such as a requirement in Section 2206.053 that governments must now authorize the initiation of a condemnation proceeding at a public meeting. There is no question that S.B. 18 was intended to increase the rights of property owners facing condemnation proceedings. Denbury concedes that the bill “reformed eminent domain law by imposing new requirements that further protect landowners’ rights.” It specifically gave property owners new rights with respect to pipeline easements. The fact that the bill left intact a provision exempting common carrier pipelines from one section of the Government Code does not persuade us that we are misreading the Constitution or the Natural Resources Code. The Legislature’s desire through S.B. 18 to give *more* protection to some landowners does not imply that it intended to *dilute* the extant property rights of others. S.B. 18 did not diminish Texas Rice’s property rights.

¹⁴ *State v. Bristol Hotel Asset Co.*, 65 S.W.3d 638, 640 (Tex. 2001) (“Proceedings to condemn land are special in character, and the party attempting to establish its right to condemn must show strict compliance with the law authorizing private property to be taken for public use.”).

¹⁵ *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 831 (Tex. 1958).

is constitutionally limited and turns in part on whether the use of the property is public or private. We have long held that “the ultimate question of whether a particular use is a public use is a judicial question to be decided by the courts.”¹⁶ We have also held in numerous contexts that the Commission does not have authority to determine property rights.¹⁷ We presume the Legislature is aware of relevant caselaw when it enacts statutes.¹⁸ Had the Legislature intended a T-4 permit to render a company’s common-carrier status and eminent-domain power unchallengeable, it would have said so explicitly. “[W]hen an action is inherently judicial in nature, the courts retain jurisdiction to determine the controversy unless the legislature by valid statute has expressly granted exclusive jurisdiction to the administrative body.”¹⁹

Further, the record, rules, and statutes before us indicate that the Commission’s process for granting a T-4 permit undertakes no effort to confirm that the applicant’s pipeline will be public rather than private. The Commission’s website states that the Commission “does not have the

¹⁶ *Maher*, 354 S.W.2d at 925; see also *Housing Auth. of Dallas v. Higginbotham*, 143 S.W.2d 79, 84 (Tex. 1940) (“The question of what is public use is a question for the courts”); *Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 722 (Tex. App.—Corpus Christi 2000, pet. denied) (holding that authority of pipeline company to condemn land was “an issue that was appropriately determined as a matter of law by the court”).

¹⁷ See *Amarillo Oil Co. v. Energy-Agri Prods., Inc.*, 794 S.W.2d 20, 26 (Tex. 1990) (“The cause is properly within the jurisdiction of the courts because the Railroad Commission has no authority to determine title to land or property rights.”); *R.R. Comm’n v. City of Austin*, 524 S.W.2d 262, 267–68 (Tex. 1975) (“This Court has also held on several occasions that the Commission does not have power to determine title to land or property rights.”); *Jones v. Killingsworth*, 403 S.W.2d 325, 328 (Tex. 1965) (“The Railroad Commission has no power to determine property rights.”); *Nale v. Carroll*, 289 S.W.2d 743, 745 (Tex. 1956) (“Rules and regulations of the Railroad Commission cannot effect a change or transfer of property rights.”); *Ryan Consol. Petroleum Corp. v. Pickens*, 285 S.W.2d 201, 207 (Tex. 1955) (“[The Commission] has not been given the power to determine property rights as between litigants.”).

¹⁸ *Gen. Servs. Comm’n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 596 (Tex. 2001) (“[T]he Legislature is presumed to be aware of case law relevant to statutes it amends or enacts.”); *Acker v. Tex. Water Comm’n*, 790 S.W.2d 299, 301 (Tex. 1990) (“A statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it.”).

¹⁹ *Amarillo Oil*, 794 S.W.2d at 26.

authority to regulate any pipelines with respect to the exercise of their eminent domain powers.”²⁰ A spokesperson for the Commission stated in 2008 that it had never denied a T-4 permit, and that the Commission grants them for “administrative purposes.”²¹ Apparently, in order to receive a common-carrier permit, the applicant need only place an “x” in a box indicating that the pipeline will be operated as a common carrier, and to agree under Section 111.002(6) to subject itself to “duties and obligations conferred or imposed” by Chapter 111. Under these minimal requirements, Denbury Green reported itself as a common carrier and obtained a permit a few days later. There was no investigation, and certainly no adversarial testing, of whether Denbury Green was indeed entitled to common-carrier status and the extraordinary power to condemn private property. Denbury Green concedes in its brief that the Commission “did not adjudicate anything.” Private property cannot be imperiled with such nonchalance, via an irrefutable presumption created by checking a certain box on a one-page government form. Our Constitution demands far more.

The Railroad Commission’s process for handling T-4 permits appears to be one of registration, not of application. The record suggests that in accepting an entity’s paperwork, the Commission performs a clerical rather than an adjudicative act. The registrant simply submits a form indicating its desire to be classified as a common (or private) carrier. No notice is given to affected parties. No hearing is held, no evidence is presented, no investigation is conducted. It is

²⁰ Railroad Commission of Texas, *Pipeline Eminent Domain and Condemnation Frequently Asked Questions (FAQs)*, <http://www.rrc.state.tx.us/about/faqs/eminentdomain.php> (last visited Feb. 14, 2012).

²¹ Amanda B. Niles, Comment, *Eminent Domain and Pipelines in Texas: It’s As Easy As 1,2,3, — Common Carriers, Gas Utilities and Gas Corporations*, 16 TEX. WESLEYAN L. REV. 271, 288 (2010) (quoting Mike Lee, *Pipeline Builders May Face Quandary*, FORT WORTH STAR-TELEGRAM, June 22, 2008, at 1B, available at <http://startelegram.typepad.com/files/pipeline-builders-may-face-quandary.htm>).

true that Commission regulations covering CO₂ pipelines (1) state that permit applications will be granted if the Commission is satisfied “from such application and the evidence in support thereof, and its own investigation” that the pipeline will “reduce to a minimum the possibility of waste, and will be operated in accordance with the conservation laws and conservation rules and regulations of the commission,” and (2) require CO₂ pipelines to comply with certain safety requirements.²² However, as for the core constitutional concern—the pipeline’s public vs. private use—the parties point to no regulation or enabling legislation directing the Commission to investigate and determine whether a pipeline will in fact serve the public. Given this scant legislative and administrative scheme, we cannot conceive that the Legislature intended the granting of a T-4 permit alone to prohibit a landowner—who was not a party to the Commission permitting process and had no notice of it—from challenging in court the eminent-domain power of a permit holder.

C. The Test for Common-Carrier Status

To qualify as a common carrier with the power of eminent domain, the pipeline must serve the public; it cannot be built only for the builder’s exclusive use. As explained above, extending the power of eminent domain to the taking of property for a private use cannot survive constitutional scrutiny. The Denbury Green pipeline would not serve a public use if it were built and maintained only to transport gas belonging to Denbury from one Denbury site to another. In such

²² 16 TEX. ADMIN. CODE §§ 3.70(a), 8.1(a)(1)(C), 8.1(b)(2)–(3).

circumstances, and in the absence of compelling legislative findings and declaration of public purpose, we can see no purpose other than a purely private one.²³

The relevant statutes also confirm that a CO₂ pipeline owner is not a common carrier if the pipeline's only end user is the owner itself or an affiliate. Section 111.002(6) states a person is a common carrier if it owns or operates a pipeline "for the transportation of carbon dioxide . . . to or for the public for hire." If Denbury consumes all the pipeline product for itself, it is not transporting gas "to . . . the public for hire." Nor can such an arrangement be characterized as transportation of gas "for the public for hire." The term "for the public for hire" implies that the gas is being carried for another who retains ownership of the gas, and that the pipeline is merely a transportation conduit rather than the point where title is transferred.²⁴ Section 111.003(a) further confirms these notions, since it states that the common-carrier provisions "do not apply to pipelines that are limited in their use to the wells, stations, plants, and refineries of the owner and that are not a part of the pipeline transportation system of a common carrier as defined in Section 111.002 of this code."

Denbury Green contends that merely making the pipeline available for public use is sufficient to confer common-carrier status. We disagree, for two reasons. First, this argument is

²³ See, e.g., *Mercier*, 28 S.W.3d at 718 (noting that pipeline indisputably "is not a common carrier" when it "does not transport gas or allow the dedication of its capacity to the public or anyone other than" the two corporate owners of the pipeline). We further note that the pipeline does not serve a public use if it only transports gas for a corporate parent or affiliate. Hence, we see no significance to the fact that Denbury Green Pipeline-Texas, LLC, the owner of the pipeline here, is a wholly owned subsidiary of the company engaged in the tertiary recovery operations. Transporting gas solely for the benefit of a corporate parent or other affiliate is not a public use of the pipeline. Moreover, even if the Legislature included findings and an explicit declaration of public purpose, such material, while undeniably instructive, would not be entitled to insurmountable deference.

²⁴ See *Theford v. Cnty. of Jackson*, 502 S.W.2d 899, 901 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.) (holding that owner of interest in well who wished to construct pipeline to transport only his own gas was not a common carrier because a pipeline owner transporting his own gas was neither transporting gas "bought of others" under relevant common carrier statute nor transporting gas "for hire").

inconsistent with the wording of Section 111.002(6). The statute provides that a common carrier owns or operates a CO₂ pipeline “to or for the public for hire, but only if such person files with the commission a written acceptance” agreeing to become “a common carrier subject to the duties and obligations conferred or imposed by this chapter.” Denbury Green points out that Chapter 111 contains common-carrier requirements such as the obligation to publish a tariff in Section 111.014, and the obligation not to discriminate among shippers in Section 111.016. But Denbury Green’s reading of Section 111.002(6) would confer common-carrier status and eminent-domain power even when the pipeline will never serve the public by transporting CO₂ “to or for the public for hire” under the statute—and indeed when there was never any reasonable possibility of such service—so long as the owner agrees to be subject to the Chapter 111 common-carrier regime. As we read the statute, the language that the pipeline be owned or operated “to or for the public for hire” is a separate requirement for common-carrier status, and the statute, *in addition*, requires the owner or operator to agree to subject itself to Chapter 111. Denbury Green’s interpretation would read out of the statute the language that the pipeline be operated “to or for the public for hire.” Such a reading contravenes two settled rules: (1) that every word in a statute is presumed to have a purpose and should be given effect if reasonable and possible;²⁵ and (2) that strict compliance with all statutory requirements is required to exercise eminent domain.²⁶ Even absent these rules, the use of “but only if” in the statute suggests that a pipeline operator must meet two requirements to obtain

²⁵ See *Tex. Workers’ Comp. Ins. Fund v. DEL Indus., Inc.*, 35 S.W.3d 591, 593 (Tex. 2000); see also *Cont’l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 402 (Tex. 2000) (“[W]e give effect to all words of a statute, and, if possible, do not treat any statutory language as mere surplusage.”).

²⁶ See *supra* note 14 and accompanying text.

common-carrier status under Chapter 111. It must first meet a broad requirement—that it operate “to or for the public for hire.” But it can qualify as a Chapter 111 common carrier if and “only if” it meets an additional requirement—that it subject itself to Commission regulation under Chapter 111. Again, Denbury Green’s reading ignores the first requirement and would confer common-carrier status when the second requirement alone is met.

Second, Denbury Green’s construction leads to a result that we cannot believe the Legislature intended, namely a gaming of the permitting process to allow a private carrier to wield the power of eminent domain. Suppose an oil company has a well on one property and a refinery on another. A farmer’s property lies between the oil company’s two properties. The oil company wishes to build a pipeline for the exclusive purpose of transporting its production from its well to its refinery. Only about 50 feet of the proposed pipeline will traverse the farmer’s property. The farmer refuses to allow construction of the pipeline across his property. The oil company knows that no party other than itself will ever desire to use the pipeline. In these circumstances, the application for a common-carrier permit is essentially a ruse to obtain eminent-domain power. The oil company should not be able to seize power over the farmer’s property simply by applying for a crude oil pipeline permit with the Commission, agreeing to subject itself to the jurisdiction of the Commission and all requirements of Chapter 111, and offering the use of the pipeline to non-existent takers. “A sine qua non of lawful taking . . . for or on account of public use . . . is that the professed use be a public one in truth. Mere fiat, whether pronounced by the Legislature or by a subordinate agency,

does not make that a public use which is not such in fact”²⁷ Hence, we conclude that Denbury Green is not entitled to common-carrier status simply because it obtained a common-carrier permit, filed a tariff, and agreed to make the pipeline available to any third party wishing to transport its gas in the pipeline and willing to pay the tariff. The statute does not allow such a result, particularly in light of the rule, stated above, that statutes granting eminent-domain power must be strictly construed in favor of the landowner.

We accordingly hold that for a person intending to build a CO₂ pipeline to qualify as a common carrier under Section 111.002(6),²⁸ a reasonable probability²⁹ must exist that the pipeline will at some point after construction serve the public by transporting gas for one or more customers who will either retain ownership of their gas³⁰ or sell it to parties other than the carrier.

Consistent with judicial review of Commission determinations generally, a permit granting common-carrier status is prima facie valid.³¹ But once a landowner challenges that status, the

²⁷ *Higginbotham*, 143 S.W.2d at 84 (quoting *Dallas Cotton Mills v. Indus. Co.*, 296 S.W. 503, 505 (Tex. Comm’n App. 1927, judgm’t adopted)).

²⁸ Our decision today is limited to persons seeking common-carrier pipeline status under Section 111.002(6). We express no opinion on pipelines where common-carrier status is at issue under other provisions of the Natural Resources Code or elsewhere.

²⁹ In this context, a reasonable probability is one that is more likely than not.

³⁰ We do not mean to suggest here that customers must trace the gas they placed in the pipeline or that ordinary business practices accommodating the commingling of gas in a pipeline cannot be employed.

³¹ See TEX. NAT. RES. CODE § 85.243 (providing generally that when party challenges Commission order, “the burden of proof shall be on the party complaining of the law or order, and the law or order is deemed prima facie valid”); *Cheesman v. Amerada Petroleum Corp.*, 227 S.W.2d 829, 831 (Tex. Civ. App.—Austin 1950, no writ) (“It must be remembered that the Commission granted the permit which Amerada attacked by filing suit in the court below. The permit carried a prima facie presumption of validity.”). *Texas Rice*, in a letter brief, acknowledges that “the pipeline permit from the Railroad Commission could serve as prima facie proof of the right to condemn.”

burden falls upon the pipeline company to establish its common-carrier bona fides if it wishes to exercise the power of eminent domain.

D. Denbury Green Was Not Entitled to Summary Judgment

Under our test, Denbury Green did not establish common-carrier status as a matter of law. A Denbury Green vice president attested that Denbury Green was negotiating with other parties to transport anthropogenic CO₂ in the pipeline, and that the pipeline “can transport carbon dioxide tendered by Denbury entities as well as carbon dioxide tendered from other entities and facilities not owned by Denbury.” This affidavit does not indicate whether Denbury Green itself intended to use all of that gas for its own tertiary recovery operations. As discussed above, a carrier is not a common carrier if it transports gas only for its own consumption. The witness also stated in his deposition that the CO₂ carried in the pipeline would be owned by affiliate Denbury Onshore, but that there was “the possibility we’ll be transporting other people’s CO₂ in the future.” He did not identify any possible customers and was unaware of any other entity unaffiliated with Denbury Green that owned CO₂ near the pipeline route in Louisiana and Mississippi. This evidence does not establish a reasonable probability that such transportation would ever occur.

Further, the record includes portions of Denbury’s own website that suggest the pipeline would be exclusively for private use. In describing the pipeline project, the site states:

We like these tertiary operations because . . . to date, in our region of the United States, we have not encountered any industry competition. Generally, from the Texas Gulf Coast to Florida, there are no known significant natural sources of carbon dioxide except our own, and these large volumes of CO₂ are the foundation for our entire tertiary program.

....

We have entered into three agreements, and are having various levels of discussions with many others, to purchase (if the plants are built) all of the CO₂ production from man-made (anthropogenic) sources of CO₂ from planned solid carbon gasification projects.

....

We see these sources as a possible expansion of our natural Jackson Dome source, assuming they are economical, and we believe that our potential ability to tie these sources together with pipelines will give us a significant advantage over our competitors, in our geographic area, in acquiring additional oil fields and these future potential man-made sources of CO₂.

....

We are also working on a 24" pipeline, named the Green Pipeline, to transport CO₂ to Hastings Field and our 2007 Southeast Texas acquisitions Initially, we anticipate transporting CO₂ from our natural source at Jackson Dome in this line, but ultimately we expect that it will be used to ship predominately man-made (anthropogenic) sources of CO₂.

....

During November 2006, we acquired an option to purchase . . . Hastings Field, a strategically significant potential tertiary flood candidate located near Houston, Texas.

....

We believe that Hastings Field possesses . . . more reserve potential than any other single field in our inventory. Currently, we are working on the right-of-ways required to build a pipeline we have named our Green Pipeline to transport CO₂ to this field [O]ur goal is to continue to pursue the acquisition of other fields in this area, which will help reduce the cost of CO₂ for each field by fully utilizing the proposed pipeline and thereby reducing our transportation cost per Mcf.

As the dissent in the court of appeals noted, these statements are “some evidence Denbury intends to fully utilize the Green Pipeline as an essential part of its tertiary oil production operations. Denbury’s description of the pipeline’s purpose indicates the CO₂ it transports in the pipeline will be its own”³² Denbury Green’s representations suggesting that it (1) owns most or all of the naturally occurring CO₂ in the region, (2) intends to purchase all the man-made CO₂ that might be produced under current and future agreements, (3) sees its access to CO₂ as giving it a significant

³² 296 S.W.3d at 882 (Gaultney, J., dissenting).

advantage over its competitors, and (4) intends to fully utilize the pipeline for its own purposes, are all inconsistent with public use of the pipeline. As Denbury Green did not establish common-carrier status as a matter of law, it was not entitled to summary judgment.

III. Conclusion

Pipeline development is indisputably important given our State’s fast-growing energy needs, but economic dynamism—and more fundamentally, freedom itself—also demand strong protections for individual property rights. Locke deemed the preservation of property rights “[t]he great and chief end” of government,³³ a view this Court echoed almost 300 years later, calling it “one of the most important purposes of government.”³⁴ Indeed, our Constitution and laws enshrine landownership as a keystone right, rather than one “relegated to the status of a poor relation.”³⁵

A private enterprise cannot acquire unchallengeable condemnation power under Section 111.002(6) merely by checking boxes on a one-page form and self-declaring its common-carrier status. Merely holding oneself out is insufficient under Texas law to thwart judicial review. While neighboring states impose fewer restrictions on the level of public use required for such takings,³⁶

³³ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT Chap. IX, Sec. 124 (C.B. McPherson, ed., Hackett Publishing Co. 1980) (1690).

³⁴ *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977). Private property rights have been described as “fundamental, natural, inherent, inalienable, not derived from the legislature and as preexisting even constitutions.” *Id.* They are, in short, a foundational liberty, not a contingent privilege.

³⁵ *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994); see also generally JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3d ed. 2008).

³⁶ LA. REV. STAT. ANN. § 19:2; MISS. CODE ANN. § 11-27-47.

meaning companies may seize land to build pipelines for their exclusive use,³⁷ the Texas Legislature enacted a regime more protective of landowners. If a landowner challenges an entity's common-carrier designation, the company must present reasonable proof of a future customer, thus demonstrating that the pipeline will indeed transport "to or for the public for hire" and is not "limited in [its] use to the wells, stations, plants, and refineries of the owner." We reverse the court of appeals' judgment, and remand this case to the district court for further proceedings consistent with this opinion.

Don R. Willett
Justice

OPINION DELIVERED: March 2, 2012

³⁷ See *ExxonMobil Pipeline Co. v. Union Pac. R.R. Co.*, 35 So.3d 192, 199 (La. 2010) (holding that "any allocation to a use resulting in advantages to the public at large will suffice to constitute a public purpose").