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LAW LETTER

Development Impact

Urban Land-Use Issues

The primary property rights issue in recent months has focused on the regulatory taking of land under the Endangered Species Act (ESA). Compensation–or lack of it–lies at the crux of the debate. Under the Fifth Amendment to the U.S. Constitution, citizens are protected from uncompensated taking. It states, ". . . nor shall private property be taken for public use, without just compensation."

Landowners contend that the land-use restrictions associated with the ESA constitute a taking requiring compensation. The U.S. Supreme Court has agreed but only where all beneficial use of the property is taken. Currently, federal legislation is being proposed to allow broader compensation.

While landowners and environmentalists share the headlines, federal judges within the Fifth U.S. Circuit, which includes Texas, have issued two opinions affecting both municipalities and urban dwellers. These decisions have gone unheralded, even though they may exert a significant impact on future urban development and land use.

Public Use and Condemnation

In *The City of Arlington v. Golddust Twins Realty Corp.*, 41 F. 3rd 960, the case focused on the Texas Constitution (Article 1, Section 17). Similar to the U.S. Fifth Amendment, it states, "No person's property shall be taken . . . for . . . public use without adequate compensation." The issue before the court in *Arlington* was not the "taking" element but the "public use" mandate.

Under the Texas Constitution, any governmental taking (condemnation) of private property must be for a public good or benefit. Case law reiterates this rule, invalidating condemnation solely for private benefit. Noteworthy is *Waggoner's Estate v. Gleghorn*, 378 S.W. 2d 47. Prior to 1964, the Texas Revised Civil Statutes allowed landlocked landowners (those having no public or private access to their land) to condemn a private right-of-way easement (Article 1377b[2]). The Texas Supreme Court ruled that the statute contravened Article 1, Section 17, of the Texas Constitution. No public use was involved in the taking.

A more recent case involved a public utility condemning an easement for a private landowner–*Saunders v. Titus Co. Fresh Water Supply Dist.*, 847 S.W. 2d 424 (1993). A proposed lake would render part of the landowner's property inaccessible. To offset the company's large land payment the utility condemned a roadway to the potentially landlocked area. The owner of the property crossed by the easement contended that the action was solely to provide private access. The appellate court agreed. The utility company could condemn the easement to relocate a public but not a private road.

Saunders, however, must be compared to *Coastal States Gas Producing Co. v. Pate,* 309 S.W. 2d 828 (1958), an oil company's condemnation of a rural easement to reach a proposed drilling site. The landowner asserted that no public use was involved in the taking.

Surprisingly, the appellate court upheld the condemnation. The Permanent School Fund owned an undivided one-fourth interest in the tract being drilled. The court held, "(T)he lessee may make a profit out of the venture, but this in itself does not make the use private rather than public. Since the public has a direct, tangible and substantial interest and right in the undertaking, it is our opinion the land will be devoted to a public use within the meaning of the Constitution."

The rationale for the *Coastal* decision parallels several urban cases in which the Texas courts struggled to find some justifying public use to sustain a taking. In each case, the court examines the role condemned property plays in the overall public good, not just its effect on a few private individuals. The *Arlington* case is but one example.

The district court held that the city of Arlington could not condemn a leasehold near the Texas Rangers' ballpark because the city failed to establish that the taking was for public parking. Evidence showed that the city had a preexisting agreement with the Rangers to swap the condemned parcel for other land that the Rangers owned in the area. The Rangers allegedly intended to erect office buildings on the property after the exchange.

The circuit court reversed the district court, upholding the

condemnation. The fact that the leasehold was condemned for one purpose but used for another was not fatal. As long as the ultimate use of the property is for a public purpose also, the condemnation will be upheld. However, the circuit court never scrutinized how the Rangers ultimately would use the land after the exchange. Instead, it focused on the current use of the land and the definition of "public use."

Evidence presented at trial revealed how the land swap fit into an overall master agreement between the Rangers and the city. According to Tom Schieffer, president of the Rangers, the inclusion of the land swap was "essential" to the agreement. Also, a lease agreement between the Rangers and the city obligated the Rangers to continue providing adequate public parking for the ballpark facilities, even if the parcel was converted to other uses.

Thus, the circuit court concluded that this use satisfied the public-use requirement. Currently, the parcel provides public parking. And, even if the current use changes, the public is guaranteed adequate parking by the lease agreement. The court observed that the exchange was an essential part of the ballpark project from its inception.

The *Arlington* court properly drew on prior case law. The land swap at the ballpark was an integral part of a larger public project. The circuit court also reaffirmed the principle that a municipality's exercise of the power of eminent domain is a legislative act and is binding on the courts unless it is manifestly wrong or unreasonable.

However, the *Arlington* court avoided an unresolved issue in Texas concerning the "Doctrine of Substitute Condemnation." This doctrine requires the court to examine the use made of the property received in the exchange, not the condemned property. If the substituted property is not used for a public purpose, the condemnation can not be upheld. This doctrine was not mentioned in *Arlington.*

Even under the court's more limited rationale, the *Arlington* decision gives much-needed judicial support to private collaboration on public projects. Governmental entities will not undertake projects such as airports, stadiums and navigational facilities without cooperation with private enterprise.

Disbursing Public Housing

The issue surrounding Judge Buchmeyer's ruling stemmed from a 1985 lawsuit in which seven black women sued the Dallas Housing Authority and the Department of Housing and Urban Development (HUD). The women argued that they, as well as thousands of other Black families, were trapped in a separate and unequal system of public housing. A settlement reached in 1987 allowed Black families to use rent certificates to live in suburban areas.

However, the attorneys for the plaintiffs argued that the ultimate changes fell short of the goals outlined in the settlement. In 1994, more than 90 percent of the Black families in Dallas public housing still lived in mostly Black projects in poor, mostly Black neighborhoods. The apartments, as well as the surrounding neighborhoods, were significantly inferior to white projects and their neighborhoods.

Judge Buchmeyer agreed with the plaintiffs. On February 7, 1995, he ordered the housing authorities to "develop, through construction or acquisition, an additional 3,205 public housing family units in predominantly white areas." This represents a ten-fold increase in the number of subsidized apartments planned for poor minority families in white areas. The order came a few days after the housing authority officials announced plans to build 335 public housing apartments in North Dallas.

The order calls for desegregation of the certificate and voucher programs. The judge requires the housing authority to provide mobility services that allow families the opportunity to move to "predominantly white areas of North Dallas, predominantly white parts of Dallas County, and predominantly white adjoining areas."

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Alex Polikoff, for many years the lead attorney in *Hills v.Gautreaux*, 425 U.S. 284 (1976), a Chicago public housing case decided by the U.S. Supreme Court, said the ruling catapults the Dallas case to the forefront in housing desegregation remedies.

The facts in the *Gautreaux* case parallel the present Dallas controversy. Black tenant applicants for public housing in Chicago brought a class action against the Chicago Housing Authority and HUD, alleging deliberately selected family public housing sites in Chicago "to avoid the placement of black families in white neighborhoods." The primary issue was whether the federal court, as part of the prescribed remedies, could place Black families in projects beyond the territorial boundaries of Chicago. The U.S. Supreme Court ruled that it not only could, but it must, do so.

Proponents hailed Judge Buchmeyer's ruling as giving low-income tenants in the Dallas area something they have never had before: a true choice of housing opportunities. It integrates them both socially and economically.

Opponents, on the other hand, fear that the onslaught of projects by the housing authority in the new areas will undermine a way of life. "These people (the housing authority) are just spreading their troubles around," according to Ms. Blumer, a Dallas council member, as quoted by the *Dallas Morning Herald*, February 17, 1995.

Another Dallas council member said the neighborhoods have good reason to oppose public housing, reasons that have nothing to do with race. One reason is not wanting to live next to a slum that is a deteriorating blight on the neighborhood.

Location for the housing projects will be announced shortly with public hearings to follow. However, the location of the projects requires the approval of only one person–U.S. District Judge Jerry Buchmeyer.

The bottom line is how the projects affect property values. This, in part, depends on site location. Will the projects adjoin other multifamily units or be isolated in single-family areas? Evidently, federal judges have the power to override deed restrictions, zoning ordinances and other land-use restrictions to locate the projects.

No one knows the ultimate effect of Judge Buchmeyer's ruling. Furthermore, no one knows if the ruling will spur similar lawsuits in other Texas metropolitan areas. However, both municipalities and urban landowners should be aware of the ruling and follow its impact.

This article is based on information used by permission from Robert E. Goodfriend and William Murchinson.

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