HOUSE COMMITTEE ON LAND AND RESOURCE MANAGEMENT
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2006

A REPORT TO THE
HOUSE OF REPRESENTATIVES
80TH TEXAS LEGISLATURE

REPRESENTATIVE ANNA MOWERY
CHAIRMAN

COMMITTEE CLERK
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Committee On
Land and Resource Management

December 7, 2006

Representative Anna Mowery
Chairman

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

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

Dear Mr. Speaker and Fellow Members:

The Committee on Land and Resource Management of the Seventy-Ninth Legislature hereby submits its interim report including recommendations for consideration by the Eightieth Legislature.

Respectfully submitted,

Representative Anna Mowery

Linda Harper-Brown, Vice Chairman

Joe Pickett

Roy Blake, Jr.

Robby Cook

Juan Escobar

David Leibowitz

Sid Miller

Rob Orr

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INTRODUCTION

At the beginning of the 79th Legislature, the Honorable Tom Craddick, Speaker of the Texas House of Representatives, appointed nine members to the House Committee on Land and Resource Management. The Committee membership included the following: Chairman Anna Mowery, Vice-Chairman Linda Harper-Brown, Joseph "Joe" Pickett, Roy Blake, Jr., Robby Cook, Juan Escobar, David Leibowitz, Sid Miller, and Rob Orr.

Pursuant to House Rule 3, Section 25, the Committee has 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;

(4) Problems and issues particularly affecting rural areas of the state; and

(5) The following state agencies: the School Land Board, the Board for Lease of University Lands, the Coastal Coordination Council, and the General Land Office.

HOUSE COMMITTEE ON LAND AND RESOURCE MANAGEMENT

INTERIM STUDY CHARGES

During the interim, Speaker Craddick charged the Committee with the following issues:

CHARGE "Determine the appropriateness of non-elected governmental bodies exercising the power of eminent domain to condemn property."

CHARGE "Consider the potential establishment of a single and uniform approach to dealing with situations involving overlapping, extraterritorial jurisdictions."

CHARGE "Study the powers and practices of homeowner associations in Texas and the possible need for legislation, such as the proposed Texas Uniform Planning Community Act, to address the rules, enforcement, restrictions, and other matters within the authority of a homeowner association. (Joint Interim Charge with the House Committee on Business and Industry).

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

Each charge was studied by the Committee as a whole.

The Committee has concluded its hearings and research and issued the following report.

CHARGE 1

"Determine the appropriateness of non-elected governmental bodies exercising the power of eminent domain to condemn property."

APPROPRIATENESS OF NON-ELECTED GOVERNMENTAL BODIES EXERCISING EMINENT DOMAIN

INTERIM CHARGE

"Determine the appropriateness of non-elected governmental bodies exercising the power of eminent domain to condemn property."[1]

SCOPE OF REPORT

It is not possible to determine the appropriateness of allowing non-elected governmental bodies to exercise the power of eminent domain in this state without a thorough understanding of the power to be granted, especially given the expansive nature of the power of eminent domain during the past century. For this reason, this report reviews in some detail the ever-changing question of how to define "public use". Equally important to this discussion is an understanding of what types of entities (both public and private, elected and non-elected) have historically been granted this power and why.

"Non-controversial" uses of the power of eminent domain, which this report defines as those uses made by elected bodies for what are true "public uses", such as the construction of roads, schools, courthouses, and post offices, for example, are not the focus of this report. Instead, this report examines "controversial" uses of the power of eminent domain, defined as those uses made by non-elected (often private) entities and those uses that result in significant private benefit.

BACKGROUND

Eminent domain is the power of government to take private land for public use. This power is limited by both the federal and state constitutions, all of which require that when government does take private property for public use that it must fairly compensate the owner for the property taken.[2] The right of a property owner to be compensated for the taking of his property by any party is a "vested right" under the federal constitution.[3] Any state law that purports to take away this right is

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

[2] *See*, U.S. CONST., Amend. V; TEX. CONST., art I, § 17. Takings Clauses are explicit in 48 states. Courts in New Hampshire and North Carolina construe sections of their state constitutions as implementing the common law requirement for just compensation for takings be paid by the state and its subdivisions.

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

unconstitutional under the Fourteenth Amendment to the United States Constitution.[4]

The U.S. Constitution's Takings Clause, found in the Fifth Amendment to that document, states in pertinent part that "No [. . .] private property [shall] be taken for public use, without just compensation."[5] In Texas, Section 17 of Article I of the constitution provides that "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person [. . .]."[6]

It is a matter settled by law that the power of eminent domain is delegated by the Texas Constitution to the legislature.[7] The legislature may grant the authority to exercise that power to governmental and non-governmental entities as long as the exercise is for a public use.[8] Chapter 21 of the Texas Property Code provides the basic framework in Texas regarding takings.[9] In addition, numerous provisions throughout the Texas codes grant the power of eminent domain to various governmental and non-governmental entities, generally for specified public uses.[10]

Importantly, neither the U.S. nor Texas constitutions specifically authorize the use of eminent domain by either of these respective governments.[11] Courts and scholars have proposed various sources that authorize the use of eminent domain by governments. For example, Errol M. Meidlinger, a private property rights scholar, has argued that "practical, historical, and philosophical assertions are often intermingled in justifying the basic power" of eminent domain.[12] Meidlinger suggests that notions of natural law, basic sovereignty, reserved rights, and historical legitimacy have been used by various courts to justify the state's power of eminent domain.[13]

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

[5] U.S. CONST., Amend. V.

[6] TEX. CONST., art I, § 17.

[7] *See, Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 716 (Tex. App.--Corpus Christi 2000, pet. denied).

[8] *Ibid.*

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

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

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

[12] Errol E. Meidlinger, "The 'Public Uses' of Eminent Domain: History and Policy", *11 Env. L. Rev. 1* (Fall 1980), at 5.

[13] *See*, Meidlinger, notes 11-14, at 5-6. Meidlinger correctly points to the following sources to substantiate the various arguments for the legitimacy of the use of eminent domain by governments.

Regarding the "natural law" argument, he lists *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 (N.Y. 1816) and *Sinnickson v. Johnson*, 17 N.J.L. 129 (1839); Young v. McKenzie, 3 Ga. 31 (1847).

Regarding the "basic sovereignty" argument he explains that "The argument is that the power to condemn is inherent in the exercise of sovereignty. It is necessary to the existence of government, and all governments, by circular implication, posses it." Meidlinger points to the following cases: *Kohl v. United States*, 91 U.S. 367 (1876); *San Mateo*

SUMMARY OF COMMITTEE ACTION

The Full Committee heard testimony at a scheduled public hearing on May 3, 2006, in Austin, Texas. Those who testified were:[14]

For: Fitzgerald, Dr. Robert T. (Medina Co. Environmental Action Association)
Fournier, Richard (Self)
Mangold, Russell J. (Self)
Mangold, Verlyn (Self)
Pietruszewski, Brian (MCEAA, Inc.)
Winkler, Nora L. (Self)
On: Peacock, Bill (Texas Public Policy Foundation)

The testimony taken in committee came almost wholly from a group of property owners in Medina County who are affected by Vulcan Materials, a private company that is attempting to condemn roughly ten miles of land for the purpose of building a railroad spur line to transport limestone from their quarry to a major rail site. The company claims that its power to use eminent domain is authorized to common carriers, such as railroads, and that their use of the rail line qualifies them as a common carrier. The property owners who testified against this argument argued that while the power of eminent domain should be preserved for common carriers, eminent domain is abused when the purpose for which property is condemned is not truly for public usage or benefit, as they contend.

DISCUSSION

Importance of the Protection of Private Property

County v. Coburn, 130 Cal. 631, 63 P. 78 (1900); *Northeastern Gas Trans. Co. v. Collins*, 138 Conn. 582, 87 A.2d 139 (1952); *Water Works Co. v. Burkhart*, 41 Ind. 364 (1872); *Beekman v. Saratoga & S.R.R.*, 3 Paige Ch. 45 (N.Y. 1831); *Covington & Cincinnati Bridge Co. v. MacGruder*, 63 Ohio St. 455, 59 N.E. 216 (1900); *White v. Nashville & Nw.R.R.*, 54 Tenn. (7 Heisk.) 518 (1872); *Stearns v. Barre*, 73 Vt. 281, 50 A. 1086 (1901).

Regarding the "reserved rights" argument he explains that "The reserved rights notion seems to trace to the civil law writer Grotius, who hypostatized that all land had been held by the sovereign prior to private possession and that private possession was subject to an implied reservation that the sovereign could retake possession. [. . .]. Various criticisms may be noted. First, this theory of origin does not necessarily imply a compensation requirement. Second, in the United States there are generally two sovereignties, both having eminent domain power over the same property. It is difficult to argue that both have some concurrent prior ownership interests, particularly as regards the colonial states." Meidlinger points to the following cases as further evidence: *Little Rock Junction Ry. v. Woodruff*, 49 Ark. 381, 5 S.W. 792 (1887); *Todd v. Austin*, 34 Conn. 78 (1867); *Board of Health v. Van Hoesen*, 87 Mich. 533, 49 N.W. 894 (1891).

Regarding the "historical legitimacy" argument he explains that "A variety of cases, including *Gardner v. Village of Newburgh*, 2 Johns. Ch. 162 (N.Y. 1816), suggest eminent domain derives from common law practices [and that . . .] is a natural outgrowth of feudal tenure [. . .]. Some courts, finally, have used an implied consent theory analogous to classical conceptions of social contract. Members of society, it is suggested, in coming together to organize governments, have impliedly consented that their property rights will yield to the needs of government."

[14] This list of witnesses is formatted in line with how Witness Affirmation Forms were completed at the time of the hearing. The Committee does not feel that it is appropriate to attempt to decipher the specific viewpoints of any witness from the witness' testimony.

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

> "the right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man [. . .]. The preservation of property then is a primary object of the social compact."[15]

In further strongly worded language, Justice Paterson explained that the power of eminent domain is a "despotic power," but one that "government could not subsist without."[16] In Paterson's opinion, the power of eminent domain should not be "exercised except in urgent cases, or cases of the first necessity."[17] Justice Paterson's words should not be read lightly. As a delegate to the Constitutional Convention and joint author of the U.S. Constitution he certainly understood not only the importance of the protection of private property to a free society, but also that this view was deeply ingrained in Americans' conceptions about the nature of their government and society.

Like Justice Paterson, the founders of both this nation and Texas considered the right to hold private property to be not only a fundamental right, but to be a primary source of all civil liberties.[18] James Madison, the author of the federal takings clause, explained what he considered to be axiomatic in 1792 when he stated that "As a man is said to have a right to his property, he may be equally be said to have a property in his rights."[19] As products of the Enlightenment, these men viewed property to be a God given and natural right that was a central component to both the establishment and maintenance of all civil governments.

The conception that the possession of private property is a natural, and therefore, fundamental right, traces its roots back to Enlightenment ideas regarding the very nature of man and of civil government. This "right of Englishmen" had been expounded at least since the seventeenth century

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

[16] *Vanhorne's Lessee*, at 311.

[17] *Ibid.*

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

[19] Madison, "Property," vol. 14, at 266.

by men like John Locke who traced the natural right to privately possess property from pre-historical times. According to Locke, in the beginning the only things that an individual owned were his body and labor, everything else was held in common. By investing labor and skill into things, those things and their products became the person's own things, thus the conception of private property. Locke explained in his *Second Treatise on Civil Government* that:

> "though the things of nature are given in common, yet man, by being master of himself, and proprietor of his own person, and the actions or labour of it, had still in himself the great foundation of property; and that, which made up the great part of what he applied to the support or comfort of his being, [. . .] was perfectly his own, and did not belong in common to others."[20]

This "right of Englishmen" certainly migrated with colonists from England to North America and became, as Justice Paterson's opinion in *Vanhorne's Lessee* demonstrates, central to this nation's conception of liberty.[21] As Justice Clarence Thomas recently wrote citing the 1798 case of *Calder v. Bull*, "The Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from "tak[ing] *property* from A. and giv[ing] it to B."[22]

Understandings of the Power of Eminent Domain -- General

> "The poorest man [. . .] in his cottage [may] bid defiance to all the forces of the Crown. It may be frail -- its roof may shake -- the wind may blow through it -- the storm may enter, the rain may enter -- but the King of England cannot enter -- all his force dares not cross the threshold of the ruined tenement."[23]

From the earliest days, Americans have extended the power of eminent domain to both governmental and non-governmental entities, elected and non-elected, frequently for what in fact were primarily private benefits. A grant of power that benefited private individuals or corporations almost always took the form of a limited grant that resulted in some benefit to the public, even if indirect. Similar to modern grants to utilities and common carriers, private corporations were granted the right to take property for the creation and operation of turnpikes, railroads, canals, and water-powered mills, each of which was arguably necessary to the citizenry of the growing nation. During the nineteenth and twentieth centuries, both legislatures and courts increasingly expanded their interpretations of takings clauses to apply to a number of more controversial situations.[24] Most recently, the U.S. Supreme

[20] Locke, Sec. 44.

[21] *See*, Meidlinger; Michael Malamut, "The Power to Take: The Use of Eminent Domain in Massachusetts," Pioneer Institute for Public Policy Research, White Paper No. 15 (December 2000).

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

[23] William Pitt, "Speech on the Excise Bill," *Hansard Parliamentary History of England*, 1753–1765 (London: T. Coltansard, 1813), vol. 15, at 1307.

[24] Interestingly, the courts have struggled with the non-traditional situation in which governmental regulation has affected property to the extent that it is in essence a taking. Though not clearly relevant to this specific report, it is important to understand that regulations that substantially diminish the value of property are routinely upheld by the courts as not a taking. *See, e.g., Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (holding that a restriction that devalued property by approximately ninety percent, from $800,000 to $60,000 was not a taking); *Village of Euclid v. Amber Realty*

Court sanctioned as constitutional the transfer of land from one private owner to another to further economic development.[25]

Important to this discussion is an understanding of the sizeable body of law that has formed around the definition of "public use". The term "public use" has never had a precise definition and courts have historically struggled to determine what it does and even should mean.[26] Determining whether a particular use is a "public use" is a judicial determination, but courts have generally insisted on a high degree of judicial deference to legislative determinations.[27] Some courts have interpreted "public use" liberally, upholding the use of eminent domain in situations in which there was no actual public use, but instead in situations where there was a public benefit or was for the public's welfare.[28] Other courts have interpreted it to require actual occupancy by the public.[29] Texas courts have historically given an ever-expanding meaning to the phrase, though at times reluctantly.

The taking of private property by public and private parties has always been somewhat controversial in that the importance of protecting private property has and continues to be a central tenet of American democracy. However, with the expansion of the type and quantity of takings during the twentieth century, the primacy of protecting private property began to take a back seat to the "public good". Before determining who should be authorized to use the power of eminent domain, and under what conditions, it is crucial to have a thorough understanding of exactly what power is to be granted, and to whom it has historically been given to.

Understandings of the Power of Eminent Domain -- Earlier Periods

> "So great [. . .] is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community."[30]

One of the early acts of the Republic of Texas was to condemn land for resale to private individuals.

Co., 272 U.S. 365 (1926) (holding that a zoning regulation that reduced value of the property by seventy-five percent was not a taking); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (holding that the Fifth Amendment does not guarantee the most profitable use of property); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023 (3d Cir. 1987) (holding that a reduction in value from $495,600 to $52,000 was not a taking); *Pompa Constr. Corp. v. Saratoga Springs*, 706 F.2d 418, 420 n.2 (2d Cir. 1983) (holding that a regulation that devalued property by approximately seventy-seven percent was not a taking).

[25] *Kelo.*

[26] Judges that adhered to the principle of judicial restraint were more likely to adopt a limited and more conservative definition of "public use" based on textual and common sense readings of takings clauses, while judges that saw their role as more activist, were willing to expand the definition to meet whatever was the necessity of the day.

[27] *City of Cincinnati v. Vester*, 281 U.S. 439, 444 (1930) (holding that it is "well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one.").

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

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

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

In 1839, the Texas Congress created a commission to obtain a site for the permanent location of the new government. Under this law, property was obtained by condemnation and then sold to the highest bidder who was required to set aside certain portions for the state capitol and other public buildings. In *Smith v. Taylor*, the Texas Supreme Court held that the new owners of the property were the legitimate owners of the taken land, thereby sanctioning the use of eminent domain that benefited private parties.[31]

The court's opinion in *Smith* was handed down in 1871, just four years before the Texas Constitutional Convention of 1875 that created the present state constitution. Convention delegates had access to not only the *Smith* decision, but to the previous constitutions that had been ratified in the state. Given this, and the fact that the wording between the Constitution of 1845 and that of 1876 regarding eminent domain are very similar, it is correct to assume that the delegates were not overly concerned by previous uses of eminent domain.[32] This conclusion is bolstered by the lack of debate on the takings clause at the constitutional convention.[33] Admittedly, the reports of the debates are not complete; however, from the records available, the debates do not show any discontent over the condemnations stemming from the 1839 law.

Since colonial times, the general movement in the U.S., and subsequently in Texas, has been away from a common sense textual understanding of the term "public use" and towards an ever-increasingly liberal definition that more closely resembles "public benefit". From the earliest periods of this era, legislative bodies engaged in takings or granted the power of eminent domain to entities (both public and private) that often resulted in takings that generated significant private benefits.

Early grants for mill dams, turnpikes, and canals were justified fairly easy on the grounds that there truly was a public need for such projects, given the limited nature of government and the expansive nature of the country. Some entity had to provide these services. With the passage of time, and the growth of the nation and its industrial needs, the power of eminent domain was granted to entities, and for such uses, that had a less direct impact on the public, and certainly were not directly used by the public. The law regarding railroads, utilities, and water-powered industries, for example, stretched the classic meaning of the power of eminent domain into an awkward and frequently unjustifiable set of laws.

The Mill Dam Acts

The changing jurisprudence regarding mill dams reflects the general expansion of the power of eminent domain from its early days in this nation through the nineteenth century.[34] These acts allowed private mill operators to dam waterways, thereby taking the flooded upstream property of their neighbors and affecting the water interests of their downstream neighbors. The power

[31] *Smith v. Taylor*, 34 Tex. 589 (1870-71).

[32] *C.f.*, TEX. CONST. OF 1845, art I, § 14 ("No person's property shall be taken, or applied to public use, without adequate compensation being made, unless by the consent of such person."); TEX. CONST., art I, § 17 ("No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person [. . .].").

[33] *See, McKay, Debates in the Constitutional Convention of 1875*, (The University of Texas, 1930) at 237.

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

generated from such dams was used initially in grist milling operations and was extremely necessary to the primarily agricultural economy, and therefore of public benefit. For this reason, and with the addition of state regulation, legislatures and courts generally sanctioned such takings.

Though the record is unclear, many historians believe that these acts were not uncommon in pre-Revolutionary times, noting that the first such act was passed in Virginia in 1667.[35] In 1884, when the only known compilation was done, the seven pre-revolutionary mill dam acts had increased to twenty-nine.[36] During this period, the types of private industry that benefited from the mill dam acts changed. Takings authorized by the various acts were more and more frequently accomplished for the benefit of larger saw, textile, paper, and iron mills, projects that required larger dams, created greater damage to surrounding property, and produced far more private than public benefits. State courts generally did not oppose such actions. As the Massachusetts Supreme Court explained in 1832, its state's taking clause:

> "has been practically construed to authorize the legislature to transfer the property of one individual to another individual or corporation, whenever the public convenience and necessity require it, although [. . .] such a transfer is usually the private emolument of the individual or corporation."[37]

As Justice John Paul Stevens recently explained, the more common sense definitional test of takings, being that of "use by the public" eroded during the nineteenth century because in part "it proved to be impractical given the diverse and always evolving needs of society."[38] It is unclear whether the common sense textual definition of "public use" was truly "impractical", or whether it was merely more expedient to more liberally construe the definition of "public use" to include takings by private parties primarily for their benefit. Regardless, many in the growing nation understood, as the Court of Chancery of New Jersey did in 1832, that all "great improvements [. . .], are made through private incorporated companies, and perhaps better accomplished in that way than any other."[39] As a result of such understandings, utilitarian orthodoxy began to overshadow what had historically been considered an inviolable individual right.

Further Economic Expansion Activities

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

[35] Meidlinger, at 15.

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

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

[38] *Kelo*, at 2662.

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

canals, mining operations, and docking facilities, to name a few.

With steady westward expansion following the Civil War, legislatures and courts routinely upheld acts that empowered railroads to condemn private property.[40] These bodies rejected the argument that property was being taken for private gain, and sanctioned such activity based on the reasoning that railroad companies were carrying out the public purpose of improving transportation. Similar to public roads, these common carriers were obligated to transport persons and goods.

The situation was no different in Texas.[41] As late as 1850 the settled areas of Texas were "largely confined to the river bottoms of East and South Texas and along the Gulf Coast."[42] Given the general lack of navigable waterways, and the inadequacy of internal roads, many proposals were debated in the first half of the nineteenth century to find a solution to the transportation problem. In 1836, the Texas Rail Road, Navigation, and Banking Company was granted a charter by the First Congress of the Republic of Texas, with the power to construct railroads "from and to any such points [. . .] as selected." For many years following this grant, the economic growth of the state mirrored the extension of railroads and railroad service in the state. These common carriers were routinely granted the power of eminent domain and the courts routinely sanctioned such grants of power. Like public utilities, it would not have been possible for railroads to grow or operate in a financially sound way without such a grant of power.

Like grants to railroad companies, the Texas legislature and the state's courts frequently allowed the taking of private property by private parties for what they considered other public uses. For example, in 1898, the Texas Court of Civil Appeals upheld a condemnation of street right of ways by the Texas Transportation Company (a private corporation comprised of the San Antonio Brewing Association and the Lone Star Brewing Association) as a "public use".[43] The company planned to lay railroad track that would expedite the carriage of beer between breweries and between a brewery and a railroad head. In *Mangan v. Texas Transp. Co.*, the court found that:

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

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

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

[43] *Mangan.*

> "It may be true that the breweries may be more benefited than the balance of the public, and that but few persons may, in fact, actually enjoy its benefits; but, if the use is public in point of law, this can make no difference."[44]

During this period of judicial restraint, the court was unwilling to circumvent the decision of the legislature which had conferred the power of eminent domain to such corporations, an action that "shows that the legislature regarded such a railroad as a public use, else such authority and power would have never been granted."[45]

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

> "we are not inclined to accept that liberal definition of the phrase 'public use' [. . .] which makes it mean no more than the public welfare or good [. . .]. We agree that property is taken for public use [. . .] only when there results to the public some definite right or use in the business or undertaking to which the property is devoted."[46]

Nevertheless, the court did affirm the lower court's determination that the taking of private property, by a private canal corporation, for the purpose of irrigating 60,000 acres of land belonging to twenty-six private owners, was within the definition of "public use".[47]

Understandings of the Power of Eminent Domain -- Later Periods

> "the law of the land [. . .] postpone[s] even public necessity to the sacred and inviolable rights of private property."[48]

Starting in 1954, the U.S. Supreme Court extended the term "public use" to include a taking of property that was subsequently given to private urban renewal agencies for a public purpose.[49] In *Berman v. Parker*, the court upheld provisions in the federal *District of Columbia Redevelopment Act* (DCRA) that authorized the use of eminent domain for the condemnation of slum property that was subsequently redistributed to private agencies who agreed to use the land consistent with an urban renewal plan.[50] Importantly, the court found that though specific parcels of land may fall outside of a "public use", they are necessary for the functioning of the redevelopment plan as a whole and so

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[44] *Ibid.*, at 1001.
[45] *Ibid.*
[46] *Borden v. Trespalacios Rice & Irrigation Co.*, 86. S.W. 11, 14 (1905).
[47] *Ibid.*
[48] Blackstone, vol. 1, at 134.
[49] *Berman v. Parker*, 348 U.S. 26 (1954).
[50] *See, District of Columbia Redevelopment Act of 1945*, 60 Stat. 790, D.C.Code, 1951, §§ 5-701-5-719. The District of Columbia Redevelopment Land Agency was authorized to transfer to public agencies the land to be devoted to public purposes such as streets, utilities, recreational facilities, and schools, and to lease or sell the remainder as an entirety or in parts to a redevelopment company. The leases or sales were required to provide that the lessees or purchasers would carry out the redevelopment plan.

qualify as having "public purpose".[51]

The Texas Supreme Court followed suit in 1959 when it ruled that the condemnation of private property in accordance with a validly enacted urban renewal plan, and then selling the properties to private citizens, was a "public use".[52] As enacted, the *Texas Urban Renewal Law* (TURL) authorized municipalities to clear blighted areas for the redevelopment of the areas by private enterprise in accordance with restrictions designed to carry out the plan of renewal. In *Davis v. the City of Lubbock*, Justice Joe R. Greenhill writing for the majority, upheld the legislature's declaration that the purpose of the TURL was for a "public use".[53]

In *Poletown Neighborhood Council v. City of Detroit*, the Michigan Supreme Court upheld Detroit's condemnation of a residential neighborhood and the conveyance of the land to General Motors for the construction of an assembly plant.[54] The court found that the benefit received by General Motors was purely incidental and that the project fell within the public purposes stated by the legislature, here to prevent unemployment and economic distress. Importantly, the court's ruling was not without controversy and was eventually overturned. Justice Ryan, writing the dissent in *Poletown*, explained that with this case the:

> "Court has subordinated a constitutional right to private corporate interests. As demolition of existing structures on the future plant site goes forward, the best that can be hoped for, jurisprudentially, is that the precedential value of this case will be lost in the accumulating rubble."[55]

In 2004, *Poletown* was reversed by the Michigan Supreme Court in *County of Wayne v. Hathcock*.[56] The court determined that the public, when it ratified the Michigan Constitution in 1963, could not have understood "public use" to allow for the taking of private property for the benefit of another private party simply to raise tax revenues or create jobs.[57]

In 1984, the U.S. Supreme Court upheld Hawaii's use of eminent domain under its *Land Reform Act of 1967*, which authorized the condemnation of residential tracts in the state and then transferring ownership of the property to existing lessees.[58] Following numerous hearings in the 1960s, the Hawaii legislature determined that while the state and federal governments owned nearly forty-nine percent of the land in Hawaii, another forty-seven percent was in the hands of only seventy-two private landowners. This concentration of land ownership was especially evident on the island of Oahu, where twenty-two landowners owned 72.5% of the fee simple titles. The legislature concluded that this oligopoly was skewing the state's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare.

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[51] *Berman*, at 35.

[52] *Davis, et al. v. the City of Lubbock, et al.*, 160 Tex. 38, 326 S.W.2d 699 (Tex. 1959).

[53] *Davis*, at 709.

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

[55] *Poletown Neighborhood Council*, at 464.

[56] *County of Wayne v. Hathcock*, 471 Mich. 445, 684 N.W.2d 765 (2004).

[57] *Ibid.*

[58] *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984).

The court found that Hawaii's act to regulate the oligopoly was a classic exercise of the state's police powers, and a comprehensive and rational approach to identifying and correcting market failure.[59] As such, the action satisfied the public use doctrine. Importantly, land does not have to be put into actual public use in order to use eminent domain. Instead, the court determined that it will look to the purpose of the taking and not its effect.

Most recently, the U.S. Supreme Court has authorized takings by governmental entities that benefit private parties, on the assumption that the added tax base of new private developments will benefit the public as a whole.[60] In *Kelo v. City of New London, Connecticut*, the U.S. Supreme Court, in a five to four decision, upheld the constitutionality of the municipal taking of a group of working-class homes from their owners and the subsequent transfer of the land to private parties for the purpose of economic development.

In *Kelo*, the city of New London approved a development plan that was anticipated to create more than one thousand jobs, increase tax and other revenues, and to revitalize the economically distressed city, most importantly its downtown and waterfront areas.[61] In assembling the land for this project, the city bought property and proposed using the power of eminent domain to acquire the rest. Several property owners in the area did not want to sell their homes. Susette Kelo had lived in the area since 1997, and had made extensive improvements to her house, which she prized for its water view. Wilhelmina Dery was born in her home in 1918 and had lived there her entire life. Her husband Charles had lived in the house since they married some 60 years before. There was no allegation that any of these properties were blighted or otherwise in poor condition; rather, they were condemned only because they happened to be located in the development area.

In response to the *Kelo* decision, legislatures throughout the nation amended their laws to limit the

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

[60] *Kelo.*

[61] Justice O'Connor, in her dissent to the court's opinion, described the basic facts as follows. "In February 1998, Pfizer Inc., the pharmaceuticals manufacturer, announced that it would build a global research facility near the Fort Trumbull neighborhood. Two months later, New London's city council gave initial approval for the New London Development Corporation (NLDC) to prepare the development plan at issue here. The NLDC is a private, nonprofit corporation whose mission is to assist the city council in economic development planning. It is not elected by popular vote, and its directors and employees are privately appointed. Consistent with its mandate, the NLDC generated an ambitious plan for redeveloping 90 acres of Fort Trumbull in order to "complement the facility that Pfizer was planning to build, create jobs, increase tax and other revenues, encourage public access to and use of the city's waterfront, and eventually 'build momentum' for the revitalization of the rest of the city." See, *Kelo*, at 2671.

affect of the court's decision.[62] In 2005, the Texas legislature, meeting in its Second Called Special Session, debated and then enacted S.B. 7, which limits the use of eminent domain in the state.[63] This law prohibits any state agency, political subdivision of the state, and any corporate entity created by the government from taking private property through eminent domain if it "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 [. . . or] is for economic development purposes."[64] It is too early to determine the full ramifications of the enactment of S.B. 7, and the courts will certainly have a say in how it is interpreted. Regardless, during the 79th Legislative Session, the legislature made clear that there are significant limitations that should be placed on the exercise of the power of eminent domain.[65]

Non-Elected Governmental Bodies in Texas

The power of eminent domain is delegated to the legislative branch of government by the people of Texas in their general grant of power to that branch. Any legitimate authorization of the power of eminent domain must come from the legislature.[66] The legislature may delegate the power to any entity that it chooses, including a private corporation, as long as it determines that it has not overstretched the limitations mandated by the U.S. and Texas constitutions.[67]

As a general rule, non-elected bodies in Texas that use the power of eminent domain are governed by statute, have limited authority to condemn land, and in some cases are regulated by the state.[68] Whether governmental, quasi-governmental, or private corporations, these entities are granted the power of eminent domain in furtherance of certain legislative directives and under varying procedural and substantive requirements.

Non-Elected Entities -- Appointed By Elected Officials

There are numerous examples of non-elected appointed governing bodies that have the power to condemn land in Texas. Enabling statutes vary greatly regarding provisions on how governing bodies are chosen, the degree of discretion they are allowed regarding the power of eminent domain, and under what procedures they must follow to condemn land.

For example, navigation districts may be created under Article III, Section 52, of the Texas

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[62] Alabama, Idaho, Indiana, Kentucky, South Dakota, and Wisconsin have passed legislation prohibiting the exercise of eminent domain for land that is to be transferred to a private entity (with some exceptions). In addition, Indiana, Kentucky, Utah, and West Virginia have either defined "public use" or have created a list of those uses that are considered public.

[63] TEX. GOV. CODE. § § 2206.00 *et. seq.*

[64] *Ibid.*, § 2206.0001(b).

[65] *See e.g.*, H.B. 1208 (Gattis) (amending § 54.209 of the Texas Water Code to prohibit a municipal utility district from exercising the power of eminent domain outside the district boundaries).

[66] *Davis.*

[67] *Valero Eastex Pipeline Co. v. Jarvis*, 926 S.W.2d 789 (Tex. App. Tyler 1996).

[68] The Texas Constitution and its statutory codes grant the power of eminent domain to far too many entities to be individually discussed in this report. *See*, Texas Legislative Research Division, FACTS AT A GLANCE, *Texas Statutes Granting, Prohibiting, or Restricting the Power of Eminent Domain* (March 2006) (listing the numerous statutory provisions regarding eminent domain).

Constitution for the purposes of improving "rivers, bays, creeks, streams, and canals" and "to construct and maintain canals and waterways to permit or aid navigation."[69] These districts are governed by three non-elected commissioners who are appointed by the local commissioner's court (or by the district's board).[70] Navigation districts are granted fairly broad eminent domain authority. For example, such districts are authorized to acquire by condemnation "any necessary rights-of-way and property for necessary improvements contemplated by the district."[71]

Sports facility districts may be created by a commissioner's court "to finance and effect the construction, acquisition, or operation of a sports facility to serve the county."[72] These districts are governed by a five member non-elected board of directors who are appointed by the elected members of various local taxing entities.[73] Like many special districts, these districts are granted broad eminent domain authority for limited purposes. Sports facility districts may acquire by condemnation "any land, easements, rights-of-way, and other property interests necessary to construct or improve a sports facility."[74] In addition, the legislature has attempted to place a check on the power of these districts by requiring that eminent domain may only be exercised following notice and a hearing regarding the proposed takings.[75]

County development districts are governed by a non-elected board of directors, comprised of five members appointed by the commissioner's court.[76] The purpose of such districts is to provide "incentives for the location and development of projects in certain counties to attract visitors and tourists."[77] These districts have the limited eminent domain authority to "acquire land or interests in land in the district considered necessary by the board for the purpose of providing water and sewer services to an authorized project."[78]

Housing authorities by law have been established in each municipality and county in Texas.[79] Municipal housing authorities are governed by five, seven, nine, or 11 non-elected commissioners who are appointed by the presiding officer of the municipality.[80] The governing body of county housing authorities are also non-elected and are appointed by the commissioner's court.[81] A housing authority is authorized to acquire property through the power of eminent domain, but only "after it adopts a resolution describing the real property and declaring the acquisition of the property necessary for the purposes of the authority [. . .]."[82]

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[69] TEX. WAT. CODE. § 61.111. See also, Chapter 62, Texas Water Code for similar provisions regarding Navigation Districts created under Article XVI, Section 59, Texas Constitution.

[70] *Ibid.*, § 61.071.

[71] *Ibid.*, § 61.115.

[72] TEX. LOC. GOV. CODE. § 325.002.

[73] *Ibid.*, § 325.011.

[74] *Ibid.*, § 325.036.

[75] *Ibid.*, § 325.037.

[76] *Ibid.*, § 383.041.

[77] *Ibid.*, § 383.002.

[78] *Ibid.*, § 383.063.

[79] *Ibid.*, § 392.011(a) and § 392.012(a).

[80] *Ibid.*, § 392.031(a).

[81] *Ibid.*, § 392.032(a).

[82] *Ibid.*, § 392.061(a).

Non-Elected Entities -- Corporations

Two types of business activities engaged in by for-profit corporations are of such a public nature that the legislature has granted these companies the power of eminent domain. Certainly not inclusive of all private entities having the power, utilities and common carriers are granted the power of eminent domain. Without such power, these businesses would likely be unable to acquire in the most cost effective manner easements, rights-of-ways, and title to real property that they need to operate their business, and would thus be forced to increase the cost of the vital services that they provide.

Gas and electric companies have the "right and power to enter on, condemn, and appropriate the land, right-of-way, easement, or other property of any person or corporation."[83] Telephone and telegraph companies have the right to "appropriate as much land owned by a private person or a corporation as is necessary to construct a facility" and to "condemn land to acquire a right-of-way or other interest in the land for the use of the telephone or telegraph corporation."[84] Private owners and operators of sewer systems are allowed to condemn private property in order to "construct and maintain sewer pipes, mains and laterals, and connections" and to "maintain vats, filtration pipes, and other pipes for the final disposition of sewage."[85] Water corporations may "condemn private property necessary to construct a supply reservoir or standpipe for water work" if it is necessary to preserve the public health.[86]

Common carriers in Texas are also granted the power of eminent domain, primarily because of the public necessity of the services that they provide and because of the economic importance of such business. For example, the building of railroads has generally been regarded as a public purpose since the great railroad boom of the nineteenth century. These common carriers have routinely been granted the power of eminent domain and courts have routinely sanctioned such grants of power. Like public utilities, it would not be possible for railroads to operate in a financially sound way without such a grant of power. In addition to railroads, crude oil pipeline companies are considered common carriers under the laws of Texas and have been granted the power to condemn "land, rights-of-way, easements, and property of any person or corporation necessary for the construction, maintenance, or operation of the common carrier pipeline."[87]

Some non-profit corporations in Texas have also been given the power of eminent domain, often for worthy public causes. However, these grants have not always been without controversy. For example, during the 79th Regular Legislative Session, Representative Garnett Coleman introduced H.B. 2537 in response to complaints from his constituents. The Texas Medical Center in Houston (a non-profit corporation) had attempted to exercise its power of eminent domain to condemn deed restricted, residential properties for the purpose of building a parking garage for its employees. The owners of the properties that were to be taken by the corporation vigorously opposed the taking, arguing that nearby available property could have been condemned instead of their homes.

[83] TEX. UTIL. CODE. § 181.004.
[84] *Ibid.*, § 181.084.
[85] TEX. LOC. GOV. CODE. § 402.102(a).
[86] *Ibid.*, § 402.103(c).
[87] TEX. NAT. RES. CODE. § 111.019(b). *See*, Laura A. Hanley, "Judicial Battles Between Pipeline Companies and Landowners: It's Not Necessarily Who Wins, But By How Much", *37 Hous. L. Rev. 125* (Spring, 2000).

CONCLUSION

The protection of private property rights in the United States is and has always been a central component to our societal notions of what it is to be an American. This fundamental right is truly at the core of our civil liberties.

However, like most rights protected by our statutes and constitutions, the ownership of private property must be balanced with other interests, particularly at times the good of society. The framers understood the necessity of this balance when they placed takings clauses in our federal constitution and state constitutions. Throughout our history, the primary legal issues involving these clauses surrounded defining what is a "public use" and determining what compensation is required following a taking. The discussion of who should be allowed to exercise the power of eminent domain has been discussed less. Nevertheless, legislative grants and judicial rulings show that both governmental and non-governmental entities can and should be authorized to exercise this power. The Committee believes that if private entities (who are in no way accountable to the people at the ballot box) are allowed to exercise the power of eminent domain, then non-elected governmental bodies should be as well. However, the important determination to be made is under what circumstances should each of these different types of bodies be authorized to use the power of eminent domain.

RECOMMENDATIONS

1) Non-elected governmental bodies should continue to be authorized to exercise the power of eminent domain with important safeguards in place.

   The enabling statutes for non-elected governmental bodies should list as specifically as possible the limited purposes for which the body may condemn property.

   The purposes for which a non-elected governmental body should be allowed to exercise the power of eminent domain should be narrowly tailored to allow the body to perform only its legislatively determined functions.

   The enabling statutes for non-elected governmental bodies should contain both anti-nepotism and conflict of interest provisions.

   To the extent possible, the actions of non-elected governmental bodies should be monitored and regulated by the elected bodies or persons that appoint them.

2) For-profit corporations that are granted the power of eminent domain due to the public nature of their businesses should generally continue to have this power, but only with continued limitations and with continued regulation by the state.

CHARGE 2

"Consider the potential establishment of a single and uniform approach to dealing with situations involving overlapping, extraterritorial jurisdictions."

OVERLAPPING EXTRATERRITORIAL JURISDICTIONS

INTERIM CHARGE

"Consider the potential establishment of a single and uniform approach to dealing with situations involving overlapping, extraterritorial jurisdictions."[88]

SCOPE OF REPORT

The Committee believes that annexation is a necessary tool for municipalities, but recognizes the seemingly endless controversies surrounding its current use. In particular, the Committee has clearly heard the ubiquitous and boisterous complaints by those who have either been annexed by municipalities or are planned to be. The Committee has routinely passed legislation attempting to address these complaints, specifically the unilateral ability of municipalities to annex areas without the consent of those to be brought within the municipality's boundaries. This report does not focus on this undemocratic situation, but instead focuses narrowly on those complications that arise from time to time regarding municipal fights over overlapping extraterritorial jurisdictions.

BACKGROUND

Municipal annexation is the process by which municipalities may extend their corporate boundaries. The authority of municipalities to extend their boundaries has changed several times during the past century. Prior to 1912, all municipalities in the state were general-law municipalities, meaning that they were only authorized to do those things specifically granted to them in their enabling statutes. As such, general-law municipalities may not annex territory without legislative approval.[89] With a 1912 amendment to the Texas Constitution, home rule cities were authorized to take any action not in violation of the constitution or the laws of the state.[90] Such power included the authority to annex unincorporated areas.

Texas Municipal Annexation Act of 1963

In 1963, the legislature passed the Municipal Annexation Act of 1963 (Act), which for the first time established statutory procedures for annexations and established the concept of extraterritorial

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

[89] *Short v. Gouger*, 130 S.W. 267 (Tex. Civ. App. 1910), writ dismissed.

[90] TEX. CONST., art XI, § 5.

jurisdiction.[91] The Act is the basis of the state's current law regarding annexations and is now codified as Chapters 42 and 43 of the Texas Local Government Code.[92]

Under the concept of extraterritorial jurisdiction, a band of a certain width of unincorporated contiguous land is established around each municipality, varying in width depending on the population of the municipality. Under law, a municipality may not annex area that is within the corporate or extraterritorial jurisdiction boundaries of another municipality.[93] In addition, a municipality may only annex property within that extraterritorial jurisdiction. Prior to 1963, municipalities could annex land up to the corporate boundaries of another municipality, regardless of the distance. At that time, court rulings generally sided with the first municipality to begin annexation proceedings over another municipality. The general confusion resulting from questions of which municipality could annex an adjacent area were largely responsible for the enactment of the Act.

The Texas Municipal Annexation Act attempted to solve the problem in two general ways. First, the legislature created permanent extraterritorial jurisdiction boundaries for municipalities, classed in groups based on a municipality's population. Currently, these boundaries include the "unincorporated area that is contiguous to the corporate boundaries of the municipality and that is located:

1) within one-half mile of those boundaries, in the case of a municipality with fewer than 5,000 inhabitants;

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

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

4) within 3-1/2 miles of those boundaries, in the case of a municipality with 50,000 to 99,999 inhabitants; or

5) within five miles of those boundaries, in the case of a municipality with 100,000 or

[91] *See*, TEX. LOC. GOV. CODE § 42.001 (describing the policy purpose underlying. "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 the municipalities."

[92] *Ibid.*, § § 42.001 and § § 43.001 *et. seq.*

[93] *Ibid.*, § 42.021 and § 42.022(c). *See also, City of Bridge City v. City of Port Arthur*, 792 S.W.2d 217 (Tex.App.—Beaumont 1990, writ denied). In *City of Bridge City v. City of Port Arthur*, a Texas Court of Appeals invalidated the attempt by Bridge City to annex area within Port Arthur's ETJ, even when the tracts that were attempted to be annexed were more closely related to Bridge City.[93] In this case, Port Arthur was on the other side of the river, in another county, and further separated by the telephone exchange system, gas companies, electrical power systems, cable television systems, water drainage systems, political systems, school districts, administrative districts and tax appraisal districts.

more inhabitants."[94]

Second, the legislature attempted to settle any pending issues by requiring that any overlapping extraterritorial jurisdictions as of August 23, 1963, be apportioned by written agreement approved by the affected municipalities.[95] Importantly, questions regarding the extraterritorial jurisdiction boundaries of municipalities are settled. However, current disputes have arisen regarding questions of the transfer of extraterritorial jurisdictions from one municipality to another, the apparent imbalance between smaller municipalities with smaller extraterritorial jurisdictions who are approached by larger municipalities, and definitional questions regarding extraterritorial jurisdictions.[96]

Extraterritorial jurisdictions are elastic, in that they can be extended and even reduced. For example, when a municipality annexes an area within its extraterritorial jurisdiction, the corporate boundary of the municipality extends to the limits of the annexed area, and as a result, the extraterritorial jurisdiction band extends as well.[97] Regarding reduction of an extraterritorial jurisdiction, except in cases of judicial apportionment due to overlapping jurisdictions, the extraterritorial jurisdiction of a municipality may not be reduced unless the municipality grants written consent.[98]

SUMMARY OF COMMITTEE ACTION

The Full Committee heard testimony at a scheduled public hearing on May 3, 2006, in Austin, Texas. Representative Vicki Truitt testified regarding certain problems that have arisen in her legislative district regarding municipal extraterritorial jurisdiction boundaries.

DISCUSSION

Overlapping Extraterritorial Jurisdictions

[94] *Ibid.*, § 42.021.

[95] *Ibid.*, § 42.901.

[96] In regards to corporate boundary issues during the 79th Regular Legislative Session, *see*, HB 585 (Corte) (changing the procedures for incorporating certain areas in the extraterritorial jurisdiction or the limited purpose annexation area of certain municipalities); HB 1623 (Goolsby) (prohibiting certain home-rule municipalities from extending their corporate limits to, having its extraterritorial jurisdiction on, or annexing a barrier island on which a municipality incorporated before September 1, 2005 exists); HB 2964 (Mowery) (authorizing a municipality, by written agreement, to transfer any part of the area of the municipality's ETJ to another municipality adjacent to the area); HB 3175 (Truitt) (establishes critera for when an annexing municipality would not have to obtain written consent of any other municipality to annex an area located in a water or sewer district that is wholly or partly in the overlapping extraterritorial jurisdiction of two or more municipalities).

[97] TEX. LOC. GOV. CODE § 42.022.

[98] *Ibid.*, § 42.023.

There are no true cases in which the extraterritorial jurisdictions of two municipalities overlap, unless they overlapped at the time the Texas Municipal Annexation Act was enacted in 1963. This situation is possible, but the Committee is not aware of any such situations. Section 42.901, dealing with overlapping extraterritorial jurisdictions in 1963, is permissive in that affected municipalities "may" agree to apportion the extraterritorial jurisdiction by written agreement.[99] In addition, there is no mechanism in place to require these boundary disputes to be resolved. Instead, the Local Government Code simply allows municipalities to file suit in district court to settle questions of overlapping jurisdiction.[100] If a lawsuit is filed to determine municipal extraterritorial jurisdiction boundaries, the court is required to consider "population densities, patterns of growth, transportation, topography, and land use in the municipalities and the overlapping area."[101] In addition, the area must be apportioned among the municipalities:

1) so that each municipality's part is contiguous to the extraterritorial jurisdiction of the municipality or, if the extraterritorial jurisdiction of the municipality is totally overlapped, is contiguous to the boundaries of the municipality;

2) so that each municipality's part is in a substantially compact shape; and

3) in the same ratio, to one decimal, that the respective populations of the municipalities bear to each other, but with each municipality receiving at least one-tenth of the area.

CONCLUSION

The Texas Municipal Annexation Act of 1963 solved the vast majority, if not all, of the situations involving true overlapping extraterritorial jurisdictions in the state. By statutorily establishing extraterritorial jurisdiction requirements, and by creating a mechanism to solve then existing overlaps, the Act settled these issues. However, current boundary dispute issues regarding extraterritorial jurisdictions still routinely arise regarding questions of the transfer of extraterritorial jurisdictions from one municipality to another, the apparent imbalance between smaller municipalities with smaller extraterritorial jurisdictions who are approached by larger municipalities, and definitional questions regarding extraterritorial jurisdictions.

RECOMMENDATIONS

1) There is no need at this time to enact any legislation regarding truly overlapping

[99] *Ibid.*, § 42.901(a).
[100] *Ibid.*, § 42.901(b).
[101] *Ibid.*, § 42.901(b).

extraterritorial jurisdictions, given that such situations are rare.

2) Secondary issues such as questions involving the transference of extraterritorial jurisdiction, the imbalance between municipalities, and other definitional questions, should be addressed on a case by case basis.

CHARGE 3

"Study the powers and practices of homeowner associations in Texas and the possible need for legislation, such as the proposed Texas Uniform Planning Community Act, to address the rules, enforcement, restrictions and other matters within the authority of a homeowner association. (Joint Charge with the House Committee on Business and Industry)."

TEXAS UNIFORM PLANNED COMMUNITY ACT

INTERIM CHARGE

"Study the powers and practices of homeowner associations in Texas and the possible need for legislation such as the proposed Texas Uniform Planning Community Act, to address the rules, enforcement, restrictions and other matters within the authority of a homeowner association. (Joint Interim Charge with the House Committee on Business and Industry)"

SCOPE OF REPORT

Over the years, numerous legislative reports, court cases, law review articles, and other legal works have studied and explained every aspect of planned communities in this and every other state of the union. This report generally focuses on the background, controversies, and the current law governing such communities in this state, and more specifically analyzes how the proposed Texas Uniform Planned Community Act (TUPCA) reflects current law and understandings.[1] This report, through the use of numerous footnotes, attempts to direct the reader to various other sources that address specific issues in greater detail. The Committee does not believe that it is necessary to restate work that has already been completed.

BACKGROUND

Planned Communities

Today, an estimated fifty-seven million Americans live within 286,000 community associations in this nation.[2] These property owner associations (POAs) are individually and generally delineated as condominium associations, cooperative associations, or homeowners' associations. Often, these communities exist in combination with one another and are generally grouped together in what is commonly referred to as Master Planned Communities.

Home Owners' Associations

[1] For example, this report has limited information on mixed-use communities. § 83.254(2) of TUPCA specifically excludes mixed-use communities containing residential and non-residential lots unless the lots would comprise a planned community in the absence of the non-residential lots. An example of a mixed-use association is the Las Colinas Association (LCA), which is a nonprofit corporation that serves as the permanent POA for all residential and commercial properties in Las Colinas. *See*, The Las Colinas Association, at http://www.lascolinasassn.com; Las Colinas is a 12,000-acre master planned community located within the city of Irving, Texas.

[2] *See*, Community Associations Institute, *Facts About Community Associations*, at http://www.caionline.org/about/facts.cfm.

Homeowner associations (HOAs) are non-profit POAs formed to provide services for homeowners in exchange for required assessment fees.[3] A number of services may be afforded to homeowners that are designed to improve the safety, function, and aesthetic quality of a neighborhood or subdivision in order to preserve the property values of the homes within the HOA's jurisdiction. Services may include the provision of street lighting and garbage services and the maintenance or creation of common areas like parks, swimming pools, and other amenities. Homeowners are generally obligated to maintain their property in accordance with deed restrictions in place at the time they purchased property in the HOA.[4] Frequently, HOAs are managed by a board of directors elected by homeowners, and are governed by deed restrictions and by the HOA's articles of incorporation, bylaws, and rules that are enforced through a system of fines for infractions.

General History[5]

During the nineteenth century, common ownership associations (the forerunners of HOAs) were developed in the United States by urban planners as a tool to create exclusive neighborhoods that were confined and separate from surrounding areas.[6] By the late 1920s, land use restrictions in many high-end subdivisions were employed to protect property values. Following World War II, during a period of rapid municipal growth, it became increasingly costly for municipalities to provide basic services to their residents. As a result, some municipalities began to refuse to provide certain basic services, such as road maintenance and garbage collection, to new developments, and left those duties for the HOAs to provide themselves.[7]

Currently, this state, as well as much of the rest of the country, is experiencing a rapid growth in the creation of planned communities. Not only do some homebuyers wish to live in communities that are regulated, but many municipalities find it beneficial to pass on to the private sector that which has traditionally been the function of local governments.

Texas History[8]

[3] The Committee has made a decision to refer to all associations that are relevant to this report as "HOAs", even though some might argue that "POA" is more appropriate. This decision is inline with the specific language of the charge given to the Committee.

[4] Restrictive covenants (restrictions placed in deeds) govern the uses of property as well as the behaviors of individuals living under them. These covenants often establish fees for a variety of services. In most cases, the developer of the neighborhood creates the covenants before any individual lots are sold, precluding any prospective owner's input in their composition.

[5] *See, e.g.*, Evan McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government* (New York: Vail-Ballou Press, 1994); Wayne S. Hyatt & Jo Anne P. Stubblefield, "The Identity Crisis of Community Associations: In Search of the Appropriate Analogy," *27 Real Prop. Prob. & Tr. J. 589 (1993);* Uriel Reichman, "Residential Private Governments: An Introductory Survey," *43 U. Chi. L. Rev. 253 (1976).*

[6] Some of the earliest common ownership associations were created in Gramercy Park in New York, and in Louisburg Square in Boston.

[7] *See, e.g.*, Shirley L. Mays, "Privatization of Municipal Services: A Contagion in the Body Politic," *34 Duq. L. Rev. 41, 57 (1995).*

[8] *See, e.g.*, Karen Ellert Pena, "Comment: Reining In Property Owners' Association's Power: Texas's Need For a Comprehensive Plan," *33 St. Mary's L. J. 323 (2002).*

By and large, HOAs in Texas are governed by the Texas Property Code and by case law.[9] Eleven specific chapters in Title 11 of the Property Code deal with a variety of HOA issues.[10] As such, Texas HOA law is not codified as a uniform set of consistent rules. Instead this set of laws has developed over time in a piecemeal fashion, usually in response to a particular situation or a constituent's complaint.

Legislative Activity

In the past eight years, at least ninety-two separate bills involving HOAs have been introduced, and three interim committees, including the current House Joint Committee, have been charged with studying issues related to HOAs.[11] It is important to understand that many of the proposals debated by the legislature in recent years have been aimed at associations comprised primarily of single-roofed family homes in which the HOA has limited maintenance functions. Any legislative debate is incomplete if it does not take into consideration the fact that other types of HOAs, often times requiring greater HOA involvement in day-to-day affairs, are now part of the equation.[12] In addition, previous debates have often focused on the two obvious parties involved in HOA questions: associations and its members, while often not taking into account the affect that any proposal will have on other stakeholders such as developers and financial institutions. Future legislative proposals and debates should be sure to include these other parties.[13]

76th Regular Legislative Session

In 1998, the Senate Committee on State Affairs issued an interim report dedicated to the study of the legal powers, duties, and structure of HOAs in Texas.[14] This report concluded that HOAs have acquired so much power over member homeowners (in essence de-facto political subdivisions) that they need to be more strenuously regulated by state law.[15] Of particular concern to the committee

[9] *See*, TEX. PROP. CODE, Chs. 201-210: TEX. PROP. CODE, Ch. 51.

[10] Chapter 201 applies to the creation, extension, and amendment of restrictive covenants in HOAs located in larger cities (population of 100,000) and in Harris County and its surrounding counties. Chapter 202 applies to the construction and enforcement of restrictive covenants throughout the state. Chapter 204 applies the powers of HOAs in Harris, Brazoria, Galveston, and Montgomery counties. Chapter 205 applies to limited situations in counties with a population larger than 65,000. Chapter 206 applies to the extension of assessment restrictions in certain HOAs in and around Harris County. Chapter 207 applies to disclosure of HOA information, particularly resale certificates by all HOAs. Chapter 208 applies to the amendment and termination of restrictive covenants in Houston. Chapter 209 is the Texas Residential Property Owners Protection Act that is statewide in affect. Chapter 210 applies to the extension and modification of restrictive covenants in Tyler and its surrounding counties. Chapter 211 applies to the amendment and enforcement of restrictive covenants in the unincorporated parts of smaller counties.

[11] *See*, Footnote 27 at 35-36 for a list of bills.

[12] Throughout the state and the nation POAs that comprise garden homes, town homes, and other non-traditional living arrangements are being created. In many cases, these new associations have responsibilities to maintain yards, roofs, fencing, and other jobs that have traditionally been left to individual homeowners.

[13] *See*, Committee Recommendation 6 at 48.

[14] *Texas Senate Interim Committee on State Affairs Report to the 76th Legislature*, November 1998, Charge Two: "Study the legal powers, duties, and structure of homeowners associations in Texas, including lien and foreclosure abilities."

[15] *Ibid.*, at 16.

was the fact that "due process concerns are not adequately addressed by the current foreclosure process."[16]

During the subsequent 76th Legislative Session, a number of bills were filed as a direct result of the preceding year's interim report from the Senate State Affairs Committee.[17] Generally, these bills aimed to lessen HOA abuses by, for example, prohibiting foreclosure as a remedy available to HOAs, requiring arbitration prior to filing liens on property, and prohibiting mandatory membership in an association. Most of these piecemeal pieces of legislation failed to be enacted.

A more comprehensive piece of legislation was filed during this session that attempted to codify rights, obligations, and procedures for homeowners and associations. Known as the Texas Planned Community Act (TPCA), S.B. 699 by Senator John Carona proposed the establishment of a statewide statutory outline for the functioning of HOAs. Though this bill was not enacted, it does nevertheless reflect the ever-increasing desire by the legislature to find a balance between the powers and duties of HOAs.

77th Regular Legislative Session

In March, 2001, Ms. Wenonah Blevins, an eighty-two year old widow from Houston, witnessed the Champions Community Improvement Association auction away her $150,000 home because she had failed to pay two years of homeowner fees totaling $814.50. The home was eventually sold for $5,000.[18] A number of bills were filed during the 77th Legislative Session to address this and other evident problems that surrounded the operations of HOAs in Texas.[19]

The most significant piece of legislation that was enacted during this session was broad in scope and attempted to give direction to associations and to protect homeowners that live within them. S.B. 507 by Senator Carona created the Texas Residential Property Owners Protection Act (TRPOPA), currently Chapter 209 of the Property Code, which includes procedural instructions and protections, prohibits the foreclosure of a home for fines and attorney's fees only, limits attorney's fees, and authorizes the redemption of a foreclosed home by the homeowner within 180 days of sale.[20]

78th Regular Legislative Session

In 2002, the Senate Committee on Intergovernmental Relations appointed an interim subcommittee chaired by Senator Jon Lindsay and charged with studying "the appropriateness of foreclosure and

[16] *Ibid.*

[17] *See*, HB 554 (Yarbrough); HB 901 (Dutton); HB 904 (Yarbrough); HB 1017 (Yarbrough); HB 1299 (Yarbrough); HB 2224 (Solomons); HB 2459 (Yarbrough); HB 2460 (Yarbrough); HJR 37 (Dutton); SB 317 (Ellis); SB 318 (Ellis); SB 319 (Ellis); SB 434 (Brown); SB 699 (Carona).

[18] *See*, S.K. Bardwell, Eric Berger, and Dale Lezon, "Sale of Widow's Home Outrages Officials: Homeowners' Group Tried to Buy Home," *Houston Chronicle*, May 3, 2001.

[19] *See*, HB 879 (Dutton); HB 1423 (Bailey); HB 2685 (Bosse); SB 507 (Carona); SB 1834 (Lindsay); SB 1835 (Lindsay); SJR 53 (Lindsay).

[20] *See*, TEX. PROP. CODE, § 209.001 *et seq.*

other powers granted to property owners associations to enforce covenants."[21] The committee made seventeen recommendations to the 78th Legislature, including prohibiting non-judicial foreclosures, prohibiting foreclosure for non-assessment liabilities alone, finding an alternative to foreclosure, increasing the redemption period to two years, various provisions regarding the retention and payment of attorneys, and a suggestion that association laws be re-codified.[22]

Many of the proposals recommended by the Senate State Affairs Interim Committee were introduced as legislation during the 78th Legislative Session.

Senator Lindsay introduced S.B. 949 that provided a number of protections for consumers pertaining to the collection of dues and fees and the enforcement of deed restrictions by HOAs. Had it become law, S.B. 949, among other things, would have created open meetings and open records rules, placed limitations on foreclosures, and would have allowed the of redemption of property up to two years following foreclosure.

Proposed Texas Uniform Planned Community Act[23]

The Texas Uniform Planned Community Act (TUPCA) is a legislative initiative that was discussed and drafted by the Texas College of Real Estate Attorneys over a number of years.[24] TUPCA reflects the attempt to create a comprehensive set of laws regarding planned communities throughout Texas. As drafted, TUPCA is a noble attempt to codify as law all of the issues surrounding the creation and maintenance of HOAs. However, it contains numerous provisions that appear to leave the door open for continued abuses by HOAs.

SUMMARY OF COMMITTEE ACTION

The Full Committee, joined by the House Committee on Business and Industry, heard testimony in Austin during a scheduled public hearing on March 21, 2006. Those who testified were:[25]

For:

Hailey, Roy D. (Self)
McCabe, John M. (National Conference of Commissioners on Uniform State Laws)
McKinney, J. Miles (Community Associations of the Woodlands, Texas)

[21] *See, Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002.

[22] *Ibid.*

[23] *See*, Texas Uniform Planned Community Act, *TUPCA* s.v. "Bill Analysis" at http://www.tupca.org, in order to view a copy of TUPCA and an analysis of it. Any future references in this report to specific provisions in TUPCA will refer to the "Proposed TUPCA" which is the Texas Legislative Council draft (79R7394) found at the preceding web page.

[24] *Ibid., History of TUPCA.*

[25] This list of witnesses is formatted inline with how Witness Affirmation Forms were completed at the time of the hearing The Committee does not feel that it is appropriate to attempt to decipher the specific viewpoints of any witness from the witness' testimony.

McLin, Amy (Self and Texas College of Real Estate Attorneys; CAI; Texas Legislative Action Committee)
Reuler, Sharon (Texas College of Real Estate Attorneys & Committee on Property Owners Associations of State Bar)

Against:

Adolph, Irene "Beanie" (hoadata.org)
Craig, Jr., Richard W. (Self and Texas Homeowner Advocate Group)
Gatlin, Barbara (Self)
Jones, Harvella (The Texas Homeowner's Advocate Group)
MacInnes, Kathy (THAG)
MacInnes, Neil (Kathy MacInnes & THAG)
McCorkle, Amy (The Texas Homeowner's Advocate Group)
McCorkle, Clark (The Texas Homeowners Advocate Group)
McGarr, Mary (Self)
Walker, Ron (Texas Association of Realtors)

On:

Arabie, Joe (Self and TX AFL-CIO)
Carr, Mindy (Texas Land Title Association)
Grucza, Paul D. (Self and C.A.I. and My Company: CMA)
Norman, Scott (Texas Association of Builders)
Tompkins, Jeffrey T. (POA Committee of State Bar)

Registering, but not testifying:

For:

Barsalou, Austin (Texas College of Real Estate Attorneys)
Davies, Thomas I. (Self and Texas College of Real Estate Attorneys)

On:

Mahoney, Tim (Texas Neighborhoods Together)

Proponents of TUPCA

The witnesses who testified in favor of enactment of TUPCA explained that it is necessary and appropriate, and that it had been drafted after thorough research and discussion to ensure a balance between the competing interests of associations, developers, and property owners.

These witnesses explained that TUPCA is necessary and appropriate for at least two specific reasons. First, due to the rapidly increasing number of Texans living within HOAs, it is especially important for the state to have a uniform, consistent, and coherent policy in place that governs associations. This is especially true given the ubiquitous trend of creating HOAs for new developments and the fairly standard practice of municipalities requiring prospective property developers to establish HOAs prior to the development of new tracts.

Second, these witnesses testified that the piecemeal set of laws governing the operations of HOAs is inconsistent, confusing, unnecessarily bracketed for individual situations, and generally an inappropriate manner for the state to govern such an important issue. In addition, these witnesses argued that it is inappropriate for the state to attempt to micromanage individual HOAs through

statute, and a uniform act would be more coherent and consistent. It was noted that the Texas Uniform Condominium Act, which has been in place for over ten years, has functioned without problems or substantive amendments and that a uniform act regulating planned community associations will function similarly.[26]

Opponents of TUPCA

Some witnesses who testified against the enactment of TUPCA, at least in its present form, explained that they are generally opposed to any new law that affects homeowners' associations. The witnesses expressed a general fear that HOAs are already too powerful and unresponsive to their needs, and that any new law or set of laws will exacerbate the problems that plague them now. They are particularly concerned with the drastic nature of remedial actions available, most importantly foreclosure, and the seeming refusal of their associations to work with them to mitigate damages.

Other opponents of TUPCA argued that city ordinances are sufficient to regulate land use and that current law is more than adequate in the governance of HOAs. These opponents argued that TUPCA placed too many burdensome requirements on smaller, less complicated associations that require little more than the payment of assessments to pay bills.

DISCUSSION

The controversies surrounding HOAs in Texas involve two broad categories of issues. First, due to the steady growth of HOAs in the state and the current piecemeal set of laws that govern them, it is especially important for the state to have a uniform, consistent, and coherent policy in place that governs associations. A single set of laws would allow those affected to find more certainty in the law, would allow homeowners to more easily decipher the law, and would allow a single set of case law to be formed around a single set of provisions.

The second set of issues, in broadest terms, involve questions of how to protect the property interests of individual members while at the same time granting enough authority to HOAs so that they can function adequately. These issues involve questions of the creation, governance, and enforcement remedies available to HOAs, as well as a policy decision as to which rights should be available to homeowner members.

Necessity of a Comprehensive Set of Laws

There is currently a strong desire in Texas from those people affected by HOA laws to create a uniform and universal set of provisions to guide the actions of associations and to protect the rights of homeowners. During each legislative session a number of bills are introduced that in one way or

[26] *See*, TEX. PROP. CODE, § 82.001 *et seq.*

another involve planned communities.[27] Generally, these bills are aimed at a narrow, often local, issue. These "band-aid" fixes have created a non-uniform and complicated set of laws regarding HOAs.

The legislature recognized the importance of codification in 1963 when it directed the Texas Legislative Council to begin statutory revisions, a program that is now codified as the Statutory Revision Program.[28] Admittedly this program involves non-substantive revisions to law; however, the purpose of the program, "to clarify and simplify the statutes and to make the statutes more accessible, understandable, and usable," is equally applicable to substantive codifications.[29]

In 2002, the Senate Interim Committee on Intergovernmental Relations recommended that association laws be re-codified or that the Uniform Planned Community Act be adopted, given that association laws in the Property Code are "confusing, redundant, and occasionally conflicting [. . . and that] association provisions are scattered throughout the Civil Statutes, Tax Code, Government Code, and others, making it difficult for owners and associations to follow."[30]

The drafting of TUPCA was motivated in large part by this desire for codification, and the authors of TUPCA propose certain legislative findings that argue the importance of a universal state-wide code.[31] First, TUPCA maintains that "it is in the best interests of the state and the residents of the state to establish a clear, comprehensive, and uniform framework for the creation and operation of [. . . HOAs]."[32] The authors of TUPCA next address the issue of the piecemeal nature of Texas HOA law by suggesting that "it is in the best interests of the state and the residents of the state to have the same legal framework for [. . . HOAs] in every part of this state, without exceptions for particular developments or regions."[33] The further proposed legislative findings argue, for example, that such a

[27] During the 79th Regular Legislative Session the following bills were introduced in the House and Senate: HB 638 (Hegar); HB 873 (Dukes); HB 927 (Dutton); HB 1072 (Casteel); HB 1240 (Hochberg); HB 1344 (Gattis); HB 1446 (Orr); HB 1631 (Hilderbran); HB 1632 (Hope); HB 1770 (Harper-Brown); HB 2215 (Bailey/et al.); HB 2426 (Puente); HB 2535 (Hartnett); HB 2539 (Davis, John); HB 2802 (Smith, Todd); SB 54 (Nelson); SB 244 (Wentworth/et al.); SB 362 (Carona); SB 534 (Lindsay/et al.), SB 892 (Carona/et al.); SB 1018 (Staples); SB 1234 (Fraser); SB 1360 (Wentworth); SB 1631 (Carona); SB 1886 (Lindsay).

During the 78th Regular Legislative Session the following bills were introduced in the House and Senate: HB 468 (Berman); HB 645 (Puente); HB 766 (Davis, John); HB 844 (Howard); HB 1129 (Farrar); HB 1279 (Zedler/et al.); HB 1454 (Eiland); HB 1641 (Bailey); HB 1866 (Coleman et al.); HB 2200 (Solomons); 2646 (Bailey/et al.); HB 2789 (Edwards); HB 2790 (West, George "Buddy"); HB 3077 (West, George "Buddy"); HB 3276 (Guillen); HB 3419 (Davis, John); SB 779 (Armbrister); SB 949 (Lindsay).

During the 77th Regular Legislative Session the following bills were introduced in the House and Senate: HB 707 (Bailey); HB 879 (Dutton); HB 1423 (Bailey); HB 1580 (Coleman); HB 1859 (Davis, John); HB 2592 (Davis, John); HB 2683 (Allen); HB 2685 (Bosse); HB 2727 (Hilderbran); HB 3322 (Yarbrough/et al.); HB 3479 (Eiland); HB 3517 (Turner, Bob); HB 1378 (Dutton); SB 1677 (Jackson); SB 1834 (Lindsay/et al.); SB 1835 (Lindsay/et al.); SB 507 (Carona); SB 620 (Jackson); SJR 53 (Lindsay/et al.).

[28] *See*, Chapter 448, Acts of the 58th Legislature, Regular Session, 1963 (Article 5429b-1, Vernon's Texas Civil Statutes): TEX. GOV. CODE, § 323.007.

[29] TEX. GOV. CODE, § 323.007(a).

[30] *See, Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002, Recommendation 1.17, at 43.

[31] Proposed TUPCA SECTION 1.

[32] *Ibid.*, (1).

[33] *Ibid.*, (2).

uniform set of laws will alleviate tensions between members and their associations, and will give more certainty to developers, builders, and lending institutions.[34]

Although TUPCA is a noble attempt to codify as law all of the issues surrounding the creation and maintenance of HOAs, and contains many useful provisions that the Committee can and does support, overall it contains too many provisions that appear to us to leave the door open for continued abuses by some HOAs.

For the foregoing reasons, the Committee recommends that a new chapter in the Texas Property Code, with state-wide and general application, should be enacted that addresses the creation, governance, obligations, and rights of POAs.[35]

The new chapter to be enacted should apply to most if not all of the associations in the state. Current provisions in law regarding property owners' associations should be repealed to the extent that they are duplicative or inconsistent with the new chapter, but with the caveat that many of these current provisions encompass sound public policy and reflect years of legislative study, debate, and compromise. Since the new chapter would not be uniform to any other state law it would not have the word "Uniform" in the title.

The new chapter to be enacted should resolve a number of issues presented by the growth in the creation of HOAs in Texas. TUPCA, as drafted, contains many provisions the Committee can support including in the new chapter, while other TUPCA provisions are not supported by the Committee.

Creation of HOAs

Voluntary Nature

The legislature has periodically addressed the policy question regarding whether HOA membership must be mandatory for all property owners living within the jurisdiction of the HOA. For example, in 1999, Representative Ken Yarbrough introduced H.B. 904 that would have prohibited any new dedicatory instruments from requiring a homeowner to join an HOA. There is a strong argument to be made that if all homeowners enjoy the benefits of an HOA (such as swimming pools, common areas, and private security) then all members should equally share the cost of these amenities. It is overly burdensome, and impossible in some situations, for an HOA to determine who within its jurisdiction should receive the benefits of the association based on membership status.

In addition, questions periodically arise regarding the seeming de facto involuntary nature of HOAs. These questions appear to have greater weight given the ubiquitous creation of HOAs, a fact that makes it more difficult for homeowners to purchase new homes outside the jurisdiction of an HOA in many urban and suburban areas of the state. Therefore, living within an HOA, on the surface at least, appears to be increasingly involuntary.

[34] *Ibid.*, (3)-(8).
[35] *See*, Committee Recommendation 1, at 48.

However, homeowners purchase homes within HOAs with the knowledge that they will be afforded certain benefits and be required to live up to certain obligations. While it may be more difficult to find a home, especially new homes, in the more desirable areas of a given region, it does not negate the fact that potential homeowners make a voluntary decision, after weighing the costs and benefits, to purchase a home within an HOA.

However, under current law some homeowners may involuntarily be made to be part of an HOA simply by living in a neighborhood that chooses to create an association. Chapter 204 of the Property Code authorizes the creation of an HOA under a specified procedure that includes approval by the owners of sixty percent of the property in the neighborhood.[36] In addition, TUPCA would authorize "constructive" notice to a homebuyer as a manner in which to inform a homebuyer that the lot is in a planned community prior to any public declaration being filed.[37] However, without "actual" notice, it is possible that a homebuyer will not be aware that they are buying a lot that will be subject to an HOA.

Forced Creation By Municipalities

Currently, some municipalities require property developers to initially create HOAs to ensure that the HOA will be responsible for the provision of certain services that the municipality is unable or unwilling to provide. In some cases, residents of the HOA must pay for services in their assessment fees to the HOA in addition to paying taxes to the municipality for the same service. In effect, residents are taxed twice for one service that is provided by the HOA.

The Committee believes that any prohibition placed on municipalities regarding the mandatory creation of HOAs will have little practical effect on whether they are created or not. If such a prohibition were enacted, it would be in essence a statement of a legislative finding that municipalities should not have such a power. In reality, many developers of new subdivisions will likely continue to create HOAs for their projects because of the demand for the special services and protections that associations offer, and because it makes good economic sense to the developer.

Governance of HOAs

In 2002, the Senate Intergovernmental Relations Committee determined that "associations carry out many of the duties and responsibilities of small governments and should be recognized as quasi-governments."[38] As such, it has been argued that HOAs should be required to follow the same types of laws regarding notices, meetings, records, voting, hearings and an array of other issues that all political subdivisions of the state must follow. The Committee believes that HOAs, being similar in many if not most regards to governmental entities, should be required to act as a body in a similar way as governmental bodies.

[36] TEX. PROP. CODE, § 204.006.
[37] Proposed TUPCA, § 83.051(c).
[38] *Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002, at 10.

Boards of Directors

Many issues have surfaced over the past decade regarding the quality, qualifications, tenure, and personal liability of boards of directors.

A concern frequently expressed in witness testimony before the various legislative committees that have studied HOAs is that boards of directors are often unknowledgeable regarding the documents that govern their association and that they must rely on management companies or attorneys to make important decisions or interpretations. As a consequence, these elected boards are sometimes compromised when board members are unwilling or unable to be educated on the issues that affect the homeowners within their association.

In regards to the qualifications of board members, many critics of HOAs have argued that board members should be vested in the association by owning property within it. According to this argument, such a personal interest in the association would lend itself to more reasoned and reasonable decisions and actions. As proposed, TUPCA does not require board members to own property within the HOA.[39] In addition, there has been some debate regarding the personal background of board members, and whether certain earlier activities should preclude a person for serving as a board member. For example, in 2005, Representative Burt Solomons was successful in amending H.B. 2215 to prohibit a person convicted of a crime of moral turpitude from serving on an HOA board.[40]

Regarding tenure of board members, TUPCA would authorize the removal of a director by the owners for or without cause.[41] Under TUPCA, this removal could only be done by vote or petition, of which generally a majority of votes, either in the form of proxies or actual votes is garnered. TUPCA would also authorize board members to fill vacancies on the board for unexpired portions of terms, provided the association's governing documents permit.[42]

Notice, Meetings, and Records

Currently, most HOAs in Harris County are regulated by both the Open Meetings Act and the Public Information Act.[43]

Under TUPCA as drafted, notices of meetings of an HOA would be required to be given to homeowners, but only as provided by the governing documents.[44] This would create an unwise loophole that could be easily closed by specifying in statute the specific manner in which notice is to be given by an association to its members.

In addition, under TUPCA, homeowners could not be prohibited from attending HOA meetings, as

[39] Proposed TUPCA, § 83.103(c).
[40] HB 2215 (Bailey, et al). SECTION 9. Amendment 11.
[41] Proposed TUPCA, § 83.171(a).
[42] *Ibid.*, § 83.103(b).
[43] TEX. GOV. CODE, § 551.0015; TEX. GOV. CODE, § 552.0036.
[44] Proposed TUPCA, § 83.169(f).

long as the board is not in executive session.[45] The situations in which an HOA can meet in executive session would be similar to those authorized by the Open Meetings Act.[46] Also, an owner could not be prohibited from speaking, so long as the length of the discussion is reasonable.[47] The Committee supports these provisions from TUPCA.

Under TUPCA, homeowners appear to be granted fair access to the records of HOAs, as long as they are willing to formally request the inspection, inspect the records at a reasonable time and for a reasonable purpose, and are willing to pay a reasonable fee for copying.[48] Because the use of "reasonable" within the draft text of TUPCA grants HOAs some latitude to deny such requests or to create exorbitant copying fees, the Committee recommends that more specific language be used to better solidify homeowners' rights regarding inspection of records. For example, in 2003, Representative Kevin Bailey attempted to pass a more definitive set of provisions regarding records that prohibited an HOA from questioning the basis of the requestor's request and by setting a twenty cents per page copying fee.[49] While this is only one example as to how to address this issues, the Committee believes that a comprehensive set of specific provisions that protect homeowners' rights to see and copy the documents of its association should be put in place.[50]

Amendments to Governing Documents

Under current law, various chapters of the Property Code require different methods and approval percentages needed to amend or extend restrictive covenants governing HOAs. For example, Chapter 204, Property Code, authorizes the extension, addition, or modification of restrictive covenants under a specified procedure that includes approval by the owners of seventy-five percent of the property in the HOA.[51] Chapter 206 authorizes the extension of a restriction imposing an assessment to be approved by a majority of owners who vote.[52] Chapter 210 requires a vote of sixty-six percent of the owners of real property in order to extend or modify restrictions.[53] Chapter 211 authorizes an amendment to a restriction upon a vote of two-thirds of the owners of real property.[54]

TUPCA would create procedures and voting requirements (with broad exceptions) for amending an HOA's governing document.[55] As the general rule, if the governing document does not specifically state that it is not amendable, then the document could be amended upon approval by more than fifty percent of the allocated votes.[56] However, TUPCA would provide exceptions to the voting requirement for the declarant, board of directors, and certain lot owners, with the board and certain

[45] *Ibid.*, § 83.169(a): In addition, a homeowner may not be prevented from attending meetings even if that member's voting rights have been suspended. *See, Ibid.*, § 83.166(c)(4).
[46] *Ibid.*, § 83.169(d)
[47] *Ibid.*, § 83.169(b).
[48] *Ibid.*, § 83.170.
[49] HB 2646 (Bailey 76th) SECTION 7.
[50] *See, e.g.*, SECTION 7. HB 2646 (Bailey 76th) (detailing provisions protecting homeowner rights).
[51] TEX. PROP. CODE, § 204.005.
[52] *Ibid.*, § 206.003.
[53] *Ibid.*, § 210.006.
[54] *Ibid.*, § 211.004.
[55] Proposed TUPCA, § 83.061.
[56] *Ibid*, § 83.061(a) and (b).

lot owners being allowed to make changes without a vote as "permitted by this chapter."[57] In addition, TUPCA contains provisions that would require a court, under certain circumstances, to "excuse compliance" with a provision of a governing document that "unreasonably interferes" with certain duties of an HOA.[58] Some opponents of TUPCA find these provisions problematic.

While not determining a voting percentage required for changing governing documents, the Committee recommends that some percentage greater than a mere majority is appropriate given the fact that these type of amendments may make substantial changes to the duties and rights of both HOAs and their members.

Enforcement Remedies Available to HOAs

HOAs must have a mechanism in place by which they can collect assessments given that these assessments are vital to maintaining neighborhoods, providing services, and protecting property values. In addition, a question of fairness is raised due the fact that without some collection power, some property owners are forced to offset the costs of those unwilling or unable to pay dues.

Informal Enforcement Options

Legal action is costly, burdensome, and often unnecessary in the enforcement of homeowner obligations to their associations. The Committee believes that HOAs and homeowners should be encouraged and possibly required by law to utilize inexpensive and informal methods for the resolution of problems and the collection of monies due the HOA.[59]

Whenever a controversy arises between an HOA and a member homeowner, it is crucial that the homeowner be made aware of the problem and be afforded ample opportunity to respond, whether that response is in the form of a denial or an admission followed by a desire to take corrective action. Problems have arisen in the past when a homeowner was construed to have had notice from an HOA of a problem, but was not actually informed.

Written notice of any violation should be sent via certified mail, return receipt requested, and state such things as the violation, the governing language regarding the violation, the availability of an opportunity to cure any violation, the process that will be followed to collect a payment, and the possibility of litigation and under certain circumstances foreclosure.[60]

Informal meetings at which an HOA and a homeowner sit down together to discuss the matter in controversy should be strongly encouraged by any new law. During such a meeting, a homeowner should be encouraged to suggest corrective action to the problem or to arrange a payment plan.

There have been several unsuccessful attempts to authorize payments in installments if a homeowner

[57] *Ibid*, § 83.061(c).
[58] *Ibid*, § 83.062(a).
[59] *See, e.g.*, Committee Recommendation 4, at 48.
[60] *See*, TEX. PROP. CODE, § 209.006 (outlining notice requirements); Proposed TUPCA § 83.155(d).

is unable to pay. For example, in 2005, Representative Bailey proposed requiring HOAs to adopt guidelines and accept partial payments of assessments until the delinquency was satisfied.[61] Under TUPCA, as drafted, an HOA would be required to inform an owner of payment plans, and must accept a payment plan that meets its standards; however, this requirement would only apply to HOAs that have such standards in place for payment plans.[62]

Payment plans seem a reasonable way for an HOA to collect dues that are owed to it without unnecessarily adding costs that may become burdensome for the homeowner. It is reasonable to require an HOA to offer to meet with a homeowner to discuss and reasonably negotiate payment plans prior to any formal enforcement action being taken.

The Committee believes a homeowner should also be afforded the due process right of a hearing prior to any action being formally taken by an HOA. TUPCA, as drafted, appropriately would authorize such a hearing upon written request of the homeowner.[63] Equally appropriate is the TUPCA provision that would allow the homeowner to appeal any decision by the HOA upon written request.[64]

Only upon the exhaustion of all informal attempts to remedy the situation should the law authorize the retention of a lawyer. It has been suggested that a waiting period be established to prevent an HOA from employing an attorney to collect assessment dues from a homeowner.[65]

Foreclosure[66]

Under current law, Texas HOAs can foreclose on a home owned by a member to attempt to collect payment for overdue dues, penalties, and attorney fees incurred in collection attempts.[67] However, the legislature has made it clear that an HOA may not foreclose on a lien on property solely based on fines or attorney's fees.[68] The right of an HOA to foreclose on an assessment lien is controversial and has been debated by the legislature in previous years.[69]

The Texas Constitution mandates that resident homesteads can be subject to foreclosure only for failure to pay mortgages, taxes, home equity loans, and liens for renovation or repairs of the

[61] HB 2215 (Bailey, et al) SECTION 4. This bill also prohibited the accrual of attorney's fees prior to the time that a payment plan was offered to a homeowner. *See also*, HB 1641 (Bailey, 2003) SECTIONS 2 and 3.

[62] Proposed TUPCA, § 83.158.

[63] *Ibid.*, § 83.156.

[64] *Ibid.*, § 83.157.

[65] *See, Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002, Recommendation 1.5, at 41.

[66] Several valuable reports have been created by the legislature regarding the power of an HOA to foreclose a homeowner's property. *See Interim Committee on State Affairs Report to the 76th Legislature*, November, 1998, at 29-32; Kellie Dworaczyk, "Foreclosure by Homeowner Associations: Striking a Balance," *House Research Organization: Interim News*, July 23, 2002.

[67] TEX. PROP. CODE, § 209.009.

[68] *Ibid.*

[69] The Senate Committee on Intergovernmental Relations recommended that this change be made. *See Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002, Recommendation 1.3, at 40.

property.[70] However, in *Inwood North Homeowners Association, Inc. v. Harris*, the Texas Supreme Court ruled that this constitutional provision does not prevent an HOA from foreclosing on a homeowner who fails to pay monthly assessment fees.[71] The court stated that the "remedy of foreclosure [. . .] is generally the only method by which other owners will not be forced to pay more than their fair share or be forced to accept reduced services."[72]

The Committee believes that the legislature (as the constitutionally authorized policy maker for the state) has a duty and right to legislate if foreclosure should be a remedy available to HOAs, and if so, under what circumstances this remedy can be used.

Opponents of HOAs' power of foreclosure argue that associations are abusive when they foreclose on homes for minor infractions of deeds or rules, or for small overdue assessments. They contend that the Texas Constitution provides for foreclosures in only exceptional cases involving taxes, mortgages, and liens for repair and renovations to property. Further, other important service providers like physicians and lawyers do not have the power of foreclosure in the collection of debts and that HOAs should collect payments using similar tactics of other creditors.

Conversely, proponents argue that HOAs must have the option to foreclose on homes as a means of collecting assessments that are vital to maintaining neighborhoods, providing services, and protecting property values. They claim that a question of fairness is raised due the fact that without the power of foreclosure, some property owners would be forced to offset the costs of those unwilling or unable to pay dues. Proponents cite the power of taxing authorities to foreclose on large and small debts as a reason that HOAs should maintain the power of foreclosure. This same logic, they argue, applies to the foreclosure on a minimal mechanic's lien. Additionally, they contend that HOAs serve a valuable function to municipalities because they provide services to homeowners that would otherwise be too expensive or inadequate.

One of the most strongly expressed objections on the issue of foreclosure pertains to the amount of debt for which a home may be foreclosed upon. Currently, in Texas law, there is no provision establishing a threshold dollar amount of indebtedness that an owner may amass before foreclosure is an option. It stands to reason that small debts owed an association do not warrant such a drastic measure as foreclosure. The public outrage generated by the case of Ms. Wenonah Blevins, of Houston, whose association auctioned away her $150,000 home because she had failed to pay two years of homeowner fees totaling $814.50 suggests that there should be substantial debt owed before foreclosure. Further, in such cases, the attorney fees and court costs involved in judicial foreclosure may far exceed the amount an owner is in debt. The Committee believes that smaller debts should be settled through a reasonable payment plan negotiated by the owner and the association.

Important to the discussion of foreclosure is whether non-judicial foreclosure should be authorized by law. There are two types of foreclosure, judicial (court-ordered) and non-judicial (also known as a "private power of sale"). Under the judicial foreclosure system, if the publicly recorded restrictions

[70] TEX. CONST. Art. 16, Sec. 50.
[71] *Inwood North Homeowners Association, Inc. v. Harris*, 736 S.W.2d 632 (Tex. 1987).
[72] *Ibid.*, at 636.

of an HOA creates a lien but does not say how the lien may be foreclosed, then an HOA must use judicial foreclosure. This procedure requires the HOA to file a lawsuit against the delinquent owner. If the HOA wins its lawsuit, the court can order the county sheriff to foreclose the HOA's assessment lien at the "sheriff's sale." Importantly, TUPCA as drafted would authorize an HOA to use judicial foreclosure as a means to collect money owed to it under a lien.[73]

Under the non-judicial foreclosure system, an HOA may use non-judicial foreclosure only if the authority for this process is stated in the publicly recorded restrictions. The procedures for non-judicial foreclosure are found in Chapter 51 of the Property Code. There have been several attempts by the legislature over the years to prohibit the use of non-judicial foreclosure by HOAs.[74] Most recently, Representative Bailey introduced H.B. 2215 that attempted to amend the Property Code to prohibit an HOA from foreclosing on an assessment lien unless the association first obtained a court judgment.[75]

Importantly, TUPCA would authorize the use of non-judicial foreclosure as a means to foreclose on a lien if so authorized by the HOA's governing documents.[76] Similar to provisions in the Property Code, TUPCA would prohibit the use of non-judicial foreclosure regarding a lien consisting "solely of fines, late fees, interest, attorney's fees, or a combination of these."[77] Perhaps more significantly, and in important ways a diminishment of current law, TUPCA does not propose this same restriction in regards to judicial foreclosures, opting instead to leave it up to judicial discretion.

The Committee believes that any new provisions regarding the enforcement remedies allowed to associations should be the least extreme remedy necessary to enforce those obligations that are due to it. Non-judicial foreclosure by HOAs should be prohibited by law. Judicial foreclosure, if continued in law, should be authorized only under limited circumstances and in accordance with procedure allowed by law. Foreclosure proceedings, if continued in law, should be allowed to be instituted only when an homeowner owes the association an amount that surpasses a high threshold dollar amount.[78]

Redemption

If the legislature determines that foreclosure should be a remedy available to HOAs, the Committee believes that a meaningful right of redemption should be authorized, given the importance that the protection of homesteads has been and continues to be to Texans.[79] While it is certainly good public

[73] Proposed TUPCA, § 83.116(a).

[74] In 2002, the Senate Committee on Intergovernmental Relations recommended that non-judicial foreclosures be prohibited by law. The committee concluded that "While non-judicial foreclosure is less costly and time consuming than judicial foreclosure, the benefits of due process far outweigh other considerations." *See, Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002, Recommendation 1.1, at 40.

During the 79th Legislature the following bills were introduced that prohibit the use of non-judicial foreclosure: H.B. 2215 (Bailey); S.B. 1886 (Lindsay).

[75] HB 2215 (Bailey et al), SECTION 7. See also HB 1641 (Bailey, 2003) SECTION 5.

[76] Proposed TUPCA, § 83.116(b).

[77] *Ibid.*, § 83.160(b).

[78] *See*, Committee Recommendation 5, at 48.

[79] *See, Ibid.*

policy to encourage certainty in property ownership by allowing a limited redemption period, it is also important that a property owner be given sufficient time to reclaim their homestead.

Under current law homeowners are allowed 180 days after they receive notice of the sale to redeem their property that has been foreclosed by an HOA for an assessment lien.[80] In contrast, the Texas Tax Code authorizes two years for tax foreclosure redemptions of homesteads.[81]

Various legislative proposals have suggested varying limits of time during which a homeowner would be allowed to redeem a home that had been foreclosed. In 1999, the Texas Planned Community Act authorized a ninety day redemption period.[82] In 1998, the Senate State Affairs Interim Committee recommended that the Uniform Planned Community Act's ninety day period be extended.[83] In 2001, Senator Carona, in S.B. 507, called for an 180 day redemption period, a provision that was codified in the TRPOPA.[84] In 2002, the Senate Intergovernmental Relations Interim Committee recommended that an owner should be allowed two years to redeem property sold at foreclosure sale.[85] Most recently, Representative Bailey introduced H.B. 2215 that attempted to amend the Property Code to grant a one year redemption period.[86]

As drafted, TUPCA would follow provisions currently in law under the TRPOPA by allowing a 180 day redemption period.[87] However, given the two year redemption period authorized by the Tax Code, the Committee believes that it is not unreasonable for the legislature to authorize at least a 180 day redemption period, and perhaps as long as two years.

Attorney's Fees

HOAs do need to use attorneys in some situations. Regardless of any potential litigation, an HOA will periodically be in need of the advice of an attorney in understanding and acting upon provisions in their governing documents. When an HOA becomes involved in a controversy, especially when it involves a member homeowner who will ultimately bear the costs of legal services, many issues arise regarding the use and costs of hiring a lawyer. During the past number of years, the legislature has looked at various ways of ensuring that if an attorney must be hired, the costs of such services are reasonable and necessary, given that the homeowner is often personally liable while the HOA board members have no individual liability.

Many attempts have been made to prevent legal fees and costs from accruing to a homeowner during an initial period of controversy, with the intent that during this period the matter can be resolved in a

[80] TEX. PROP. CODE, § 209.011(b).
[81] TEX. TAX CODE, § 34.21(a).
[82] *See*, S.B. 699 (76th Regular Session), adding § 207.127, Texas Property Code.
[83] *See, Interim Committee on State Affairs Report to the 76th Legislature*, November, 1998, Recommendation 6, at 79.
[84] TEX. PROP. CODE, § 209.011(b).
[85] *See, Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002, Recommendation 1.4, at 40.
[86] HB 2215 (Bailey et al), SECTION 8. See also HB 1641 (Bailey, 2003) SECTION 6.
[87] Proposed TUPCA, § 83.162(a).

less formal way. Under current law, reasonable attorney's fees and costs can only be charged to a homeowner following written notice that they will be charged if a payment delinquency or violation continues after a certain date.[88] In addition, current law prohibits attorney's fees from accruing against a homeowner until after a hearing (as prescribed by law) is held at which the homeowner is allowed to discuss and verify facts and resolve the matter at hand.[89] As proposed, TUPCA contains almost identical provisions.[90]

In 2002, the Senate Intergovernmental Relations Interim Committee recommended that statutory language prohibiting "deferred billing" arrangements with attorneys be enacted.[91] Under a deferred billing arrangement, an attorney is authorized to collect money directly from a homeowner for the benefit of the HOA. The committee found that "eliminating such practices will force associations to be more conscious of attorney billings because they would receive regular invoice statements and pay accordingly."[92] TUPCA recognizes the problematic nature of deferred billing and would prohibit it not only in regards to attorneys but as to "third parties" as well.[93]

In an attempt to further prohibit the foreclosure of homes for failure to pay fines, the legislature has also debated provisions requiring that any payment received by a HOA from a homeowner be applied first to any assessments owed by the property owner. For example, in 2005, Senator Jeff Wentworth's S.B. 244 attempted to establish a priority of payment system, by which delinquent and current assessments would be credited first and then fines and attorney fees when a homeowner made a payment to the HOA. This approach was intended to prevent an association from applying an assessment payment made by an owner toward an outstanding fine. Such an application of a payment would create a delinquent assessment and therefore open up the possibility for the association to foreclose on the property even though in actuality the delinquency was for a fine rather than an assessment.

Finally, it has been suggested that a homeowner should be able to recover reasonable attorney fees from an HOA if the association is found to have had no reasonable basis on which to sue the homeowner.[94] The Committee believes that such a provision is appropriate in that it will encourage informal means of dispute resolution.

Homeowner Rights and Privileges

Water Conservation

Many homeowners associations have deed restrictions, covenants, or regulations in place that

[88] TEX. PROP. CODE, § 209.008(a).

[89] *See*, TEX. PROP. CODE, § 209.008(b); TEX. PROP. CODE, § 209.007(a).

[90] Proposed TUPCA, § 83.164.

[91] *See, Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002, Recommendation 1.7, at 41.

[92] *See, Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002, at 33.

[93] Proposed TUPCA, § 83.064(a): Proposed TUPCA, § 83.065(c).

[94] *See, Texas Senate Interim Committee on Intergovernmental Relations Interim Report*, October 2002, Recommendation 1.6, at 41.

address landscaping practices. Often these rules undermine water conservation goals by mandating certain amounts and types of turf grass coverage or excessive maintenance standards and irrigation systems, while at the same time prohibiting native or climatically appropriate landscapes and rainwater harvesting systems. Given the ever scarcity of available water resources in the state, it is important that a balance be found between a homeowner's decision to practice water conservation and an HOA's ability to control the property values of all of its members.

In 2003, the 78th Legislature enacted H.B. 645 by Representative Robert Puente in an attempt to find a balance between HOA regulations regarding landscaping practices and the important state policy of water conservation. The new law prohibits an HOA from including or enforcing any provision that restricts a property owner from installing a rainwater harvesting system or implementing an efficient irrigation system, including underground drip or other drip systems.[95]

During the 79th Legislature, Representative Puente introduced, but did not pass, H.B. 2426. This bill attempted to expand the water conservation goals enacted with H.B. 645 by, for example, prohibiting an HOA from restricting the use of drought-tolerant or native landscape vegetation, or by requiring a defined irrigation schedule or the installation of turf grass.

TUPCA contains a provision that would prohibit the enforcement of any governing document provision that may "discourage or prohibit water conservation activities within fenced or screened portions of a lot, including the implementation of water conservation procedures, the installation of water conservation improvements, and the maintenance of turf and landscape material that promote water conservation."[96]

First Amendment

During the past decade, HOAs throughout the state have attempted to enforce restrictions that prohibit their members from exercising certain First Amendment Rights. As a result, the Texas Legislature has worked to enact provisions that prohibit an HOA from infringing on these rights.

Representative Dawnna Dukes introduced and passed H.B. 873 during the 79th Legislative Session that prohibits an HOA from restricting a homeowner from displaying an endorsement for a political candidate or ballot item in the form of a sign, poster, flag, or banner except for the protection of public health or safety or if the posting or display violates a local, state, or federal law.[97] Importantly, the United States Supreme Court has ruled that municipalities may not prohibit homeowners from exercising their free speech rights through the placement of political signs in their windows and on their lawns.[98] Even though this ruling was applicable to a municipality and not a homeowners' association, it is important to note the judicial opinion on the critical role of signs in political discourse.

[95] TEX. PROP. CODE, § 202.007.

[96] Proposed TUPCA, § 83.067(e)(3).

[97] TEX. PROP. CODE, § 202.009.

[98] *City of Ladue v Gilleo*, 512 U.S. 43 (1994) (striking down a citywide ban on residential signs calling these signs a "venerable means of communication that is both unique and important.").

Similarly, Senator Jane Nelson attempted to pass S.B. 54 in 2005 that would have allowed all homeowners, regardless of their participation in a homeowners' association, to display the American flag.

CONCLUSION

The protection of private property rights is one of the core functions of all governments. This nation, and this state in particular, has always held fast to the notion that the true independence of its citizens rests squarely with the ability of those people to hold private property with the assurance that government will not interfere with that natural right.

However, also central to the idea of private property is the concept that individual property owners can contract away all or portions of that right as they see fit. Government has a very limited role in interfering with such contracts, as long as such contracts do not violate either manmade or natural law. When potential homeowners contract to be part of an HOA through deeds of sale, they should not generally look to the government to protect them when they are unhappy with the bargain that they made.

On the other hand, when HOAs (which have taken on many of the attributes and functions of governmental entities) violate the spirit or the letter of the law regarding their duties and rights, then it becomes incumbent on government to rein in these abuses.

RECOMMENDATIONS

1) A new chapter in the Texas Property Code, with state-wide and general application, should be enacted that addresses the creation, governance, obligations, and rights of property owners' associations. Although the Committee supports the enactment of certain provisions proposed in TUPCA, the Committee does not support the wholesale enactment of TUPCA.

   The new chapter should apply to most if not all of the associations in the state.

   Since the new chapter will not be uniform to any other state law it should not have the word "Uniform" in the title.

   Current provisions in law regarding property owners' associations should be repealed to the extent that they are duplicative or inconsistent with the new chapter.

2) The new chapter should generally be directed at protecting the interests of homeowners, with the balance of power and presumptions in their favor and not that of the associations that represent them.

3) The new chapter should include provisions that encourage, to the greatest extent possible, member participation in the discussions and actions of the association as a whole.

4) The new chapter should include provisions that encourage non-legal and inexpensive resolutions to the conflicts that occur between the association and its members.

5) The new chapter should limit remedies allowed to associations to the least extreme necessary to enforce obligations due to it.

Non-judicial foreclosure by HOAs should be prohibited by law.

Judicial foreclosure by HOAs, if continued in law, should be authorized only under limited circumstances and in accordance with procedure allowed by law.

Foreclosure proceedings by HOAs, if continued in law, should be allowed to be instituted only when a homeowner owes the association an amount that surpasses a high threshold dollar amount.

If the legislature determines that foreclosure should be a remedy available to HOAs, a meaningful right of redemption should be authorized.

6) The new chapter should take into account the ever-changing nature of HOAs and the various stakeholders, in addition to associations and homeowners, that will be affected by any new law.

CHARGE 4

"Monitor the agencies and programs under the committee's jurisdiction."

MONITOR AGENCIES AND PROGRAMS

INTERIM CHARGE

"Monitor agencies and programs under the committee's jurisdiction."[1]

SCOPE OF REPORT

This report examines the four state agencies or governmental entities over which the House Committee on Land and Resource Management has jurisdiction. As such, the Committee has reviewed the activities of the Texas General Land Office, the School Land Board, the Coastal Coordination Commission, and the Board for Lease of University Lands. This report does not review each of the myriad of programs and issues that these groups are responsible for. Instead, the Committee has focused on the larger, more important, or more controversial responsibilities of these entities.

SUMMARY OF COMMITTEE ACTION

Coastal Tour

On March 22, 2006, the Committee toured the following coastal projects in and around the Corpus Christi and Port Aransas areas that the Texas General Land Office (GLO) is involved in:

Shamrock Island Nature Preserve

Shamrock Island is a 110 acre area located on Mustang Island that is one of the most productive bird rookeries on the Texas coast. The GLO, in conjunction with the Texas Parks and Wildlife Department, has used federal funds to construct an artificial breakwater, create shallow water wetlands, and to build a feeder beach outside of the breakwater.

Port Aransas Nature Preserve

The Port Aransas Nature Preserve is an eleven hundred acre area of coastal wetlands and bird habitat on Mustang Island that has experienced shoreline erosion of up to forty-five feet per year. The GLO

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

has used funds from the Coastal Erosion Protection and Response Act (CEPRA) to build more than 5,200 linear feet of concrete bulkheads along the shoreline to maintain the preserve.

Conn Brown Harbor

In 1944, the state transferred 9,644 acres of submerged land near Conn Brown Harbor to the City of Aransas Pass, a transfer that the Texas Attorney General has recently held to be invalid.[2] Since the transfer, the city has made significant and costly improvements to the land that included dredging the harbor and using the fill to create an uplands area. A controversy has arisen over how to resolve the ownership issue of this property.

Oil Spill Prevention and Response Program

The Oil Spill Prevention and Response Program was created in 1991, and designates the GLO as the state agency responsible for oil spill prevention and response in the state. The program has fifty-six employees in five field offices who respond to approximately one thousand reported spills each year.

The Village

In 1989, the GLO created a Master Plan for the development of seventy-seven acres of land in Corpus Christi, referred to as "The Village." This property will be leased to a private developer whose developments will create jobs for the local economy and will generate millions of dollars for the Permanent School Fund (PSF).

Packery Channel

Packery Channel is a storm channel that separates Mustang Island from Padre Island. The GLO is involved in a $30 million project to establish a navigation channel and to renourish the eroding beach along North Padre Island.

Interim Hearing

The Full Committee heard testimony in Austin during a scheduled public hearing on May 3, 2006. Commissioner Jerry Patterson from the GLO spoke at length to the Committee regarding those subjects and programs that his offices are responsible for.

DISCUSSION

Texas General Land Office

The Texas General Land Office (GLO) was created in 1836 shortly after Texas won its independence

[2] TEX. ATT'Y GEN. OP. JC-0069 (1999).

from Mexico. The GLO's core mission is the management of state lands and mineral right properties totaling 20.3 million acres. This includes the beaches, bays, estuaries, and other "submerged" lands out to 10.3 miles in the Gulf of Mexico, institutional acreage, grazing lands in West Texas, timberlands in East Texas, and commercial sites in urban areas throughout the state. The GLO now leases drilling rights for oil and gas production on state lands, producing revenue and royalties that are deposited into the state's Permanent School Fund (PSF).

In addition to its oil and gas activities, the GLO's responsibilities now cover many other areas. The Asset Management Program helps promote efficient use of state real property. The Recycling, Adopt-A-Beach, Coastal, and Oil Spill Prevention and Response Programs work to protect our natural resources. The GLO triggers economic development through its natural gas marketing initiatives, commercial real estate investments, and loan programs offered to veterans through the Texas Veterans Land Board (VLB).

Coastal Erosion Planning and Response Act

The Texas Legislature enacted the Coastal Erosion Planning and Response Act (CEPRA) in 1999, in an effort to assist the GLO in protection of the state's coastal areas.[3] CEPRA calls for the funding of beach nourishment, dune restoration, shoreline protection, and marsh restoration projects with a mix of state and local funds. The creation of this partnership also allows federal funds to be attained from various agencies, including the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers. CEPRA funds consist of general revenue funds appropriated by the legislature, and the interest accrued on the Oil Spill Account.

The program is now in its fourth funding cycle. During the first two cycles, starting in 1999, $15 million was appropriated out of general revenue for each biennium. The $30 million that was appropriated was able to fund ninety-five projects. Because of budgetary constraints during the 2004-05 biennium, only $7.32 million was appropriated for projects. As a result, only twenty of the seventy-seven projects were funded. During the current biennium, $7.3 million was appropriated for projects. In addition, the state is due to receive $360 million (to all entities) for the damages caused by Hurricane Katrina, and an additional $190 million for damages caused by Hurricane Rita. However, of this amount, only $1.5 million in Federal Emergency Management Agency funds are available for CEPRA projects.

In its 2004 Interim Report, the House Committee on Land and Resource Management made the following recommendations regarding CEPRA:

1) The committee believes that a stable dedicated funding source equal to $30 million per biennium should be found to protect the Texas coastline from erosion.

2) The committee believes that the funding should come from a variety of sources, primarily those that are responsible for the erosion or that benefit most from Texas beaches.

[3] S.B. 1690 (Bernsen, et. al.) took effect on September 1, 1999.

Various "fee" bills were introduced during the 79th Regular Legislative Session aimed at providing a dedicated source of revenue for CEPRA.[4] The Committee, in conjunction with the GLO, various stakeholders, and members of the coastal delegation worked to find a compromised solution, but were ultimately unsuccessful, due in large part to the resistance of potential stakeholders to accept any new fees that would impact their businesses.

For example, H.B. 3128 by Representative Craig Eiland initially authorized up to $32 million per biennium to be put into a sub-account of the dedicated Coastal Protection Account to be used for coastal erosion control and coastal management programs. This introduced version of H.B. 3128 authorized numerous fees from a variety of sources, in an attempt to spread the costs of the program as widely as possible. For example, the bill included:

1) A $5 surcharge per passenger on commercial passenger vessels traveling from a port in Texas;

2) A $10 coastal windstorm insurance premium surcharge;

3) A coastal property transaction fee;

4) A fee on each entity that uses a pipeline to import oil and gas produced from state submerged lands;

5) Various fees on the purchase of marine engine lubricants, marine fuels, and marine residual and distillate fuel oils;

6) A $100 dockage fee on certain commercial shipping vessels;

7) A beach condominium rental surcharge;

8) A $1 waste tire fee;

9) A seven percent (instead of six percent) tax on the price paid for a room in a hotel for hotels located in coastal counties;

10) One-third of the revenue received under Section 8(g) of the Outer Continental Shelf Lands Act or any similar federal law; and,

11) One-third of the revenue received from the Inland Waterways Trust Fund or any similar federal law.

The Committee voted in favor of a compromised bill that created a single fee to pay for the program. The single fee of 75¢ for each new automobile or truck tire sold in the state was not passed by the

[4] *See, e.g.*, H.B. 3128 (Eiland et. al.); H.B. 3248 (Ritter).

Legislature.

2005-06 Hurricane Season

Hurricanes Katrina and Rita caused varying degrees of coastal erosion along the Texas coast from the Bolivar Peninsula in Galveston County to the Village of Surfside Beach in Brazoria County.[5] The natural dune system along the Gulf of Mexico side of Bolivar Peninsula and western Galveston Island was severely damaged in many areas and in some places destroyed by a number of tropical storms, hurricanes, high tides, and other meteorological events. The effects of Hurricanes Katrina and Rita compounded this damage. The loss of the natural dune system lessens the protection available to neighborhoods, roads, and public infrastructures from coastal flooding.

Consistent with the GLO's State Strategy #1 for coastal properties affected by hurricanes and coastal erosion, the state's response to the impact on the coast of these hurricanes has been to call for the restoration of dunes and vegetation.[6] The GLO performs two primary duties in furtherance of the state's response to coastal damage.

First, the GLO makes direct application submissions to the Federal Emergency Management Agency's (FEMA) Hazard Grant Mitigation Program (HMGP) through the State's Department of Emergency Management. Two HMGP applications were prepared and submitted by the GLO. The first application proposed a dune restoration project on Bolivar Peninsula to be constructed along the Little Beach community's gulf-facing beach, with two dune walkovers, as a proposed mitigation response to the damages documented at that location. The second HMGP application proposed a dune restoration project adjacent to the west Galveston Island beaches for nine subdivisions.

Second, the GLO prepared and submitted FEMA Public Assistance damage claims. To date, FEMA has approved claims for the Galveston Island subdivisions of Quintana Beach, Sands of Kahala, Riviera I/II, West Beach Grand, and Caplen Beach. FEMA has also approved submissions for the Sunny Beach, Hershey Beach, and Spanish Grant subdivisions.

Despite the closer geographic proximity to Hurricane Rita on the extreme upper portion of the Texas coast in Jefferson and Orange counties, neither of these counties have asked the GLO to assist them in filing claims for damages with the federal government. The Jefferson County shoreline is largely undeveloped, being comprised of the McFaddin National Wildlife Refuge and Sea Rim State Park.

[5] On Bolivar Peninsula, the area of impact included a stretch of gulf-facing beach in the vicinity of the Little Beach community and the North Jetty subdivision area on the far western end of Bolivar Peninsula in the Port Bolivar area, from Ft. Travis to the North Jetty, back from the Gulf beach to State Highway 87. The beach dune system in this area was lost to the extent that the beach had essentially deflated, reducing the ability of the beach/dune system to protect the homes behind it from seawater inundation.

Similarly, at West Galveston Island, the dune system was impacted along the gulf-facing beach of nine subdivisions: Sunny Beach, Hershey Beach, Spanish Grant, Bermuda Beach, Terramar-Eastern section, Half Moon, Miramar, Bay Harbor, and Pointe San Luis. There were also shoreline impacts adjacent to the subdivisions of Quintana Beach, Sands of Kahala, RivieraI/II, West Beach Grand, and Caplen Beach.

[6] *See*, State of Texas Mitigation Plan at 3-19 and 3-20 (October, 2004).

The Village of Surfside has applied for a grant to remove fourteen homes that are seaward of the line of vegetation. Due to the extensive erosion from the 2005 hurricane season, approximately fifty thousand cubic yards of beach was lost. There are currently thirty-two beach front homes on the public beach easement. The Village applied for a grant to remove fourteen of these houses at a total cost of $750,000.

Two Year Moratorium on Enforcement of Open Beaches Act (OBA)

The 78th Texas Legislature passed H.B. 1457 that authorized the Commissioner to establish a two-year moratorium on removing structures from the beach that have become seaward of the line of vegetation after a storm. The two-year period allows time for the natural line of vegetation -- the boundary that separates public beach from private property -- to potentially grow back in such a way that the structure is no longer on the public beach.

On June 6, 2004, the Commissioner issued moratorium orders for 116 homes located on the public beach. The orders provided a two-year prohibition on removing these houses that might be barriers to public beach access and possible beachfront hazards (in violation of the OBA). The moratorium expired on June 6, 2005, and by statute cannot be extended. The GLO is developing a comprehensive enforcement policy to address the moratorium structures and other buildings that may become situated on the public beach easement in the future.

Texas Farm and Ranch Lands Program

In 2005, S.B. 1273 by Senator Mike Jackson was enacted that created the Texas Farm and Ranch Lands Program within the GLO and established the Texas Farm and Ranch Lands Conservation Fund (Fund) to pay for the purchase of agricultural conservation easements through grants to qualified landowners. Revenue sources to the Fund consist of public or private gifts, grants, donations, or contributions, and other sources, including federal and state mitigation and bond proceeds.

The GLO is currently developing draft guidelines regarding the program and is exploring funding options. S.B. 1273 vested rule making and grant award authority to a newly created advisory council chaired by the Commissioner. The Governor's Office is currently interviewing candidates for appointment to the council.

Derelict Vessels

In the 79th Regular Legislative Session, H.B. 2096 by Representative Dennis Bonnen was enacted that expanded the authority of the Commissioner to deal with derelict vessels and structures. The act directs certain revenues, such as salvage income associated with the abandoned vessels, to be deposited into the Coastal Protection Account to be used by the Commissioner for the removal or disposal of derelict vessels and structures.

The act also requires persons participating in the shrimp license buyback program to execute a contract that specifies that they will not abandon or dispose of any vessel in violation of state law,

and that they will forfeit any funds received under the buyback program if the Commissioner finds that their vessel was abandoned in violation of state law.

The GLO anticipates there to be approximately four hundred abandoned vessels in need of removal. No funds have been appropriated to pay for vessel removal. However, in November of 2007, the state expects to receive $39 million in federal funding for the next four years from the Coastal Impact Assessment Program (CIAP). A portion of these funds are allocated to mitigating the effects of offshore oil and gas drilling. The GLO has applied for $1 million of these funds to be dedicated to the removal and disposal of derelict vessels. A consensus on the application is expected next year.

School Land Board

In 1939, the state created the School Land Board (SLB). The duties of the Board of Mineral Development, which had been established in 1931, were transferred to the SLB. The SLB's jurisdiction includes the management, leasing, and sale of the public school lands, and the power to determine the prices at which the land can be leased or sold. Originally, the SLB was composed of the Commissioner and the Governor as ex officio members, and one citizen member appointed by the Governor. The current board is chaired by the Commissioner and has one member appointed by the Governor and one appointed by the Attorney General.

Beachfront Restoration

The 79th Texas Legislature enacted S.B. 1044, which authorized certain property owners of coastal land that becomes submerged due to erosion, to "restore" their property by constructing bulkheads and backfilling the land. The law provides that after restoration the owner possesses the restored land in fee simple, subject to the common law rights of the public in the state's beaches and the rights of public school land lessees holding a lease on the property on September 1, 2005. To qualify for restoration, the property must have been a privately owned lot of one acre or less in a platted subdivision and not submerged or owned by the SLB on December 31, 1955.

Because Texas owns the coastal water, beds, and shores within tidewater limits, any privately owned coastal land that becomes submerged loses its private character and becomes state owned submerged land, which is dedicated to the PSF. Since the new law does not require compensation for the value of the submerged state land that is restored, there is a question as to whether S.B. 1044 violates provisions of the Texas Constitution.[7]

On August 26, 2005, the Commissioner requested an Attorney General's Opinion regarding the constitutionality of S.B. 1044, in which he posed the following questions:[8]

[7] The Texas Constitution prohibits the Legislature from enacting any law that appropriates any PSF land for any purpose other than for the support of the public free schools. TEX. CONST. art. VII, § 5. The Attorney General has previously maintained that the Constitution prevents the Legislature from making a free grant of PSF lands. TEX. ATT'Y GEN. OP. No.-H881 at 3712 (1976).

[8] *See*, TEX. ATT'Y GEN. RQ. 0338-GA at 1 (2005).

1. Does Section 33.613, which allows the restoration of Submerged PSF Land and, subsequently, the granting of title to the Property Owner without compensation to the PSF, violate Article VII, Sections 4 and 5 of the Texas Constitution?

2. Can the GLO adopt rules concerning the restoration of land as required by Section 33.613(d) without violating Article VII, Sections 4 and 5 of the Texas Constitution or related statutory constraints on the alienation of PSF lands?

On March 2, 2006, the Attorney General determined that S.B. 1044, in its entirety, violates Article VII, Section 4, of the Texas Constitution, and that the GLO has no authority to adopt rules that are required by the bill.[9]

Conn Brown Harbor

In 1944, then Commissioner Bascom Giles conveyed approximately 9,644 acres of state owned submerged land in and near Conn Brown Harbor to the City of Aransas Pass. In the years following the transfer, the city made significant and costly improvements to the land that included dredging the harbor and using the fill to create an uplands area. A 1999, Attorney General Opinion held that the Commissioner did not have authority to transfer any submerged land.[10] Moreover, submerged land, or an interest therein, could not have been validly conveyed to the city without compensation to the PSF.[11]

The 79th Texas Legislature passed H.B. 1740 by Representative Gene Seaman to facilitate a trade between the state and the city of the Conn Brown Harbor area and a city-owned tract. The GLO and the city agreed to a timeline for survey and appraisal, which were completed in January 2006, and March 2006 respectively. Discussions are ongoing between the city and the GLO on a trade agreement.

Appurtenances to Piers on Coastal Land

As enacted by the 79th Texas Legislature, H.B. 932 by Representative Larry Taylor authorized owners of ocean-front property to construct not only a pier on adjacent coastal public land without SLB approval (as was currently the law) but also associated appurtenances, such as a boathouse.

The act also allows the SLB to adopt rules consistent with state policies and law. The proposed text of the new rules was published in the Texas Registry on July 15, 2005, and the SLB announced the adoption of these rules without change on October 14, 2005.[12]

Coastal Coordination Council

[9] TEX. ATT'Y GEN. OP. GA-0407 (2006).
[10] TEX. ATT'Y GEN. OP. JC-0069 (1999).
[11] Id.
[12] *See*, 30 TexReg 4119; 30 Tex Reg 6772; and 31 TAC § 155.5.

The Coastal Coordination Council (CCC) administers the Coastal Management Program (CMP) and is generally responsible for the adoption of the goals and policies that guide the actions of those entities regulating or managing natural resource use within the Texas coastal area.[13] The CCC also reviews actions taken or authorized by state agencies and subdivisions that may adversely affect coastal natural resources to determine their consistency with the CMP goals and policies.

Coastal Management Program

The purpose of the CMP is to improve the management of the state's coastal natural resource areas and to ensure the long term ecological and economic productivity of the coast. This program supports access to outdoor recreation and the protection of natural habitats and wildlife by awarding federal grants to local entities for attaining better access to beaches, bays, and coastal natural resource areas.

Additionally, the program oversees the development and implementation of the Texas Coastal Non-Point Source Pollution Control Program (NPS), which supports protection of natural habitats and wildlife by identifying sources of coastal non-point source pollution and developing recommendations for prevention. Through the CMP, the coastal Permit Service Center provides direct access to permitting agency staff and offers project-specific technical assistance during the pre-application process. The Beach Watch Program gives Texans baseline data on the health of gulf waters by analyzing water samples.

The CMP brings approximately $2.2 million in federal Coastal Zone Management Act funds to the state and local entities to implement various projects. The CCC passes ninety percent of the funds on to coastal communities. The CCC established the following categories for use of these funds by coastal communities:

1) Coastal natural hazards response;

2) Critical areas enhancement;

3) Shoreline access;

4) Waterfront revitalization and ecotourism development;

5) Permit streamlining/assistance and governmental coordination;

6) Information and data outreach; and,

[13] The Commissioner of the GLO chairs the council, which is comprised of: 1) The chair of the Parks and Wildlife Commission; 2) The chair of the Texas Commission on Environmental Quality; 3) The chair of the Texas Water Development Board; 4) The chair of the Texas Transportation Commission; 5) A member of the Railroad Commission; 6) A member of the State Soil and Water Conservation Board; 7) The director of the Texas A&M University Sea Grant Program; and, 8) Four gubernatorial appointees. *See*, TEX. NAT. RES. CODE, § 31.2041.

7) Water quality improvement.

Board for Lease of University Lands

On December 20, 1838, President Mirabeau B. Lamar, in an address to the Third Congress of the Republic of Texas, urged the legislature to establish the foundations for a system of public education. A little more than one month later, approximately 220,000 acres of land was set aside from the public domain for the establishment and endowment of a university.

The Constitutional Convention of 1875 appropriated one million acres of land for the establishment of the Permanent University Fund (PUF) and an additional one million acres was added in 1883. Since this beginning, more than three billion dollars have been deposited into the PUF from oil and gas royalties, lease bonuses, and rentals generated from the exploration and development of university lands.

The Board for Lease of University Land (Board) was created in 1929 and was given authority over the leasing of oil and gas on the PUF lands.[14] The mission statement of the Board is:

> To maximize the revenue from University Lands by applying intensive management, accounting, conservation, and environmental programs which improve and sustain the productivity of University Lands, protect the interests of The University of Texas System and promote awareness and sensitivity for the environment.

CONCLUSION

The Texas General Land Office, School Land Board, Coastal Coordination Council, and the Board for Lease of University Land, all under the competent leadership of Commissioner Jerry Patterson and his able staff, have consistently and professionally managed the responsibilities that have been placed on them by both the constitution and the legislature of this state. Commissioner Patterson takes his fiduciary obligations to the school children of this state extremely seriously, and has been unwilling to shortchange them regardless of the significant political pressures that are periodically placed on him. The Committee believes that Commissioner Patterson and his staff should be applauded for their unyielding dedication to the mission of the General Land Office.

RECOMMENDATIONS

1) A stable dedicated funding source equal to $30 million per biennium should be created to fund the protection of the Texas coastline from erosion.

[14] The board is chaired by the Commissioner of the GLO and is comprised of: 1) Two members of the board of regents of the University of Texas System; and, 2) One member of the board of regents of The Texas A&M University

2) Dedicated CEPRA funds should come from a variety of sources, primarily those that are responsible for the erosion or that benefit most from Texas beaches.

3) The Legislature should continue to encourage the state's congressional delegation to promote further federal funding of Texas coastal projects, especially those stemming from large meteorological events such as Hurricanes Katrina and Rita.

4) The Legislature should be made aware of the significant political pressures that are put on the General Land Office in regards to the disposition of property under its care. This awareness should take into consideration the absolute fiduciary obligation that the Commissioner has to the Permanent School Fund regarding the disposition of land under his care.