

Eminent Debate:

The discussion over eminent domain in Texas

BY BRANDI SMITH

As this issue of REDNews went to print, a discussion was beginning in Washington, D.C., that may have an impact on thousands of acres of privately held Texas property. The Surface Transportation Board, which oversees freight and passenger railways, is considering whether it has jurisdiction over Texas Central, a first-of-its-kind, high-speed rail line proposed from Dallas to Houston.

The filing is a preliminary step in the process of moving the project forward, but it's already spurring debate in Texas about property rights because of the amount of property that could be needed to build the line. At this point, that amount is unclear because a final route has yet to be determined.

"[Eminent domain] is the power of governmental entities and other private

entities to take people's property involuntarily," explained attorney David Showalter of Richmond's Showalter Law Firm. "A lot of people hear about it when, for example, a new freeway is being built."

"It is just constant. It is nonstop. It is pervasive." - David Showalter

What might surprise some REDNews readers is the list of agencies that are gifted the ability to acquire land by invoking eminent domain, including utility districts, school districts and private companies.

"As the state grows and as people move here, the decision is made to deal with transportation issues by widening roads and adding more roads," Showalter said. "It is just constant. It is nonstop. It is pervasive."

The issue, though, typically flies under the radar for most Texans because, as Waller

County Judge Trey Duhon pointed out, "it doesn't impact them." Once a property owner does feel the effect of eminent domain, it almost always sparks a debate about which a state favors: private property rights or public benefit.

"I still think we have an eminent domain process in Texas that really puts the landowner at a serious disadvantage," said Duhon. "It kind of becomes a self-fulfilling prophecy in regard to land values in that area."

The power of eminent domain has been challenged hundreds of times in Texas and results vary depending on the complainant's case, but generally, Showalter said, property owners take the biggest hit. Owners usually cannot stop the taking of their property. Rather, the primary focus becomes obtaining the greatest possible compensation. While the state and federal constitutions require that condemnees be fully compensated, various court decisions actually prevent a landowner from recovering all the damages an appraiser would document in an ordinary transaction. These limits include impaired access and loss

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Judge Trey Duhon



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of visibility.

"I think the courts have decided if they allow landowners to be compensated for all of their true damage, it would be a crushing liability on the state," Showalter said.

"I understand eminent domain has its place and time. I know that sometimes you have to use it for the public good, but people are still entitled to due notice," said Duhon.

Houston to Dallas in 90 minutes

Duhon said he is most troubled about the lack of notice regarding TC's filing with the STB. TC, though, said it has held two dozen open houses in communities and counties along the proposed route in an effort to keep the public informed about the project.

"It is extremely controversial," he said.

TC, managed by Texas Central Partners (TCP),

between Texas' two largest cities.

"Nearly 50,000 Texans, sometimes called 'super-commuters,' travel back and forth between Houston and Dallas/Fort Worth more than once a week," the group's website reads. "Many others make the trip regularly."

While few would argue against the value of such a project, the challenge comes when considering it will take roughly 3,000 acres to build the 240-mile rail line. It would cross through 11 counties, including Dallas, Harris, Montgomery and Duhon's Waller. TC says it plans to follow utility lines or freight tracks when possible, but inevitably some private property will be needed.

"TCP is committed to treating landowners with respect, negotiating in good faith and engaging in a fair and transparent land acquisition process consistent with Texas law

during the discussion. "We wouldn't have air-conditioning without eminent domain. All these things, we can't imagine living without them."

Duhon countered that, while eminent domain does have its time and place, he believes in transparency, something he accused TC of ignoring.

"TC filed these petitions with the STB without any notice to the counties involved or the municipalities that are affected," Duhon said. "So basically they filed with no notice whatsoever to anybody."

TC countered in a statement: "This request does not seek to remove protections afforded to landowners under Texas law. It merely clarifies the STB procedures that Texas Central must follow and does not change or override any state landowner protections."



plans to spend roughly \$10 billion dollars to bring high-speed rail to the state of Texas. In fact, it would be the first bullet train system in the country.

The Houston-to-Dallas route would only take 90 minutes, thanks to Japanese N700 Shinkansen trains, which can reach speeds of up to 200 miles per hour. The goal by 2021 is to have more than 60 of those trains running each day, providing an easy and environmentally friendly commute option

and the "Texas Landowner Bill of Rights," according to the group's website. "Eminent domain would be used as a last resort after voluntary options have been exhausted."

The issue of eminent domain recently came up at a Texas A&M Student Senate meeting, during which Aggies voted 68-2 to pass the Eminent Domain Opposition Act.

"We wouldn't have the Internet if telephone companies didn't have eminent domain," said Holly Reed, managing director of TC,

The group also posted a lengthy "Bill of Rights" on its website, outlining its policies regarding land acquisition.

"A lot of noise"

As the STB mulls TC's petition, there's debate at the state level about how to respond to property owners who are concerned about the project.

"Texas is a huge private property rights state,"

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said Duhon, “and there should be a process that’s followed.”

That process could be the topic of discussion in Austin come next January. During the last legislative session, Texas lawmakers didn’t intervene. However, in the months since, homeowners along the line have increased the volume of their opposition.

“There has been a lot of noise made in the last couple of legislative sessions about protecting property owners’ rights and changing eminent domain laws. There have been some laws passed, but they still fall short of fully compensating landowners,” said Showalter.

Some states other than Texas have laws that require condemning authorities to pay the landowner’s legal fees when the landowner successfully attacks a low-ball offer. Additionally, lawmakers could step up efforts to ensure property owners are paid for the full value of any land taken due to eminent domain. That, Showalter said, is a long shot.

“The legislators who also have to balance the state budget would have to decide, ‘OK, we are going to be more fair or generous to the landowners,’” he said. “They are the ones who have to pass the laws that do that. They also have to fund the state government. I think there may be a lot of talk about it, but whether

there is real action is something else.”

“Counsel can navigate these different competing interests”

Though currently TC is certainly the most visible project considering eminent domain in the state of Texas, smaller entities invoke the power often, as Showalter said. There are a number of things property owners can do proactively and reactively to lessen its impact.

The first tip comes into play before a property is purchased and involves having a conversation with the lender about what would happen should eminent domain be exercised on part of the land.

“Typically, in deeds of trust, the lender has the right to dictate that all of the money goes to them toward the balance of any debt,” Showalter said. “Sometimes, if the property owner has sufficient equity and a good relationship with the lender, he can negotiate something that allows the property owner to keep some or all of the proceeds.”

If you already own the property and have received notice that an entity is seeking to invoke eminent domain, Showalter said the most important thing you can do is call an attorney experienced in eminent domain.

“Often, there’s tension among these competing interests and what the landowner has to do,” Showalter said. “The landowner’s counsel can navigate these different competing interests.”

An attorney, especially one who specializes in eminent domain, will be far more well-versed in the deadlines and considerations at play than a typical property owner.

“We see time and time again where the landowner thinks, ‘I can negotiate this myself,’ or, ‘I can reason with the condemning authority and get more money without having to pay a professional,’” said Showalter. “That is really a false hope. Often, the condemning authority will take information that has been given to it in good faith in negotiations and use it to limit or cap the damages of the landowner.”

Eminent domain is a complicated and controversial issue that typically flies under the radar for most Texans. Now that TC has brought it into the spotlight, it’s important for all property owners to educate themselves about the topic. ●

