

Protecting Private Property Rights After the Public Use Ship Has Sailed

by Charles B. McFarland

In *How the Whale Got His Throat*, Rudyard Kipling told the story of a whale who ate fishes:

He ate the starfish and the garfish, and the crab and the dab, and the plaice and the dace, and the skate and his mate, and the mackereel and the pickereel, and the really truly twirly-whirly eel. All the fishes he could find in all the sea he ate with his mouth—so!

In the wake of the Supreme Court's opinion in *Kelo v. City of New London*, 125 S. Ct. 2655 (U.S. 2005), affirming the government's taking of private property for the promotion of economic development without any proposed public use or ownership of the property to be taken, property owners find themselves contemplating their own troublesome whale: the government and its power of eminent domain.

Ownership of private property is not absolute. It is a fundamental premise to private property ownership that all property is held subject to the government's powers of taxation, escheat, the police power, and eminent domain. With the exceptions of the Constitution's grant to Congress of the power of conscription and the death penalty, government's power of eminent domain—the taking of private property for public use—is the most extraordinary power government exercises against its own citizens. Like Kipling's whale eating all the fishes, the government's power to take private property must be constrained. In Kipling's story, a mariner “of infinite resource and sagacity” checked the whale's eating “by means of a grating” lodged in the whale's throat. Under our Constitution, government is similarly fitted with a grating designed to limit the exercise of eminent domain.

At least in theory, the government's power of eminent domain is constrained by two requirements: that the taking serve a public use and that just compensation be paid. The

public use and just compensation requirements are the basic protections afforded to private property owners and are, consequently, the lawyer's basic tools in the representation of private property owners in takings cases.

Kelo involved the scope of the limitation imposed on takings by the public use requirement. Susette Kelo and the other property owners lived in the Fort Trumbull area of New London, Connecticut. Although a few of the properties were held for investment, most were either owner-occupied or occupied by members of the owner's family. There was no allegation that any of the properties was blighted or in poor condition. At the same time, there was no evidence of an illegitimate purpose behind the takings in the case.

In its opinion, the *Kelo* majority set forth the precedential ground rules applicable to the case, and its framing of these ground rules dictated the result in the case. First, the Court recognized that the concept of “public use” had long been extended beyond actual use by the public. Instead, if a taking is shown to serve the broader concept of a “public purpose,” it will withstand constitutional scrutiny. The Court additionally reaffirmed both the limited scope of its review of determinations of what takings would serve the public welfare and its deference to the legislature and its authorized agencies in these determinations.

In affirming the city's taking in the *Kelo* case, the Court rejected as clearly inconsistent with these precedents a bright-line rule that economic development does not qualify as a public use. The Court also declined to impose heightened scrutiny to takings for economic development, such as a requirement of a “reasonable certainty” that the expected public benefits would occur, as inconsistent with the Court's view of the judicial role in the takings process. Put simply, the Court held that it is not the role of the courts to second-guess a legislative determination as to what proj-

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ects will serve the public good, what land is necessary for those projects, or how the projects will be implemented.

With *Kelo*, the public learned what practitioners in this area already knew (despite post-*Kelo* protestations): The public use requirement provides only minimal protection of private property rights.

If the public use requirement does not serve to curtail government's taking of private property, does that mean the whale is left free to eat as it pleases? The framers of the Constitution, themselves astute men of considerable resource and sagacity, included an additional limitation on government's power to take private property for public use: "nor shall private property be taken for public use *without just compensation*." In contrast to the public use requirement, the obligation to pay just compensation serves as a practical limitation on government's power of eminent domain. It forces government to pick and choose which projects it can afford to implement, thus tending to promote responsible government in a way that the public use requirement does not.

The basic goal of the just compensation obligation is to make the property owner whole, monetarily, for the taking of property. Because the property owner is, in theory, left in as good a position as before the taking, courts are not as concerned for the rights of property owners as they might be for uncompensated governmental intrusions. Although the takings clause originally was intended to protect the use and enjoyment of private property, it now functions primarily as a constitutional safeguard against *uncompensated* taking or use of private property for public purposes. The underlying principle of the clause is the recognition that government should not force a select few to bear public burdens that should be borne by the public as a whole.

Although it is true that public use is fundamental to any takings case, the first inquiry is actually whether there is a compensable taking at all. While *Kelo* involved a formal exercise of government's eminent domain power, it is well settled that a taking can occur even when the government does not formally exercise its eminent domain power. In these instances, the takings clause of the relevant jurisdiction establishes the extent to which the property owner is entitled to compensation for impacts caused to his property interests by a public work or government regulation. The federal Constitution and fewer than half of state constitutions provide that the owner is entitled to be compensated for the detrimental impacts of a public work or regulation on his property *only* when part or all of the property is taken. The majority of state constitutions, however, offer more expansive protection, providing that the owner shall be compensated if any portion of his property is intentionally damaged by the public work or regulation.

The distinction is important because public works often impact the market value of property even when no part of the property is required for the construction and operation of the public facility. In a jurisdiction where compensation is limited to a "taking," the property owner may not be entitled to any compensation for the damage he has sustained because damages alone—when not accompanied by a taking—may not trigger the just compensation obligation. In jurisdictions where the takings clause provides for compensation in the event of either a taking or "damaging" of property, the property owner has a clearer road to compensation for the damage he may suffer from the public work, even when there is no physical taking.

The term "property" is construed broadly, and the kinds of property that are subject to constitutional protection are practically unlimited. Every kind of property that the public may require, including legal and equitable rights of every description, is subject to taking if the legislative body charged with delegating the eminent domain power sees fit—and, thus, every kind of property should be entitled to compensation. The property interest, however, must be more substantial than a unilateral expectation of continued rights or benefits under the law. Because government normally retains the power to change the law to promote the general welfare, a taking does not occur when the government exercises this power, even

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though the change in the law may eliminate some benefit or claimed right under the prior law. Other factors in the takings analysis include whether the particular action or regulation under attack constitutes government action and, in the case of a physical invasion of property, whether the action was intentional. The government will typically enjoy sovereign immunity if the damage claimed is caused by the negligent performance of a governmental function.

In addition to sovereign immunity, the takings analysis must include consideration of government's police power. Broadly speaking, the police power is the sovereign power to regulate the use of property to promote the health, safety, and welfare of the community, even though the exercise of it may decrease the value of one's property and even destroy it. All property is held subject to the valid exercise of the government's police power. For this reason, a rational-basis test is generally applied to evaluate statutes and regulations that infringe on property rights. A valid exercise of the police power, however, does not preclude a takings claim by the property owner. A regulation or statute may meet the standards necessary for exercise of the police power but still result in a taking. For example, states on occasion have had to destroy healthy citrus trees to prevent the spread of disease from infested trees. This is clearly a valid exercise of the police power. Nevertheless, courts addressing this situation have repeatedly confirmed the states' obligation to pay just compensation for the healthy trees destroyed. Although a property owner is usually not in a position to challenge the government's valid exercise of its police power, the validity of the exercise does not preclude a determination that the action constitutes a compensable taking.

Assuming there has been a taking or damaging of a constitutionally protected interest in property, the next inquiry is the public use determination addressed in *Kelo*. As discussed, the courts have a limited role in overseeing legislative determinations of public use. Any challenge to the government's right to take property can be very difficult, time consuming, and expensive; a challenge to the public use or necessity of a public project faces a decisively uphill battle. In theory, most

property owners affected by a public project would probably rather see the project go somewhere else or, at least, avoid having their property taken. The attorney representing a property owner must work hard to ensure that his client has a realistic expectation of what can be accomplished in terms of challenging the right to take. The client needs to understand that the trial court's discretion to second-guess a condemning authority's determination of public necessity and authorization to condemn necessarily is limited.

An unsuccessful challenge to the condemnation, with its attendant fees and expenses, can abrogate the overarching purpose behind the constitutional guarantee of just compensation. Money is fungible, and except in those few jurisdictions with fee-shifting statutes, every dollar spent by the property owner, either in challenging the right to take or in attempting to obtain the compensation to which he is entitled, is a dollar that is deducted from the ultimate recovery and, accordingly, "just compensation." The property owner's counsel may be ethically obligated to pursue a challenge to the right of eminent domain if the client insists, but the decision to do so should not be taken lightly. Counsel for property owners should fully disclose the potential costs and give their clients a realistic assessment of the likelihood that the challenge will fail and the government will win.

There are many countervailing considerations to weigh in a property owner's decision to challenge a taking, even when the public purpose behind the taking seems dubious. My own representation of Pavol Vido, the owner of a junkyard in the historic Heights neighborhood in Houston, Texas, illustrates the complexities that these representations can involve. The city sought to condemn Vido's property for use in connection with an adjacent existing city park. Without a doubt, his property was inconsistent with the character of development in the neighborhood, but Vido suspected that he was being unfairly targeted for condemnation. Despite serious skepticism on this point, I made a preliminary inquiry into the legitimacy of the taking. At every level of this inquiry, it turned out that Vido's suspicions were confirmed. The city never made a determination of public use. Even two years after filing its petition in condemnation, the city could not articulate a plausible public use for his property. Nevertheless, Vido ultimately could not prevent the taking because of procedural rules that made it impossible for him to litigate the claim on its merits.

During the litigation over the right-to-take issue, the city had not initially taken possession of Vido's property, which would have required a deposit of a preliminary estimate of the compensation owed. As the hearing approached, however, the city proposed to take possession, which would have forced Vido to find somewhere else to live. Because of a procedural rule, Vido could not access the funds deposited for the taking without waiving his right to contest it. Relocating his residence and business without benefit of those funds, however, was impossible. Alternatively, the city offered Vido the maximum amount of compensation he could hope to recover for the taking if he would drop his challenge. Vido had no realistic choice but to give up his challenge to the city's taking, and thereby his property, despite his conviction and mine that the taking served no public purpose whatsoever.

In the vast majority of cases, however, the taking will serve a legitimate public purpose. In these cases, most property owners will have accepted the fact of the taking, and their primary objective will be to maximize the compensation they

receive. The challenge for the property owner's lawyer is to ensure that the property owner is paid for *all* compensable impacts of the taking. For example, for a partial taking, the owner may be entitled not only to the market value of the property taken but also to compensation for the diminished desirability of the remaining property because of decreased accessibility, utility, or visibility of the site, or some other impact. In limited circumstances, the property owner may be able to recover lost profits. Depending on whether the condemnation involves a whole or partial taking, vacant or improved land, fee ownership or a leasehold interest, or claims for remainder damages, this inquiry can range from straightforward to exceedingly complex.

On the other side, the government's lawyer must ensure that the government does not pay damages for elements of damage that are not compensable. Interestingly, there is no concomitant burden to ensure that the government pays for all compensable elements of damages. The result of this imbalance is an incentive for the government's lawyers to restrict the categories of damage for which compensation may be paid, and an increased burden on lawyers representing property owners to make sure that they seek all compensation to which the property owner is entitled. Meeting this burden in complex cases requires a thorough understanding of an area of law that has been compared to Milton's Serbonian bog, into which whole armies sank. Depending on the jurisdiction, damages from a taking to a property owner's remaining property may not be recoverable if the damages are not specific to the property but are experienced by the general community. For example, the noise, dust, and inconvenience that occur during the construction of a public project are typically experienced by the entire community and would not be compensable. Increased circuitry of travel resulting from a taking may not be compensable. Diminished access to and from the property, however, can be compensable, but jurisdictions differ as to the threshold that will apply before an impact to access is compensable. In some jurisdictions, decreased access may not be compensable if suitable access to and from the property remains so that the property can continue to function at its highest and best use. Even in a jurisdiction where the impairment of access does not arise to the level requiring compensation, the property owner may still be able to recover the cost of restoring safe access to the property after the taking in cases where a safety issue is presented.

These countervailing responsibilities and incentives for condemning authorities and property owners in takings cases have resulted in a push-and-pull dynamic in the law of compensable damages. Consistent with the obligation to see that government does not pay more than is required, its attorney may assert that damages claimed by the property owner are not recoverable. The property owner's lawyer may argue for the compensability of damages that are not clearly provided for under existing case law as part of her effort to ensure that the property owner receives all compensation to which he is entitled. An analysis of three partial takings cases out of the Texas Supreme Court demonstrates the role this phenomenon can have in shaping condemnation law.

State v. Schmidt, 867 S.W.2d 769 (Tex. 1993), involved the taking of a five-foot strip of land in connection with the state's elevation of Highway 183 in Austin, Texas. In the trial court, the property owners recovered substantial damages for the

negative impact of the elevated highway facility on the market value of their remaining land, despite the fact that none of the elevated facility was to be constructed on the part taken from the property owners but was to be located instead entirely on the state's preexisting right-of-way. The *Schmidt* court rejected the property owners' theory of damages, determining that the damages claim did not result from the state's taking of their property but from its new use of its existing right-of-way and of property taken from other landowners. These damages, resulting from the "diversion of traffic, inconvenience of access, impaired visibility of ground-level buildings, and disruption of construction activities," were, according to the court, "a consequence of the change in Highway 183 shared by the entire area through which it runs." The damages were held to be community in nature and not recoverable.

The general rule for compensation prior to *Schmidt* was set forth in *State v. Carpenter*, 89 S.W.2d 194 (Tex. 1936):

[T]he damages are to be determined by ascertaining the difference between the market value of the remainder of the tract immediately before the taking and the market value of the remainder of the tract immediately after the appropriation, taking into consideration the nature of the improvement, and the use to which the land taken is to be put. . . .

Generally, it may be said that it is proper as touching the matter of the value and depreciation in value to admit evidence upon all such matters as suitability and adaptability, surroundings, conditions before and after, and all circumstances which tend to increase or diminish the present market value.

There can be little doubt that in the 57 years between *Carpenter* and *Schmidt*, this language was construed broadly by attorneys for property owners, with an eye toward obtaining compensation for their clients for any element of damages that could be viewed as impacting market value. Thus, *Schmidt* was hailed as a watershed case for condemning authorities in Texas, to be asserted by condemnor lawyers as authority for denying broad categories of remainder damages in partial-takings cases. There can be little doubt that the holdings in *Schmidt* were construed broadly by attorneys for condemning authorities to restrict the compensation to be paid by their clients. As a result, eight years later the court was compelled to clarify compensable damages in condemnation cases.

This clarification came in *Interstate Northborough Partnership v. State*, 66 S.W. 3d 213 (Tex. 2001), which involved the state's project to widen a freeway in Houston, requiring moving the frontage road to within 22.5 feet of the property owner's office building. As a result of the taking, two of the property's five driveways had to be relocated or closed. The increased proximity of the roadway was held to be a compensable damage. The property owner was additionally permitted to recover damages for the resulting loss of the property's aesthetics. Finally, even in the absence of finding of a material and substantial impairment of access to the property as a result of the loss of the two driveways, the property owner was permitted to recover its costs for necessary modifications to the remaining property resulting from the condemnation, including modifications necessary to restore safe access to

the property.

From *Interstate Northborough* it was clear that the *Schmidt* opinion did not cut as widely as attorneys for the condemning authorities had argued. It did not, however, leave wide open the door to these damages. The push-and-pull contest over where the line on compensable damages should be drawn continued with *County of Bexar v. Santikos*, 144 S.W. 3d 455 (Tex. 2004). In *Santikos*, the property owner, relying in part on *Interstate Northborough*, asserted substantial damages to the remainder of its unimproved property resulting from the state's taking of a sliver of land from the frontage for con-

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struction of a sloping embankment up to the newly raised highway facility. The property owner argued that, in the event of future big-box retail development, the slope of this embankment would prevent "normal" driveways into the property at the location of the taking and that the state's construction of the embankment created a "market perception problem" by leaving the property "in a hole."

The *Santikos* court first rejected the property owner's characterization of his claim for damages for the potential impairment of a hypothetical driveway at the location of the taking and future embankment as one of "unsafe access" under *Interstate Northborough*:

More important, it is hard to find any effects on access here, as the tract has no businesses, homes, driveways, or other improvements of any kind. Easy access to the frontage remains along 90 percent of the Santikos tract; the only claim is that someday a developer might want to build a driveway at the single most difficult and expensive location on the entire property.

The court recognized *Interstate Northborough* as authority for the proposition that "costs to mitigate or move existing driveways or other improvements may be compensable even if impaired access is not," but noted again that "no driveways or other improvements need to be moved in this case." The court was less kind in its treatment of the property owner's claim for damages for "diminished market perception," which it characterized as a "malleable" term that, in this case, "proved to be based on a combination of diminished access, diminished visibility, loss of view, and loss of 'curb appeal.'" The court determined that all claims denominated by the property owner as diminished market perception represented noncompensable damages and that these damages could not be "transmuted to compensable ones by asserting them under a pseudonym." The court thus rejected all claimed remainder damages, remanding the case solely for a determination of the market value of the land taken.

The arguments made by the opposing sides in these cases can be viewed from the perspective of the lawyers' competing goals for their clients. In each case, the attorney for the con-

demning authority asserted, consistent with his obligation to see that government not pay more than is required, that the claimed damages were not recoverable. In each case, the property owner's lawyer argued for the compensability of damages that may not have been clearly provided for under existing case law, as part of his effort to ensure that the property owner received all compensation to which it was entitled. Furthermore, it is not an accident that these cases arose in the context of partial takings. These cases, particularly those involving improved property, pose the most complex compensation issues in condemnation cases.

Government lawyers in condemnation cases live by the mantra that not all damages to property are compensable, while lawyers for the property owner are constantly aware that the condemnation case represents the property owner's one and only opportunity to recover for the impacts of the taking on the market value of the property. In considering whether to seek categories of damage that are arguably not compensable, the attorney must be mindful that the property owner is certain not to recover for a particular element of damages if the attorney does not seek to recover it. The property owner has to rely on the attorney to determine what claims can be reasonably asserted to make sure it recovers all of the compensation to which it is entitled without incurring needless expenses litigating noncompensable items.

The cost of a lengthy pursuit of damage claims that are ultimately rejected can have a chilling effect on pursuing attenuated or remote damage claims. And yet, if the lawyer fails to pursue compensable damages, the property owner will not recover the full amount of damages allowed under law for the taking. On the other side, the government may be rewarded by the decision to contest the property owners' claimed damages, but it also risks being penalized where the substantial litigation costs involved in an unsuccessful appeal will be added to the damages that it is required to pay.

On a case-by-case basis, these inefficiencies can be punitive. Depending on whether the property owner has hired an attorney on an hourly or contingent basis, a sustained and unsuccessful pursuit of damages, as in the *Schmidt* and *Santikos* cases discussed above, can result in attorneys' fees greatly in excess of the client's recovery or, more typically, in a contingent fee that fails to compensate the attorney for the time spent on the case. Unfortunately, these inefficiencies in condemnation cases are probably unavoidable as long as the attorney representing property owners is fully committed to fulfilling her duty to her clients. Damage issues on the blurred line of compensability will arise, and this duty at times will require the attorney to litigate the issue as far as necessary, irrespective of the risk that she may not recover a fee or that the fee will not be commensurate with the amount of time and effort expended on the case.

When the compensation paid for the taking of private property does not include all compensable impacts of the taking, the just compensation obligation fails in its function as a check on government's taking of private property. The underlying principle of the takings clause is that public burdens should be borne by the public and not by individual property owners. Therefore, it is critical that this calculus include the full magnitude of the burden to be imposed on the property owner as a result of the taking. Too often, however, it does not. The proponents of public projects have an incentive to understate the property acquisition costs associated with a

project to facilitate its approval. It is particularly easy to understate or omit damages to property that is not acquired but will suffer a negative impact from the project. When the true cost of the acquisition is revealed through the judicial process, usually years later, these same proponents blame the property owners, the attorneys representing them, or juries for the cost overruns. In fact, these overruns are the direct and natural result of their own conduct in failing to assess the compensation question fully.

Because of the length of time between when projects are budgeted and when the final compensation is determined, the proponents of these low-balled projects generally escape accountability. But not always. Many experienced practitioners in this field have had instances in which the government has had to withdraw or dismiss its proposed taking of property because, when the bill came, the compensation owed was simply more than it could afford. Dixon Montague recently represented a property owner in a case involving the taking of land for flood control. The flood control district offered \$415,000; the compensation subsequently awarded in litigation was \$4.7 million. Upon receiving notice of this award, the district realized that the property it was taking was not the property it had budgeted to take. Rather than pay this amount in compensation, the district dismissed its condemnation.

In instances where government abandons its taking, the property owner is typically able to recover the fees and expenses incurred in connection with defending against the taking. Under certain circumstances and in certain jurisdictions, the property owner may also recover for temporary damages to the property resulting from the abandoned taking. An outcome in which government has to pay a property owner for a taking yet does not end up with the property should tend to force an inquiry into accountability. A thorough analysis of the estimated compensation owed for the taking of land needed for a public project should be part of government's planning process as much as a complete site analysis would be for a contractor's building construction project.

At the end of the day, it is the just compensation obligation, not the public use requirement, that serves as the necessary constitutional check on government's taking of private property. That this is true may readily be demonstrated by imagining having to give up one of the two requirements in the takings clause. Restricting takings to agreed-upon public uses, without a payment obligation, only limits the uses for which private property may be taken. The amount of property that could be taken would be unlimited. On the other hand, removing all use restrictions on takings as long as government pays just compensation would limit the amount of property that it could condemn. In this scenario, government would have greater flexibility in determining when to exercise its power of eminent domain. Under either scenario, the exercise of eminent domain would still be subject to the political process if the public perceived that the power was being abused. This abuse, however, would be much more likely in the absence of the just compensation obligation than if the public use restriction were removed. And so it is that, just as whales nowadays never eat men or boys or little girls, property owners may continue to trail their toes in the water, secure in the indemnification afforded by the Constitution's just compensation obligation. □