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SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

No. 24-0447

In the Supreme Court of Texas

The State of Texas and Kyle Madsen
in his official capacity as Director of Right of Way,
Petitioners,

v.

JRJ Pusok Holdings, LLC,
Respondent.

On Petition for Review from the
Fourteenth Court of Appeals, Houston, Texas

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of the Case:	This lawsuit arises from the State's failure to comply with Pusok's repurchase rights under Chapter 21, Subchapter E of the Texas Property Code after determining that a portion of property previously acquired via eminent domain lawsuit was no longer necessary for public use. Pusok brought a repurchase rights claim, an inverse condemnation claim, and an ultra vires claim.
Trial court:	County Court at Law No. 4 of Harris County, Texas, The Honorable Miryea Ayala.
Disposition in the trial court:	The trial court granted the State's motions to dismiss for want of jurisdiction, dismissing Pusok's claims against Petitioners with prejudice. CR.517.
Court of appeals:	Appellant: JRJ Pusok Holdings, LLC Appellees: State of Texas and Kyle Madsen, director of Right of Way
Disposition in court of appeals:	The Fourteenth Court of Appeals affirmed in part and reversed in part, holding that Pusok's claim under the repurchase statutes was not barred by immunity and fit within the scope of these statutes, but Pusok's inverse condemnation and ultra vires claims were barred. *JRJ Pusok Holdings, LLC v. State* (*JRJ Pusok I*), 693 S.W.3d 679 (Tex.App.—Houston [14th Dist.] 2023, pet. pending) (Christopher, C.J., joined by Bouiliot and Hassan, JJ.). After denying both parties' motions for rehearing, the court issued a supplemental opinion affirming that the trial court ha jurisdiction over Pusok's repurchase claim. *JRJ Pusok Holdings, LLC v. State (JRJ Pusok II),* 693 S.W.3d 860 (Tex.App.—Houston [14th Dist.] 2024, pet. pending).

COUNTER STATEMENT OF ISSUES PRESENTED

The issues presented by the State in its petition for review are as follows:

1. Whether the court of appeals erred in agreeing with the Fifth Court and finding that Chapter 21 of the Property Code provides a waiver of sovereign immunity in suits based on the right to repurchase against the State as condemnor, particularly when considering the framework of Chapter 21, the context, statutory history, and purpose of Subchapter E, and the meaning of eminent domain.

2. Whether the court of appeals erred in concluding that county courts at law have jurisdiction over the repurchase claim, given that Chapter 21 does not limit such claims to district court, and the Government Code explicitly grants jurisdiction to county courts at law.

3. Whether the court of appeals erred in determining that property acquired in the settlement of an eminent domain lawsuit by deed (rather than by judgment) qualifies as property acquired "through eminent domain" for repurchase eligibility under Chapter 21, Subchapter E, particularly when the State initiated the eminent domain lawsuit and the Landowners were powerless to stop the taking, and considering the meaning and scope of eminent domain.

4. Whether the court of appeals erred in finding that the repurchase statutes apply to the repurchase of a portion of the property acquired, especially considering Legislative intent and public policy.

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INTRODUCTION

The Texas Constitution permits the State to take private property from its citizens in exchange for adequate compensation and the promise it will be used for public benefit. As a means of empowering landowners and curbing governmental abuse of eminent domain through speculative takings or "land banking," the Legislature created a procedure within Chapter 21 granting former landowners the first right to repurchase their taken property when the property becomes unnecessary for public use at the price paid by the condemnor. Tex. Prop. Code §§ 21.101-.103.

Despite Chapter 21's eminent domain framework and application to public condemnors, the context, statutory history, and purpose of Subchapter E, and the absence of justification for applying sovereign immunity, the State argues that sovereign immunity applies and the Legislature did not consent to former landowners suing the State for repurchase actions under Chapter 21, Subchapter E. And even if it did, the State claims, Pusok's claims fall outside the scope of the repurchase statutes barring recovery.

Acceptance of the State's arguments would not only disregard the Legislature's intent and fair meaning of the repurchase statutes but furnish the State with an unfair (and arguably, unconstitutional) advantage by allowing it to use the land it condemned purportedly for public use for *any* use and unfairly profit from its citizens. The State's interpretation of section 21.101(a)'s "through eminent domain" also violates rules of construction, wrongly attaches importance to the form of settlement, discourages case

resolution outside of trial, and violates this Court's directive to liberally construe condemnation protections for the benefit of landowners. Further, should repurchase eligibility only apply to recovery of the entirety of property acquired, condemnors would be incentivized to acquire more property than necessary as they would be immune from landowner attempts to recover lesser portions.

REASONS TO DENY REVIEW

Since enactment in 2003, the repurchase statutes have received little judicial consideration. The few appellate courts that have examined these provisions—the lower court and the Fifth Court—have unanimously concluded that Chapter 21 provides a legislative waiver of immunity in suits based on the right to repurchase. There is also no conflict with this Court's precedent. Modern jurisprudence weighs against the application of sovereign immunity to Chapter 21, Subchapter E repurchase actions.

The lower court remanded this case to allow Pusok to proceed on its repurchase claim against the State. There has yet to be a determination about recovery or remedies. The lower court also declined to rule whether the State judicially admitted that it designated the underlying property unnecessary for public use in its pleadings, making it ripe for consideration by the trial court. But even assuming it does not amount to such an admission, an outstanding fact issue exists on this point.

Accordingly, this Court should either deny the State's petition, wait for a more complete record to determine Pusok's rights, expressly declare that repurchase statutes

contain a sufficient waiver of sovereign immunity, or declare that repurchase claims do not implicate sovereign immunity.

STATEMENT OF THE FACTS

The court of appeals correctly stated the nature of the case.

A. The Condemnation Lawsuit

Prior to this lawsuit, Pusok's predecessors in interest ("Landowners")[1] owned land at 19502 Mueschke Road in Tomball, Texas. CR.279. In 2013, the State, acting by and through TxDOT, sent an initial offer letter to Landowners to acquire 650,364 square feet of their property known as Parcel 112 ("Subject Property")[2] for the expansion of right-of-way for the Grand Parkway or State Highway 99. CR.279, 282-84, 59.

In December, the State sent a final offer letter to condemn the Subject Property. CR.286-287. The State explained in this letter that if the owner elected to reject the offer, "eminent domain proceedings will be initiated by the State." *Id.*

The State attached the Landowner's Bill of Rights required under Section 21.0112 of the Property Code to the initial offer, CR.289-93, acceptance of which was acknowledged. CR.295. The Bill of Rights states that it "applies to any attempt by the

[1] Landowners assigned their claims to Pusok pursuant to Tex. Prop. Code § 21.101. CR.374-390. This is not disputed. CR.59-60.

[2] Parcel 112 or the Subject Property refers to the 650,364 square feet acquired by the State from Landowners.

government or a private entity to take your property," CR.290, and advises of landowners' repurchase rights, which are the subject of this lawsuit, by stating:

> If private property was condemned by a governmental entity, and the public use for which the property was acquired is canceled before that property is used for that public purpose, no actual progress is made toward the public use within ten years or the property becomes unnecessary for public use within ten years, *landowners may have the right to repurchase the property for the price paid to the owner* by the entity at the time the entity acquired the property through eminent domain.

CR.293 (emphasis added).

In April 2014, the State initiated a lawsuit to condemn the Subject Property by filing a petition in condemnation (Condemnation Lawsuit). CR.297-334. In the petition, the State, in pertinent part, provided the following:

- "…the Texas Transportation Commission has further found and determined that the tract(s) of land and improvements, if any, described in Exhibit "A" [Parcel 112] is/are suitable for public use for such purposes the State highway designated as SH 99 and it is intended to use said land for said purposes, and it is necessary to acquire fee simple title to said land, and improvements…to be used on said State highway designated in Exhibit "A" [Parcel 112], as a part of the State highway system…" CR.303.

- "Plaintiff is entitled to condemn the fee simple title in such land and improvements, if any, for said purposes aforesaid and asks that the same be condemned for such purposes aforesaid…" CR.303.

- "The Landowner's Bill of Rights was sent to the landowner in accordance with Texas Property Code Section 21.0112." CR.304.

- "That Plaintiff and Defendant have been unable to agree upon the value of said real estate and interests therein to be condemned or the damages occasioned by the acquisition of such land and improvements, if any..." CR.305.

Later, Landowners entered into Rule 11 Agreements with the State to settle the Condemnation Lawsuit. CR.336-338. Pursuant to settlement, Landowners conveyed the Subject Property to the State in exchange for consideration. CR.340-57, 279. The State paid Landowners approximately $1.05 per square foot for the Subject Property. *Id.;* CR.359-60.

B. The Determination of Surplus Land

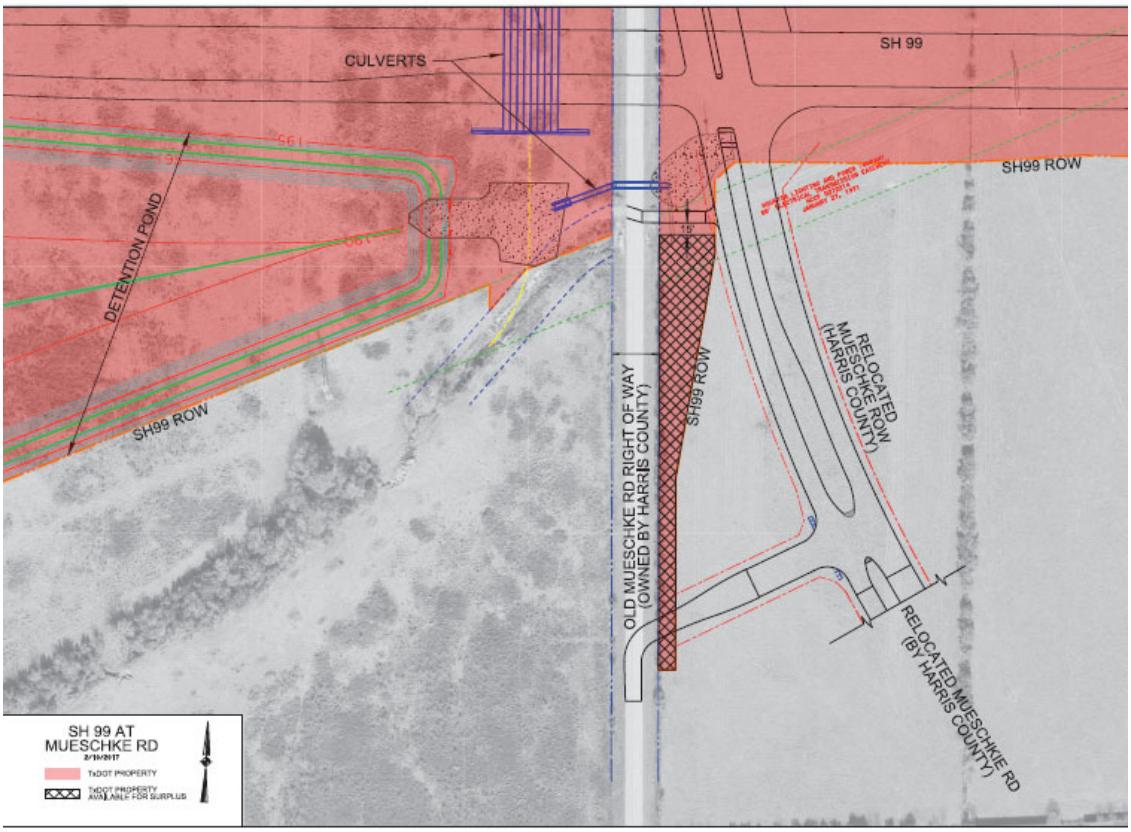
Years later, the State, through TxDOT, advised that a portion of the Subject Property (approximately 20,000 square feet) constituted surplus land ("Surplus Land"), CR.362-65, as shown in cross-hatched lines in the following excerpt:

From: Jess Berglund <Jess.Berglund@txdot.gov>
Sent: Monday, February 27, 2017 2:37 PM
To: Jeremy Baker
Subject: RE: Grand Parkway at Mueschke Rd. Surplus Land Inquiry
Attachments: SH99 at Mueschke RD.pdf

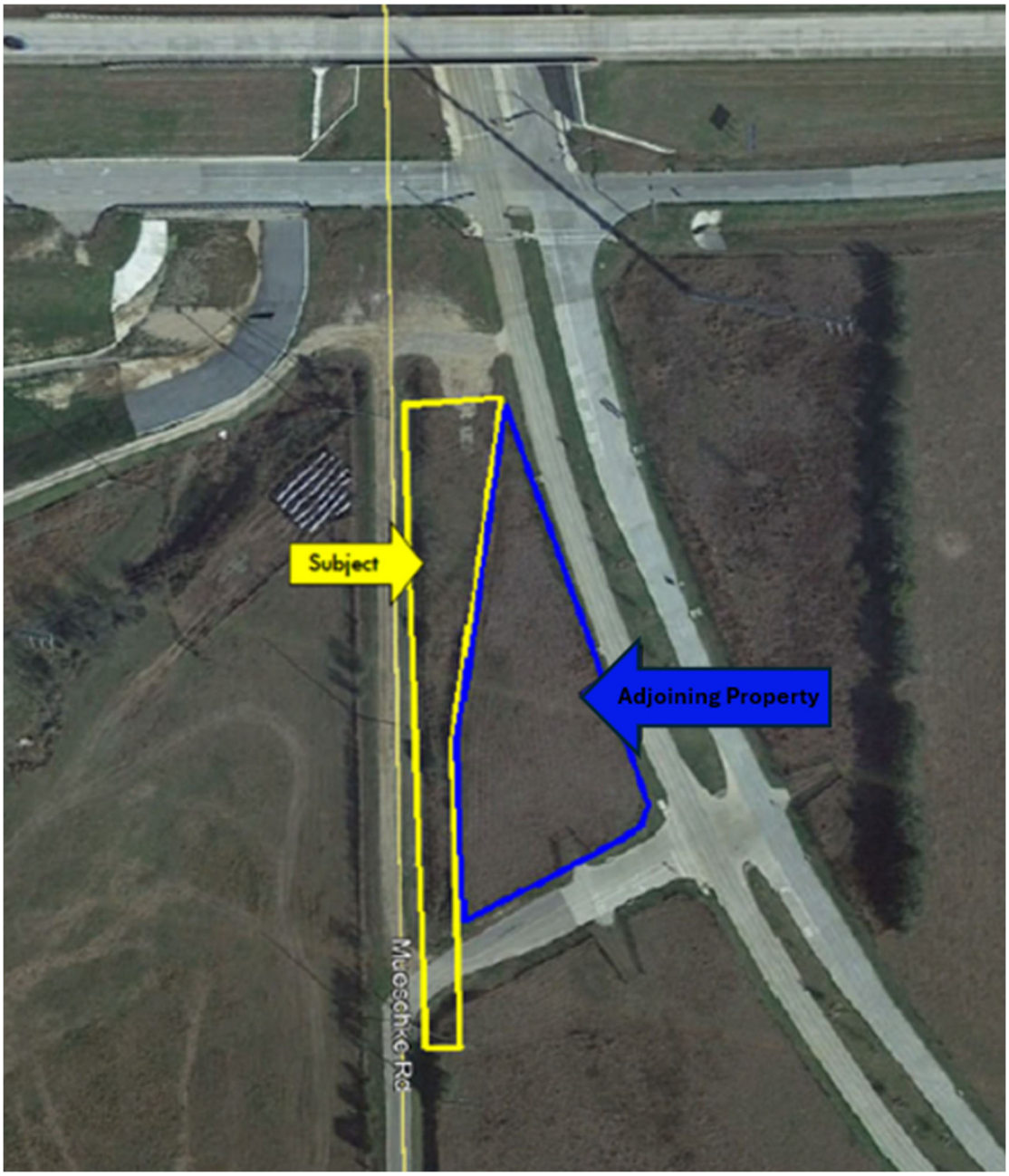
Jeremy,
Thank you for reaching back out. Please see the attached pdf showing what TxDOT would consider surplus.

Thank you,

Jess R Berglund, JD
Right Of Way Division
118 Riverside Drive
Austin, TX 78745
Office: (512) 486-5883



The Surplus Land became unnecessary for the State's use following a decision to reroute Mueschke Road. *See* State Br. at p. 4. As shown in the image below, the Surplus Land, outlined in yellow, is located outside the SH 99 Grand Parkway.



The above image also shows that the Surplus Land is adjacent to land currently owned by Pusok, outlined in blue. Pusok seeks to recover the Surplus Land to make better use of the adjoining property.

C. This Lawsuit

1. Trial Court Proceedings

After the State refused to sell back the Surplus Land, Pusok filed this lawsuit in Harris County Civil Court at Law, to enforce its right of repurchase under Chapter 21, Subchapter E. CR.8-47, 236-44, 198-235. Pusok's petition included three claims: (1) a claim under the repurchase statutes, Tex. Prop. Code §§ 21.101-.103; (2) an inverse condemnation claim; and (3) an ultra vires claim. CR.240-242.

The State moved the trial court to dismiss Pusok's lawsuit for want of jurisdiction, CR.59-111, 245-59, and Pusok filed responses. CR.184-235, 398-403. Notably, the State *admitted* in these motions that it determined that the approximately 20,000 square feet of land is, in fact, unnecessary for public use, specifically providing that, "[t]he State exercised its discretion to designate the Subject Property as Surplus Land, rendering it unnecessary for its public use of furthering the SH 99/Grand Parkway project."[3] CR.68, 257, CR.60, 246.[4]

On May 2, 2022, the court signed an order granting the State's motion and dismissed Pusok's claims with prejudice without explanation. CR.517. After denying Pusok's post judgment motions, CR.521-26, CR.532, Pusok appealed. CR.535-37.

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[3] The State later changed these admissions in response to the summary judgment, to which Pusok objected. CR.406, CR.510, CR.512.

[4] Claiming that there was no issue of material fact that Pusok's repurchase rights were triggered per section 21.101(a)(3) due to these admissions, Pusok filed its motion for summary judgment on its ultra vires claim. CR.265-394. The State filed a response, CR.404-477, and Pusok filed a reply. CR.480-487. Although set for hearing, the court did not hear this motion.

2. Court of Appeals Proceedings

The Fourteenth Court reversed and remanded the dismissal of Pusok's Chapter 21 repurchase claim but affirmed the trial court's dismissal of Pusok's inverse condemnation[5] and ultra vires claims.[6] *JRJ Pusok Holdings, LLC v. State* (*JRJ Pusok I*), 693 S.W.3d 679, 688-89 (Tex.App.—Houston [14th Dist.] 2023, pet. filed). The court declined to rule on whether the State judicially admitted that it designated the property unnecessary for public use. *Id.* at 686.

With respect to the repurchase claim, the court agreed with the Fifth Court of Appeals' reasoning in *State v. LBJ/Brookhaven Investors, L.P.*, 650 S.W.3d 922 (Tex.App.—Dallas 2022, pet. denied) and held that "Chapter 21 provides a legislative waiver of immunity in suits based on the right of repurchase" based on a "full reading of Chapter 21, including the purpose of Subchapter E..." *Id.* at 683-84 (citing *LBJ/Brookhaven.* 650 S.W.3d at 931-32).

The lower court also concluded that Pusok alleged a valid claim within that waiver. *Id.* at 684. That is, the court held that property acquired in settlement of a condemnation proceeding qualifies for purposes of the repurchase statute as property

[5] The lower court concluded that Pusok's inverse condemnation claim fails because it "is entirely predicated upon an anticipated continuance of existing law." *JRJ Pusok I*, 693 S.W.3d at 686. The court also disagreed with Pusok's claim that it retained a reversionary or future interest in the Surplus Land pursuant to Chapter 21. *Id.* at 687.

[6] The lower court held that Pusok's ultra vires claim fails because the mandatory notice and offer requirements of sections 21.102 and 21.103 hinge on the decision-making authority of Madsen and does not support an ultra vires claim. *JRJ Pusok I*, 693 S.W.3d at 687-88.

acquired "through eminent domain." *Id.* at 682. Noting the well-established common law meaning of eminent domain and focusing on the involuntary nature of the acquisition, the court disagreed with the State that a judicial decree is required for the exercise of eminent domain. *Id.* at 684-85. The court also held that the trial court, as a statutory county court, has jurisdiction to hear Pusok's Chapter 21 repurchase claim based on Tex. Gov't Code § 25.1032(d)(6). *JRJ Pusok I*, 693 S.W.3d at 688.

In response to the State's rehearing motion, the court issued a supplemental opinion confirming that the statutory county court has subject matter jurisdiction over Pusok's repurchase claim. *JRJ Pusok Holdings, LLC v. State* (*JRJ Pusok II*), 693 S.W.3d 860, 861 (Tex.App.—Houston [14th Dist.] 2024, pet. filed). Specifically, the court rejected the State's argument that Chapter 21's waiver of sovereign immunity is only effective in suits brought in district court. The court reasoned that the State failed to support their argument with any authority and noted that there is no textual basis that district courts are the exclusive courts for suits involving the right to repurchase. *Id.*

SUMMARY OF ARGUMENT

Despite previously admitting that property it acquired for right-of-way by following Chapter 21 eminent domain procedure is no longer necessary for public use and therefore available for repurchase, the State refuses to comply with Chapter 21, Subchapter E and sell the land back, claiming sovereign immunity shields it from landowner enforcement. Instead, landowner recourse under these repurchase statutes, says the State, is limited to private entities with Legislatively granted eminent domain

authority. Sovereign immunity, however, should not apply in this case. But even if it did, the Legislature's consent to suit against the State based on repurchase rights is, at a minimum, implicit in the repurchase statutes. The State's position is based on a misinterpretation of Court precedent and hypertechnical application of sovereign immunity waiver analysis. Additionally, adopting the State's view would ignore the statutory history, fair meaning, and context of the repurchase statutes.

The State also argues that Pusok's claims do not fit within the scope of the repurchase statutes because (1) the State acquired the property by deed (as opposed to judgment) in the settlement of a State-filed eminent domain suit, (2) Pusok filed suit in county court at law (as opposed to district court), and (3) Pusok seeks only a portion of the property acquired by the State (not the entirety).

These arguments disregard the Legislature's intent and grant the State an improper advantage by allowing it to engage in speculative condemnations and unfairly profit from its citizens. In its brief, the State too narrowly reads this Court's precedent and Chapter 21 provisions regarding waiver and jurisdiction. The State's interpretation of the scope of the repurchase statutes also violates rules of construction, wrongly attaches importance to the form of settlement, violates this Court's directive to liberally construe condemnation protections for landowners, and invites eminent domain abuse.

This Court should deny review because the lower court correctly held sovereign immunity does not bar Pusok's repurchase claim and that such claim fits within the scope of the repurchase statutes.

ARGUMENT

A. Sovereign immunity does not apply to Chapter 21, Subchapter E repurchase claims.

Applying this Court's standard for applicability of sovereign immunity, the unavoidable conclusion is that Chapter 21, Subchapter E claims do not implicate sovereign immunity.

Because sovereign immunity is a common-law doctrine, this Court has recognized that the judiciary is responsible for defining sovereign immunity's boundaries and determining whether it applies in the first instance. *Hidalgo Cnty. Water Improvement Dist. No. 3 v. Hidalgo Cnty. Irrigation Dist. No. 1*, 669 S.W.3d 178, 183 (Tex. 2023). "That obligation—to evaluate whether the doctrine should be modified or abrogated under particular circumstances—remains squarely within the judiciary's province, while the Legislature determines the circumstances under which immunity is waived." *Id.* (citing *City of Dallas v. Albert*, 354 S.W.3d 368, 373 (Tex. 2011)).

In determining whether sovereign immunity is implicated, this Court considers the nature and purposes of the doctrine as guiding principles. *Id.* The modern justifications for the sovereign immunity doctrine are twofold: (1) protecting the public treasury by shielding tax resources from paying monetary judgments, and (2) preserving the separation of powers by respecting the Legislature's authority to apportion tax dollars to their intended purposes. *Id.*

Because the concerns underlying the Court's modern justifications for sovereign immunity are not threatened by repurchase claims under Subchapter E, sovereign immunity should not apply in this instance.

1. Repurchase claims under Chapter 21, Subchapter E do not threaten the public fisc.

The "core" modern justification for immunity is "protect[ing] the State…from lawsuits for money damages." *Brown v. Gay Eng'g, Inc. v. Olivares*, 461 S.W.3d 117, 121 (Tex. 2015). A repurchase claim under Subchapter E does not impose monetary damages or threaten the public fisc. Instead, it seeks the recovery of property taken by the condemnor (here, the State) that is not serving public use. *See* Tex. Prop. Code §§ 21.101-.103. It is the landowner transferring funds to the State to redeem this property, not the other way around. *Id.* at § 21.103. The landowner essentially refunds the State for the price it paid in acquiring the property. *Id.* Thus, no tax dollars are at risk and there are no concerns about diverting public funds to satisfy judgments. *See Hidalgo,* 669 S.W.3d at 183-84, 188 (holding that sovereign immunity does not apply in eminent domain proceedings); *City of Conroe v. San Jacinto River Auth.*, 602 S.W.3d 444, 458-59 (Tex. 2020) (holding that governmental immunity does not bar an EDJA *in rem* suit because it does not impose personal liability or require payment to satisfy a judgment. Therefore, it does not subject governments to the costs and consequences of improvident government actions).

This action also differs from trespass-to-try-title claims which benefit from sovereign immunity protection. *See Hidalgo*, 669 S.W.3d at 187-88. This is because a repurchase action—a unique procedure that is legislatively authorized—seeks recovery of property taken with reimbursement to the condemnor. It essentially allows redress of a taking not justly executed. If anything, the condemnor would lose any increased value that accrued in the property. But if no public interest is served, this value is not for the condemnor to keep. Alternatively, the value of the property could also decrease, thereby providing a monetary benefit to the condemnor upon repurchase. A repurchase action merely seeks a return to status quo and therefore does not endanger the public fisc. *See e.g., Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 375-77 (Tex. 2006) (holding that governmental entity does not have immunity against claims that offset recovery, in part because they do not require "tax resources to be called upon to pay a judgment").

Because Subchapter E repurchase claims do not attack the public fisc, sovereign immunity is not implicated.

2. Repurchase claims under Chapter 21, Subchapter E do not cause separation of power concerns.

Additionally, abrogating immunity in this context would not threaten separation of power principles sovereign immunity aims to protect. Immunity "preserves separation-of-powers principles by preventing the judiciary from interfering with the

Legislature's prerogative to allocate tax dollars." *Hays Street Bridge Restoration Grp., v. City of San Antonio*, 570 S.W.3d 697, 704 (Tex. 2019).

The Legislature granted the Texas Transportation Commission, through TxDOT, to acquire property in the name of the state. Tex. Transp. Code § 203.051 (a); 43 Tex. Admin. Code § 1.1(a). In connection with this grant, the Legislature provided that Chapter 21 of the Property Code applies to such acquisitions. Tex. Transp. Code at § 203.051(b). By granting TxDOT authority to acquire property on behalf of the state and applying Chapter 21 to such acquisitions, the Legislature defined procedural protections for eminent domain, including a specific mechanism for former landowners to repurchase their property acquired through eminent domain from the state under certain circumstances. The Legislature intended that the repurchase provisions apply to TxDOT.

There is no concern about the judiciary interfering with the Legislature's prerogative. The Legislature has already decided that landowners should be able to repurchase their property under certain conditions. There is also no issue about tax allocation because the former landowner pays the condemnor. Any concern about litigation or defense costs, if any, have already been contemplated by the Legislature. *See infra* at p. 35-36 (discussing Tabs 3 and 4). Wholly immunizing the State would undermine the Legislature's carefully constructed eminent domain "procedures and protections available to property owners", including the right to repurchase property from the government. *Alamo Heights ISD v. Jones*, 705 S.W.3d 317, 332 (Tex.App.—El

Paso 2024, no pet.); *FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619, 640 (Tex. 2008) (Willett, J., dissenting in part, concurring in part) ("Chapter 21 of the Property Code is the Legislature's comprehensive rulebook governing the taking of private property for public use."); *REME, L.L.C. v. State*, No. 23-0707, 2025 WL 567970, at *2 (Tex. Feb. 21, 2025) (per curiam) ("Texas Property Code Chapter 21 governs the State's exercise of its eminent domain power through condemnation.").

Considering the modern justifications for sovereign immunity, there is no basis for application of this doctrine to Chapter 21, Subchapter E repurchase claims.

3. The State effectively abandoned sovereign immunity protection by initiating the Condemnation Lawsuit.

This Court has also abrogated sovereign immunity in situations where the defendant makes a claim to offset or respond to state-initiated proceedings which is akin to Pusok's repurchase claim. Specifically, in *Reata,* this Court held that sovereign immunity does not protect the state from counterclaims that are "germane to, connected with, and properly defensive to" the State's own claims, but only to the extent that the counterclaims act as a monetary "offset" to the State's claim. 197 S.W.3d at 377; *but see State ex. rel. Best v. Harper,* 562 S.W.3d 1, 19 (Tex. 2018) ("…*Reata* does not hold that a monetary claim is a necessary condition for abrogation in every instance."). Additionally, in *Kinnear*, this Court held that the State abandoned its immunity from suit of defendant's attorney fee claim because the State initiated the proceeding and the defendant's claim was brought as a consequence of that proceeding. *Kinnear v. Tex.*

Comm'n on Human Rights ex rel. Hale, 14 S.W.3d 299, 300 (Tex. 2000). In *Harper,* the Court held that sovereign immunity does not protect the State from a counterclaim for attorney's fees under the TCPA. 562 S.W.3d at 19.

Pusok's repurchase claim is similar to those of defendants in *Reata, Kinnear,* and *Harper*. The State initiated the Condemnation Lawsuit under Chapter 21 and condemned the Subject Property. When the State determined the Subject Property was surplus, yet refused to sell it back to Pusok, Pusok asserted a repurchase claim under Chapter 21. Pusok's repurchase claim is "germane to, connected with, and properly defensive to" the State's Condemnation Lawsuit, and therefore supports a finding of abrogation of immunity in this instance.

B. The lower court, like the Fifth Court of Appeals, properly found waiver of sovereign immunity for suits based on the right of repurchase under Chapter 21.

Even if this Court concludes the sovereign immunity doctrine applies to Subchapter E claims, the Fourteenth Court correctly held that Chapter 21 provides a legislative waiver of sovereign immunity based on the right to repurchase. *JRJ Pusok I*, 693 S.W.3d at 684. While "a statute shall not be construed as a waiver of sovereign immunity unless the waiver is effected by clear and unambiguous language," Tex. Gov't Code § 311.034, this rule "cannot be applied so rigidly that the almost certain intent of the Legislature is disregarded." *Oncor Elec. Delivery Co. v. Dallas Area Rapid Transit*, 369 S.W.3d 845, 850 (Tex. 2012). Legislative intent remains the polestar of statutory construction. *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 3 (Tex. 2000). "'If a statute

leaves no reasonable doubt of its purpose,'" perfect clarity of waiver is not required. *Oncor*, 369 S.W.3d at 850 (citing *City of LaPorte v. Barfield*, 898 S.W.2d 288, 292 (Tex. 1995)). Thus, even in the absence of explicit waiver language, a statute may waive immunity where the Legislature's consent to suit is implicit in the statute. *Id.*; *see also Fernandez*, 28 S.W.3d at 3 ("The clear and unambiguous requirement is not an end in itself, but merely a method to guarantee that courts adhere to legislative intent. Therefore, the doctrine should not be applied mechanically to defeat the true purpose of the law.").

Other than this case and the *LBJ/Brookhaven* case, Pusok could not find another Texas case that discusses repurchase rights under Chapter 21, Subchapter E in the context of sovereign immunity.[7] However, Texas courts, including this Court, have provided that other Chapter 21 provisions waive sovereign immunity. *See FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619, 635 (Tex. 2008) (providing that Tex. Prop. Code § 21.019(b)—a provision under Chapter 21 that allows a property owner to recover fees and expenses from condemnor—"provides for waiver of sovereign immunity…"); *State v. Langley*, 232 S.W.3d 363, 368 (Tex.App.—Tyler 2007, no pet.) (providing that, where applicable, Tex. Prop. Code § 21.043(a)—a provision

[7] Although a handful of jurisdictions outside of Texas have statutory repurchase rights post eminent domain, Pusok could only find one case that discussed it in the context of sovereign immunity. *See Ferrell v. Dep't of Transp.,* 334 N.C. 650, 655, 435 S.E.2d 309, 313 (1993). In this case, the North Carolina Supreme Court held that the Department of Transportation (DOT) was not shielded from suit because "the legislature ha[d] implicitly waived the DOT's sovereign immunity to the extent of the rights afforded in [the repurchase statutes]." *Id.*

under Chapter 21 providing a claim for recovery of relocation expenses against condemnor—"is a sufficiently clear waiver of sovereign immunity."); *City of Killeen v. Oncor Elec. Delivery Co., LLC,* No. 03-23-00063-CV, 2025 WL 648521, at *9-10 (Tex.App.—Austin Feb. 28, 2025, no pet.) (holding that Chapter 21 expressly waives governmental immunity for a suit seeking declaratory and injunctive relief against a city's threatened exercise of its eminent domain authority).

For the reasons discussed below, the lower court correctly found legislative waiver of sovereign immunity for right to repurchase claims under Chapter 21, Subchapter E.

1. The context and placement of Subchapter E in Chapter 21 evince the Legislature's intent to waive sovereign immunity.

When considering the repurchase statutes, context is key. *See City of Conroe*, 602 S.W.3d at 451. Texas courts are required to construe words in light of their statutory context, considering the context and framework of the entire statute. *Pub. Util. Comm'n of Tex. v. Luminant Energy Co.,* 691 S.W.3d 448, 460 (Tex. 2024) ("We discern a statute's objectives from its plain text. That text must always be read in context—not isolation. We give meaning to every word in a statute, harmonizing each provision, while considering the context and framework of the entire statute, in order to meld its words into a cohesive reflection of legislative intent." (internal citations omitted and cleaned up)). When interpreting each provision, courts must consider the statutory scheme as a whole. *20801, Inc. v. Parker*, 249 S.W.3d 392, 396 (Tex. 2008). "'Contextual reading yields

the text's fair meaning,' our interpretative North Star." *Kelley v. Homminga*, 706 S.W.3d 829, 832 (Tex. 2025). "'Context,' after all, 'is a primary determinant of meaning.'" *Brown v. City of Houston*, 660 S.W.3d 749, 754 (Tex. 2023) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts 167* (2012)).

The placement of Subchapter E under the Chapter 21 Eminent Domain umbrella cannot be ignored. When a condemnor chooses to exercise its condemnation powers, Chapter 21 of the Property Code imposes a specific process that outlines "the procedures and protections available to property owners" in support of art. I, § 17 of the Texas Constitution. *Alamo Heights*, 705 S.W.3d at 332; *see also LBJ/Brookhaven*, 650 S.W.3d at 926 ("Chapter 21 of the Texas Property Code is entitled "Eminent Domain" and governs the procedures to be used when an entity takes a landowner's property via eminent domain for public use.").

Chapter 21, entitled Eminent Domain, is divided into five subchapters: A. Jurisdiction, B. Procedure, C. Damages and Costs, D. Judgment, *and* E. Repurchase of Real Property from Condemning Entity. Tex. Prop. Code § 21.001 *et seq*. It lays the framework for initiating and conducting eminent domain proceedings, including setting forth condemnor's pre-suit obligations of making a good faith offer and informing the landowners of their rights, the requirements for the filing of the eminent domain lawsuit, the procedure for special commissioners' hearings, and the process for repurchase of surplus property. *Id.* By embedding Subchapter E into this chapter, the Legislature intended that repurchase rights be another protection available to

landowners in eminent domain. *See Alamo Heights*, 705 S.W.3d at 336 (while acknowledging that headings of a chapter, subchapter, or section should not limit or expand the meaning of a statute, they "can inform of the Legislature's intent.") (citing *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68, 75 (Tex. 2016), *In re United Services Auto. Ass'n*, 307 S.W.3d 299, 307-08 (Tex. 2010), *Univ. of Texas Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 361 (Tex. 2004)).

Indeed, the State, through TxDOT, acquired the Subject Property for right of way by following Chapter 21 procedure by, among other things, sending pre-suit offer letters (CR.282-84, CR.286-87), issuing the Landowner's Bill of Rights (CR.289-93), and filing its Petition for Condemnation (CR.302-18). TxDOT's authority in acquiring the property in the name of the State comes from the Transportation Code. Tex. Transp. Code § 203.051(a). This statute also provides that Chapter 21, as a whole, applies to such acquisition. *Id.* at § 203.051(b). If the State is bound by Chapter 21 in acquiring property, the State is also bound by it for repurchase.

The Legislature's placement of Subchapter E within the eminent domain framework of Chapter 21 not only shows that the right to repurchase is an eminent domain protection but evinces the Legislature's intent to waive sovereign immunity and enable landowners to repurchase their property acquired by the State as part of this process and as an additional landowner protection. *See Alamo Heights*, 705 S.W.3d at 336 ("To assume that [a relocation assistance provision under Chapter 21] was just randomly placed in this sequence of statutes and is not tied to condemnation defies

reason."). To include a repurchase provision with no ability to enforce it would render Subchapter E meaningless.

2. The history of Subchapter E evinces the Legislature's intent to waive sovereign immunity.

The starting point for determining statutory meaning is to examine both the literal text and its context; and part of the statutory context includes statutory history. *In re J.S.*, 670 S.W.3d 591, 597 (Tex. 2023). Statutory history concerns how the law has changed and can clarify what the law means. *Keyes v. Weller*, 692 S.W.3d 274, 281 (Tex. 2024); *see also* Tex. Gov't Code § 311.023 (stating that a court may consider, among other matters, legislative history, the object sought to be attained, the enactment's circumstances, former statutory provisions, and a particular construction's consequences).

In 2003, the Texas Legislature amended Chapter 21 to add Subchapter E to the eminent domain framework after recognizing that no mechanism existed to allow a person whose property was acquired by the *government* to get the property back—other than a bidding process—when the project for which the property was acquired is cancelled. *LBJ/Brookhaven*, 650 S.W.3d at 926; Act of June 1, 2003, 78th Leg., R.S., ch. 1307, 2003 Tex. Gen. Laws 4739-4740 (S.B. 1708), **Tab 1.**

When initially enacted, Subchapter E included a provision making it inapplicable to right-of-way acquisitions under TxDOT's jurisdiction. But, in 2011, the Legislature

removed this exception. *See* Act of May 6, 2011, 82d Leg., R.S., ch. 81, § 19, 2011 Tex. Gen. Laws 354, 361-362 (S.B. 18), **Tab 2**.[8]

The House Research Organization Bill Analysis specifically provides that S.B. 18 "[a]mends Chapter 21, Property Code, by adding Subchapter E" and "[r]equires the governmental entity" to "offer to sell the property interest" and "to send by certified mail to each property owner a notice….", among other things. House Research Organization, Bill Analysis, S.B. 18, 82d Leg., R.S. (2011), **Tab 3** at p. 3. This analysis further provides:

> **Right of repurchase.** [The bill] would provide for the repurchase of condemned property at the price the entity paid at the time of the acquisition. …[The bill] would curtail speculative condemnations and establish an important safeguard against the excessive and reckless use of eminent domain authority. The bill would not confer any special advantage on an individual because it would allow the redress only of a taking that was not justly executed. It would create a strong disincentive against the speculative use of eminent domain by condemning authorities, including schools, municipal and county governments, state agencies, pipelines, and utilities. Condemning authorities would be discouraged from acquiring land through eminent domain for which there were no immediate plans. Takings completed on a speculative basis deprive current owners of the future value of their property.

Id. at p. 9 (underlines added).

[8] The Legislature also noted that Chapter 21, as amended by this Act, applies "…to a condemnation proceeding in which the condemnation petition is filed on or after the effective date [September 1, 2011] of this Act and to any property condemned through the proceeding. *See* Act of May 6, 2011, 82d Leg., R.S., ch. 81 § 24, 2011 Tex. Gen. Laws 354, 363 (S.B. 18) (emphasis added). This Act amended other provisions under Chapter 21, including sections 21.012 (Condemnation Petition), sections 21.023 (Disclosure of Information Required at Time of Acquisition). To claim that this phrase "through eminent domain" requires closure by judgment based on this phrase does carry weight when considering the other amendments.

The State, through TxDOT, acquired the Subject Property for right-of-way. There is no dispute that the 2011 version applies to this case. The 2011 deletion of the exception for right-of-way under Subchapter E shows the Legislature intended to allow former property owners to recover their property from the State in this instance. Additionally, the House Bill Analysis supports the Legislature's intent to waive sovereign immunity against the State for claims under Subchapter E. *Id.* ("[The bill] would create a strong disincentive against the speculative use of eminent domain by condemning authorities, including…state agencies…").

In connection with the above-referenced 2011 amendments, the Legislative Budget Board prepared a Fiscal Note which noted that TxDOT and other governmental entities, themselves, anticipated additional fees resulting from this amendment. *See* Fiscal Note, S.B. 18, 82d Leg., R.S. (May 4, 2011) ("Based on the analysis of [TxDOT], it is assumed the bill would result in increased costs for the acquisition of highway right-of-way through condemnation, primarily due to right of repurchase provisions...," but noting that "negative fiscal implications to the state cannot be determined."), **Tab 4**.

In 2011, the Legislature also added § 21.101(c) to Subchapter E, which provides that "[a] district court may determine all issues in any suit regarding the repurchase of a real property interest acquired through eminent domain by the former property owner or the owner's heirs, successors, or assigns." Tex. Prop. Code § 21.101 (c); *see also* Act of May 6, 2011, 82d Leg., R.S., ch. 81, § 19, 2011 Tex. Gen. Laws 354, 362 (S.B. 18),

Tab 2; House Research Organization, Bill Analysis, S.B. 18, 82d Leg., R.S. (2011), **Tab 3** at p. 4 ("Suits over the right of repurchase could be settled in a district court.").

For these reasons, the history of the repurchase statutes demonstrate that the Legislature intended to waive sovereign immunity for Pusok's claims.

3. The State mischaracterizes Court precedent regarding sovereign immunity waiver.

a. Sections 21.003 and 21.101 support a finding of waiver.

The State essentially argues that precedent regarding sovereign immunity concludes that waiver of sovereign immunity was never intended. But this is not the case. Two primary provisions in Chapter 21, along with the context, history, and fair meaning of this chapter, demonstrate clear and unambiguous waiver of immunity and authorize Pusok's repurchase claim under section 21.101(a):

- Section 21.003: "A district court may determine all issues, including the authority to condemn property and the assessment of damages, in any suit: (1) in which this state….is a party; and (2) that involves a claim for property…" Tex. Prop. Code § 21.003.

- Section 21.101(c): "A district court may determine all issues in any suit regarding the repurchase of a real property interest acquired through eminent domain by the former property owner or the owner's…assigns." Tex. Prop. Code § 21.101(c) .

In its brief, the State hyperbolizes Court precedent and applies a hypertechnical application of the clear and unambiguous standard, disregarding this Court's directive that it "cannot be applied so rigidly that the almost certain intent of the Legislature is disregarded." *Oncor*, 369 S.W.3d at 850. These two statutes must be considered with

"the surrounding provisions" and "how that text arises within the statute[s'] larger historical sweep." *Browns*, 660 S.W.3d at 754. Only then can this Court determine "the true purpose of the law." *Fernandez*, 28 S.W.3d at 3.

Section 21.003 supports a finding of waiver. While the statute concerns subject matter jurisdiction, nothing prohibits it from serving a dual role. *See City of Killeen,* No. 03-23-00063-CV, 2025 WL 648521, at *10. The statute also does not require the State to *already* be a party to the action. *Id.* ("Chapter 21 expressly waives immunity and grants the district court jurisdiction to consider all issues…in suits brought against governmental entities for various property-related claims, such as inverse condemnation and trespass—not only in suits that begin as condemnation proceedings brought by an entity with eminent-domain authority."). Subchapter E benefits from the powers granted in § 21.003. Chapter 21 grants power to the courts in Subchapter A, and Subchapters B, C, and D rely on those powers to carry out eminent domain-related matters. Without Subchapter A, these subchapters would be meaningless. This is equally true for Subchapter E. Further, courts are to presume the Legislature enacted the repurchase statutes with "'complete knowledge of'" the remainder of Chapter 21, "'and with reference to it.'" *In re Bridgestone Am.'s Tire Operations, LLC*, 459 S.W.3d 565, 572 (Tex. 2015) (quoting *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990)).

The same applies to section 21.101(c). Contrary to the State's argument, this statute does not "grant district courts additional authority when certain claims are already before it." State Br. at p. 14. There is no such requirement. Further, nothing

prohibits this statute from serving a dual role as both a waiver of immunity and grant of permissive jurisdiction.

b. In considering waiver, courts must determine whether there is another sensible construction of a statute absent waiver—not just any construction—while also acknowledging the surrounding framework and history.

The State also strains Court precedent, arguing that waiver cannot be found if the repurchase statutes could make any sense or serve any purpose—rational or not—if sovereign immunity is not waived. State Br. at p. 20-21. The State argues that a sovereign immunity waiver should not apply because repurchase rights could still be enforced against private entities with condemning authority.[9] State Br. at p. 21-22. This view, however, disregards Chapter 21 language and history, as well as the meaning of eminent domain. It also fails to find a "sensible construction" absent waiver. *See Fernandez*, 28 S.W.3d at 7; *Barfield,* 898 S.W.2d at 291 ("If a statute leaves no *reasonable* doubt of its purpose, we will not require perfect clarity, even in determining whether governmental immunity has been waived.") (emphasis added).

[9] The State previously argued that Pusok's ultra vires claim fails because "Madsen's actions have fallen within the letter of the law and the discretion granted to him," but now the State seems to indicate that an ultra vires action could be brought under the repurchase statutes. *See* Appellee's Brief at p. 7 and Appellees' Response to Motion for Rehearing at p. 2 - 5, *contra* State Br. at p. 14 and 22 ("And a properly pleaded and proved ultra vires claim could result in prospective relief under the repurchase statutes if a government official has 'acted without legal authority or failed to perform a purely ministerial act.'"). The State does not indicate what a "properly pleaded and proved" ultra vires claim under Chapter 21, Subchapter E would look like, however. It appears the State *now* concedes that ultra vires may be a proper avenue for relief despite previously claiming it barred. While Pusok did not cross petition the lower court's ruling on the ultra vires claim, Pusok recognizes exceptions to the law of the case doctrine that do not foreclose this Court's consideration of legal questions properly before it for the first time at a later date. *See e.g. City of Houston v. Jackson*, 192 S.W.3d 764, 769 (Tex. 2006).

The Legislature added Subchapter E after recognizing there was no mechanism allowing a person whose property was acquired by the government to get the property back if the government does not use it. Act of June 1, 2003, 78th Leg., R.S., ch. 1307, 2003 Tex. Gen. Laws 4739-4740 (S.B. 1708), **Tab 1.** And, in 2011, the Legislature removed an exception to Subchapter E applicability for *right-of-way under TxDOT jurisdiction,* which is pertinent to this case. *See* Act of May 6, 2011, 82d Leg., R.S., ch. 81, § 19, 2011 Tex. Gen. Laws 354, 361-62 (S.B. 18), **Tab 2**.

Moreover, eminent domain is the inherent power of a *governmental* entity to take private property for public use in exchange for compensation. *See discussion infra* at p. 52-54. While it is true that some private entities have eminent domain power, it is only because the Legislature (*i.e.*, the government) granted that power to them. TEX. CONST. art. I, § 17(a)(1)(B). The government is inherently and inextricably embedded within the exercise of eminent domain. The Legislature's placement of Subchapter E within a series of statutes that methodologically deal with eminent domain and indisputably apply to the State was of no mistake. The right of repurchase flows from the exercise of eminent domain and therefore from governmental action. *See Miles v. Texas Cent. R.R. & Infrastructure, Inc.*, 647 S.W.3d 613, 640 (Tex. 2022) (Huddle, J., dissenting, with whom Devine, J. and Blacklock, J. joined) ("Eminent domain…is an inherently sovereign power."). It is not a sensible construction of Subchapter E to conclude that it only applies to private condemnors considering the chapter as a whole.

The State's position also violates statutory construction rules. Chapter 21 applies to all condemnors[10] and the State followed Chapter 21 procedure in acquiring the underlying property. Accepting the State's position that all but one of five subchapters under Chapter 21's eminent domain framework applies to the State would violate Texas rules of construction in that it would fail to harmonize Subchapter E with the rest of the chapter. *In re Hall*, 286 S.W.3d 925, 929 (Tex. 2009) (holding that courts must apply a meaning that is in harmony and consistent with other statutory terms unless a more limited definition is apparent).

Moreover, Subchapter E, entitled Repurchase of Real Property From C*ondemning Entity*,[11] provides that, "[a] person from whom a real property interest is acquired by *an entity* through eminent domain for a public use, or that person's heirs, successors, or assigns, is entitled to repurchase the property…" upon certain conditions. Tex. Prop. Code § 21.101(a) (emphasis added). The Legislature repeatedly used "entity" and "condemnors" when referring to both public and private condemnors throughout this chapter. S*ee e.g.,* Tex. Prop. Code §§ 21.0111; 21.0113; 21.012; 21.023. However, the Legislature defined "private entity" and carved out a specific statute in Chapter 21 that

[10] Pusok notes that there are some Chapter 21 provisions dealing exclusively with private condemnors, but those sections explicitly refer to them as "private entit[ies]." *See e.g.,* Tex. Prop. Code §§ 21.0114; 21.0112 (a). There is no mention of private entities in Subchapter E.

[11]When enacted, Subchapter E was entitled Repurchase of Real Property from Governmental Entity. *See* **Tab 1**. The Legislature amended the title in 2011 to state Condemning Entity. This demonstrates the Legislature's intent to clarify that Subchapter E applies to both public and private condemning entities.

applies *only* to private entities with the power of eminent domain. *See* Tex. Prop. Code § 21.0114. The Legislature could have easily specified in Subchapter E if the intent was that repurchase rights be limited against private entities as it did in other sections of this chapter, but it did not. *See id.*; *Union Carbide Corp. v. Synatzske*, 438 S.W.3d 39, 52 (Tex. 2014) ("We take statutes as we find them, presuming the Legislature included words that it intended to include and omitted words it intended to omit."); *Sunstate Equip. Co., LLC v. Hegar*, 601 S.W.3d 685, 690 (Tex. 2020) (requiring that words and phrases be interpreted consistently); *Bush v. Lone Oak Club*, 601 S.W.3d 639, 647 (Tex. 2020) ("When 'a legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter,' its meaning in the subsequent statute will ordinarily be the same."). Application of this Court's statutory interpretation rules direct a finding that the Legislature intended for former landowners to enforce their repurchase rights against both private and public condemnors alike.

While this Court in *Taylor* held that the creation of a statutory cause of action for violating a patient's rights did not waive immunity for state-operated treatment facilities, based partly on the finding of meaningful application to private facilities without waiver, that case is distinguishable. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 700 (Tex. 2003). In making this conclusion, the Court focused on statutory and legislative history of the Act that indicated it was designed to address abuse in private facilities—not public ones. *Id.* Specifically, the Court noted that the Act's legislative history indicated

it was "designed to curb abuse in *private* mental health facilities," and there was an *absence* of statutory history to "'suggest that the legislature was even aware of the existence of similar abuse in public facilities.'" *Id.* (emphasis added). The opposite is true here, as both the statutory and legislative history of Subchapter E evince a design to empower landowners from governmental takings and curb governmental abuse of eminent domain.

The State also argues that another possible construction of the repurchase statutes that gives it meaning without waiver would be to read them as a system to give repurchase rights "[r]egardless of whether they are enforceable in court." *See* State Br. at p. 21. That is because "[p]resumably, entities…will comply with statutory requirements." *Id.* In other words, the State argues that even if landowners cannot legally enforce their rights, they can assume (or really, hope) the government will follow these statutes. Suggesting the Legislature granted a property owner repurchase rights with no ability to enforce the rights is absurd. This would improperly credit the Legislature with enacting a series of meaningless statutes and the Legislature "is never presumed to do a useless act." *See Hunter v. Fort Worth Capital Corp.,* 620 S.W.2d 547, 551 (Tex. 1981).

Moreover, the *Stetson* case cited by the State for this proposition is inapplicable. *In re Stetson Renewables Holdings, LLC*, 658 S.W.3d 292 (Tex. 2022). In *Stetson*, the Court held that taxpayers lacked a judicially enforceable right to compel the Comptroller of Public Accounts to act on applications for participation in a property-tax incentive

program before the program's expiration. *Id.* at 294-95. In so holding, the Court focused largely on the Comptroller's significant efforts in complying with the law despite resource constraints. *Id.* at 295-96. This case is different. The State refuses to comply with the repurchase statutes even though it formerly admitted that the property is unnecessary surplusage. It has offered no excuse for noncompliance, other than finding the repurchase statutes inapplicable. The instant case also implicates fundamental property rights whereas the *Stetson* case did not. *Id.* at 297-99.

The State also mischaracterizes this Court's precedent, claiming it stands for the proposition that no waiver of sovereign immunity can be found if text would make *any* sense absent waiver while failing to acknowledge the importance of statutory history and surrounding context in applying this Court's standard for waiver. State Br. at p. 20-21 (citing *Oncor*, *Barfield*, and *Fernandez*).

Specifically, in *Barfield,* the Court examined potential sources of immunity waiver for former employees' claims under the Anti-Retaliation Law, which prohibits employees from discharging employees for filing workers' compensation claims. The Court noted that the Legislature "used language strongly suggesting a waiver of immunity in contexts in which any other intention is hard to discern." 898 S.W.2d at 292. Through its analysis, the Court examined the history of workers' compensation as it applies to governmental entities and focused, in part, on the 1981 Amendment to the Political Subdivisions Law. *Id.* at 295. This amendment "adopted" the Anti-Retaliation Law but stated that *cities* that provided "ultimate access to the district court for wrongful

discharge" were exempted from the Anti-Retaliation Law. *Id.* at 297. The Court reasoned that this option implied the Legislature intended to waive immunity for at least reinstatement and backpay, otherwise cities would have no incentive to provide their own remedies. *Id.* at 296-97. The Court ultimately held that this 1981 version (and the 1989 version) of the Political Subdivisions Law waived political subdivisions' immunity from liability for anti-retaliation violations. *Id.* at 296-98. The Court's reasoning was that the Legislature must have intended to waive immunity because it could not discern any *sensible* construction of those provisions unless immunity had been waived. *Id.* at 296-98.

Further, in *Fernandez,* the Court considered whether state agencies are liable for violations of the Anti-Retaliation Law in the Labor Code. 28 S.W.3d at 2. The Court focused on section 15(b) of the State Applications Act (SAA), which provided that "For purposes of [the Anti-Retaliation Law], the individual [state] agency shall be considered the employer" and held that sovereign immunity is waived for state agencies. *Id.* at 2-4, 9. The Court based its holding on the finding that this language would serve no purpose if immunity were not waived, along with consideration of statutory history and surrounding provisions. *Id.* at 4-9. The Court also concluded that there was no other "sensible" or "reasonable" construction absent waiver. *Id.* at 6-7.

Likewise, in *Oncor*, the Court focused on whether section 37.053(d) of the Utilities Code, a provision that extended rights to an electric corporation to condemn property, amounted to a waiver of governmental immunity. 369 S.W.3d at 850. In

finding waiver, the Court emphasized the statute's specific and restricted rights and found that it "cannot *reasonably* be read to tacitly condition their exercise on a separate waiver of immunity." *Id.* (emphasis added). The Court also noted that the statute at issue specifically exempted "land owned by the state" from condemnation, indicating that other governmental entities' land was intended to be a proper subject of condemnation. *Id.* at 851.

Contrary to the State's assertions, these cases do not direct this Court to apply sovereign immunity if the repurchase statutes could serve *any purpose* absent waiver. Rather, they direct the Court to determine whether a *reasonable* or *sensible* construction of a statute exists absent waiver, considering not only the text but also statutory history, context, and surrounding provisions.

Considering sections 21.003 and 21.101(c) and the rest of Chapter 21, the Legislature clearly and unambiguously provided for waiver of sovereign immunity for Subchapter E repurchase claims, as any other proffered basis for the repurchase statutes does not make sense. Accordingly, the lower court properly found a legislative waiver of sovereign immunity for Pusok's repurchase claim.

4. The *Hillman* factors do not support a finding of sovereign immunity.

In *Hillman,* this Court identified five factors to consider in determining whether there is an implicit legislative waiver of sovereign immunity. *Hillman v. Nueces Cnty.*, 579 S.W.3d 354, 360, 363 (Tex. 2019). If applicable, these factors support a finding of waiver too.

Under the first factor, courts are to consider whether Chapter 21 waives immunity without doubt, even if not a model of clarity. *Hillman*, 579 S.W.3d at 360. Chapter 21, titled "Eminent Domain," is divided into five subchapters that outline the procedures and protections available to property owners with respect to eminent domain. Tex. Prop. Code § 21.001 *et seq*. The Legislature added Subchapter E, sections 21.101-.103, under this "Eminent Domain" umbrella "to fill an unjust gap that existed in the law by allowing landowners to reclaim property acquired by the government through eminent domain under certain conditions." *LBJ/Brookhaven*, 650 S.W.3d at 931. The Legislature has amended Subchapter E over time, notably *removing* an exemption to Subchapter E applicability for *right-of-way under TxDOT jurisdiction* and inserting a provision stating that district courts may determine all issues in any suit regarding repurchase in 2011. **Tab 2.**

The entirety of Chapter 21, including sections 21.003 and 21.101(c), as well as the context, statutory history, and legislative purpose of the repurchase statutes as discussed *supra,* demonstrate that the Legislature clearly and unambiguously intended to waive immunity and allow a former landowner (or assigns) to enforce its repurchase rights against the State, dictating a finding of waiver.

Under the second *Hillman* factor, courts are to resolve any ambiguity in favor of retaining immunity. *Hillman*, 579 S.W.3d at 360. The State has not pointed to any specific ambiguity other than an argued absence of a clear waiver and Pusok finds none. Where there is no ambiguity, as is here, this factor dictates a finding of waiver.

Under the third *Hillman* factor, courts are to find waiver if the Legislature requires the governmental entity to be joined in this suit. *Id.* To enforce its rights under Subchapter E, Pusok must join the State, as the condemning entity, in this case. *See* Tex. Prop. Code §§ 21.003 ("…in which this state…is a party…"); 21.101 (a), (c); Tex. R. Civ. P. 39. Accordingly, this factor supports a finding of waiver.

Under the fourth *Hillman* factor, courts are to consider whether the Legislature provided an objective limitation on the governmental entity's potential liability. *Hillman*, 579 S.W.3d at 360. Under the repurchase statutes, the State's liability is limited to offering to sell and allowing former landowners to buy back their property for the price the State initially paid. Tex. Prop. Code §§ 21.102; .103. This is the relief sought by Pusok. Pusok is not seeking a monetary judgment. Rather, it seeks to not only recover the property but reimburse the State in exchange. Thus, the State is exposed to limited and defined liability, supporting a finding of waiver.

Under the fifth *Hillman* factor, courts are to consider whether the statutory provisions would serve any purpose absent waiver of immunity. *Hillman*, 579 S.W.3d at 360. As noted by *LBJ/Brookhaven*, "[t]he purpose of the statute is clear, and it is the only purpose…It would make little sense to give landowners the right to repurchase property previously taken by eminent domain yet deny them the ability to exercise the right." 650 S.W.3d at 932. The State argues otherwise, claiming that landowners could still bring a claim, but it would have to be "against private entities that acquire land through eminent domain." *See* State Br. at p. 22. Or, alternatively, they could suggest government action

for repurchase without any enforcement rights. *Id.* at 21. But these views disregard the statutory history and legislative intent of Chapter 21, as well as the meaning of eminent domain. *See supra* at p. 31-37. It also fails to find a *sensible* purpose absent waiver given the context and framework of Chapter 21 and the meaning of "condemning entity" and "entity" throughout the Chapter. *Fernandez,* 28 S.W.3d at 6.

Accordingly, the lower court properly found legislative waiver for Pusok's repurchase claim.

C. Pusok's repurchase claim falls within the scope of Chapter 21, Subchapter E.

The State argues that the lower court expanded waiver of sovereign immunity because (1) Pusok filed this suit in county court at law and Chapter 21 mentions only district courts; (2) the State acquired the property by settlement of the Condemnation Lawsuit and thus did not acquire it "through eminent domain"; and (3) Pusok seeks to recover a portion of the property acquired—not the entirety. These arguments are without merit.

1. Pusok properly filed its repurchase claim in the trial court.

The State argues that repurchase claim must be filed in district court because sections 21.003 and 21.101(c) refer only to district courts and limit waiver to those courts. But these statutes do not grant exclusive authority to district courts to hear Pusok's repurchase claim nor do they obligate Pusok to file its claim in district court to benefit from waiver. As the lower court properly concluded, these sections, by use of "may," *permit* district courts to hear these matters, but in no way require it. *JRJ Pusok II*,

693 S.W.3d at 861. Accordingly, these provisions do not indicate that the Legislature conditioned its consent to Pusok's repurchase claim on the filing of such a suit in district court.

The lower court's finding of waiver of sovereign immunity under Chapter 21 also does not limit review to this chapter's provisions in determining whether the trial court has jurisdiction over Pusok's claims. The provisions may also be examined with reference to other applicable jurisdictional statutes, which the lower court properly considered. *Id.; JRJ Pusok I,* 693 S.W.3d at 688; *see also* Tex. Gov't Code § 311.026. The Government Code, for example, provides that, "[i]n addition to other jurisdiction provided by law, a county civil court at law has jurisdiction to: hear a suit for the recovery of real property." Tex. Gov't Code § 25.1032(d)(6). As the lower court correctly held, "Pusok has brought a suit for the recovery of real property that was previously taken through eminent domain." *JRJ Pusok I,* 693 S.W.3d at 688; *JRJ Pusok II,* 693 S.W.3d at 861. Therefore, the trial court has jurisdiction to hear Pusok's Chapter 21 claim and there is no basis for the State's claim that district courts can only hear these claims.

Chapter 21 does not condition waiver of sovereign immunity on the filing of suit in district court and the Legislature has properly conferred the trial court jurisdiction over Pusok's claims. The lower court correctly held that the trial court has jurisdiction over Pusok's repurchase claim. *See also JRJ Pusok II*, 693 S.W.3d at 861; **Tab 3** at p. 4

("Suits over the right of repurchase *could* be settled in a district court.") (emphasis added).

Even if this Court found that district courts have exclusive jurisdiction over Pusok's claims, the trial court's dismissal of Pusok's claim *with prejudice* was improper. Instead, the trial court should have transferred these claims to district court. *See* Tex. Prop. Code § 21.002. But, even if this Court did not find transfer required, Pusok should be able to refile its claims pursuant to Tex. Civ. Prac. & Rem. Code § 16.064(a) upon removal of "with prejudice" language. *Sanders v. Boeing Co.*, 680 S.W.3d 340, 356-57 (Tex. 2023).

2. The State acquired the Subject Property "through eminent domain."

The State argues that because it settled the Condemnation Lawsuit by deed as opposed to judgment, the State did not acquire the Subject Property "through eminent domain" and therefore Pusok's repurchase claim does not trigger section 21.101(a). This position is unfounded, however.

Courts are to "discern a statute's objectives from its plain text." *Luminant*, 691 S.W.3d at 460. "The text must always be read 'in context—not isolation.'" *Id.* (citing *State v. Hollins*, 620 S.W.3d 400, 407 (Tex. 2020)). Courts are to "tether" themselves "'to the *fair meaning* of the text,' not the hyperliteral meaning of each word in the text.'" *See In re Dallas County*, 697 S.W.3d 142, 158 (Tex. 2024) (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 356 (2012)).

Section 21.101(a) provides that "[a] person from whom a real property interest is acquired by an entity *through eminent domain* for a public use, or that person's…assigns, is entitled to repurchase the property…" upon certain conditions. Tex. Prop. Code § 21.101 (a)(1)-(3) (emphasis added).

In reading the fair meaning of section 21.101(a) within the context of Chapter 21, the lower court correctly held that property acquired in settlement of an eminent domain proceeding qualifies for purposes of the repurchase statutes and a judicial decree is not necessary for the exercise of eminent domain. *JRJ Pusok I,* 693 S.W.3d at 684-85.

a. All that is required for a property to be acquired "through eminent domain" is a transfer of land in exchange for compensation.

Acquisition of property "through eminent domain" does not require a judicial decree. Under Texas common law, "Eminent domain is defined to be: 'The sovereign power vested in the state to take private property for public use, providing first a just compensation therefor.'" *City of Austin v. Nalle*, 102 Tex. 536, 538, 120 S.W. 996, 996 (1909). And a "take" or "taking" is an appropriation of private property for public use by a governmental authority, completed upon payment being made by the authority and accepted by the landowner. *City of San Antonio v. Grandjean,* 41 S.W. 477, 478-79 (Tex. 1987). "An agreement to convey property to a governmental authority for public purpose has the same effect as a formal condemnation proceeding." *City of Carrollton v. Singer*, 232 S.W.3d 790, 796-798 (Tex.App.—Fort Worth 2007, pet. denied); *see also*

Weingarten Realty Inv'rs v. Albertson's, Inc., 66 F. Supp. 2d 825, 844 (S.D. Tex. 1999), *aff'd*, 234 F.3d 28 (5th Cir. 2000) (interpreting Texas law).

Additionally, Black's Law Dictionary defines "eminent domain" as "[t]he inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking." Eminent Domain, Black's Law Dictionary (12th ed. 2024); *Texas Dep't of Crim. Just. v. Rangel*, 595 S.W.3d 198, 208 (Tex. 2020) (noting that courts look to dictionary definitions to determine meaning).

Considering the above, the Subject Property was acquired through eminent domain. The State, by and through TxDOT, followed Chapter 21 procedure and acquired the Subject Property for public use:

- The State complied with Tex. Prop. Code § 21.0113's bona fide offer requirement by providing offer letters and stating that if rejected "eminent domain proceedings will be initiated by the State." CR.282-284, 286-287.

- The State issued the Landowner's Bill of Rights, indicating that the Subject Property was to be acquired for public use. CR.289-293.

- The State filed the Petition for Condemnation, asserting the Subject Property was to be acquired for public use as part of the state highway system and that the State was entitled to "condemn" such land. CR.303-304.

- Landowners signed TxDOT's Special Warranty Deed for the Subject Property, noting the State's authority to purchase the land for highway right-of-way public use. CR.340.

Finally, payment was made and accepted. CR.295.

Contrary to the State's assertions, the State's focus on its urged meaning of "through" does not necessitate finalization to judgment. First, the interpretation of "through" cannot be examined without also considering "eminent domain." But even despite this, "through" does not require completion from beginning to end, as the State argues. "Through" is also commonly defined as "because of" or "by means of." *See e.g.,* Through, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/through (last visited Apr. 7, 2025) (defining "through" and providing it is "used as a function word to indicate means, agency, or intermediacy," such as "by means of" or "because of"); *see also* Through, Dictionary.com, https://www.dictionary.com/browse/through (last visited Apr. 7, 2025) (defining "through" as "by the means or instrumentality of; by the way or agency of" and "by reason of or in consequence of").

b. The State conceded that the Subject Property was acquired "through eminent domain" by following Chapter 21 procedure.

Section 203.051 of the Texas Transportation Code, which grants authority to the commission to acquire property, provides that "Chapter 21, Property Code, applies to an acquisition by eminent domain." Tex. Transp. Code § 203.051 (b). As discussed above, this Chapter lays the groundwork for eminent domain practice. *See infra* at p. 31-34.

The State conceded that Chapter 21 applies to the Surplus Land and that the Subject Property was acquired by eminent domain as it followed the procedures set

forth under Chapter 21 by, among other things, sending initial and final offer letters and the Landowner Bill of Rights, as well as filing the petition to condemn the Subject Property. *See* Tex. Prop. Code §§ 21.0111-21.0113; 21.012. The language included in the State's documents further support such a finding, excerpts of which are provided below:

- The December 2013 final offer letter states that if the landowner chose to reject the State's offer for the property, "eminent domain proceedings will be initiated by the State." CR.286-287.

- The Landowner Bill of Rights, mandated by Section 21.0112 of the Property Code pre-suit, states that it "applies to any attempt by the government or a private entity to take your property" CR.290. It also provides that "[i]f you and the condemning entity do not agree on the value of your property, the entity may begin condemnation proceedings. Condemnation is the legal process that eligible entities utilize to take private property. It begins with a condemning entity filing a claim for your property in court…" CR.291. It further advises of the repurchase rights owed to landowners under the Texas Property Code, which are the subject of this lawsuit: "*If private property was condemned by a governmental entity,* and … the property becomes unnecessary for public use within ten years, *landowners may have the right to repurchase the property for the price paid to the owner* by the entity at the time the entity acquired the property through eminent domain." CR.293 (emphasis added).

- The petition in the Condemnation Lawsuit states the following:

    - "…the Texas Transportation Commission has further found and determined that the tract(s) of land and improvements, if any, described in Exhibit "A" [Parcel 112] is/are suitable for public use for such purposes the State highway designated as SH 99 and it is intended to use said land for said purposes, and it is necessary to acquire fee simple title to said land, and improvements…to be used on said State highway designated in Exhibit "A" [Parcel 112], as a part of the State highway system…" CR.303.

- "Plaintiff is entitled to condemn the fee simple title in such land and improvements, if any, for said purposes aforesaid and asks that he same be condemned for such purposes aforesaid…" CR.303.

- "That Plaintiff and Defendant have been unable to agree upon the value of said real estate and interests therein to be condemned or the damages occasioned by the acquisition of such land and improvements, if any, and asks that Special Commissioners be appointed as provided by law to assess the damages to the owner." CR.305.

The State's actions taken in acquiring the Subject Property by following Chapter 21 procedure and filing the Condemnation Lawsuit, as well as prior statements, confirm that the State acquired the Subject Property through eminent domain thereby triggering Pusok's Section 21.101(a) rights.

The State also argues that the language in the special warranty deed providing that the parties settled "as to the value of the property conveyed in order to avoid ED proceedings and the added expense of litigation," CR.152, demonstrates that the Subject Property was not acquired "through eminent domain." This statement proves no such thing. It merely states the obvious reason for settlement: The parties intended to avoid the uncertainty of continued litigation and additional legal expenses. It does not mean the State did not acquire the Subject Property through eminent domain. Notably, the State omits that this deed also mentions the State's authority to purchase the land for highway right-of-way public use. CR.151.

c. The manner of settlement of the Condemnation Lawsuit should have no bearing on whether repurchase rights attach to the property.

The lower court correctly found that Landowners did not voluntarily convey the Subject Property to the State. *JRJ Pusok I*, 693 S.W.3d at 685. The State filed a lawsuit against Landowners to condemn their property. Landowners were "powerless to stop the taking" and the transaction was "fundamentally involuntary." *Id.*.

The State has argued that Landowners' decision to convey the Subject Property "voluntarily" by deed as opposed to agreed judgment indicates that the Subject Property was not "acquired through eminent domain" and therefore Subchapter E's repurchase rights do not attach to the Subject Property. CR.248; 254.

While Landowners signed a special warranty deed pursuant to Rule 11 agreement to convey the Subject Property to the State in 2014, it was anything but voluntary. After the State filed the Condemnation Lawsuit against Landowners for the acquisition of the Subject Property, Landowners and the State settled. CR.35-7. To complete the settlement, Landowners signed the special warranty deed conveying the Subject Property to the State, CR.340-57, and payment was made by the State and accepted by Landowners in exchange. CR.359-60. Landowners did not *voluntarily* convey the Subject Property to the State as the State filed an eminent domain lawsuit against Landowners to condemn their property after Landowners refused to accept the State's offers to purchase the Subject Property. It was the State's exercise of its eminent domain power that precipitated the settlement.

Moreover, the manner in which the State's eminent domain lawsuit was resolved (by settlement and deed or judgment), especially after the filing of a Condemnation Lawsuit, should not impact a landowner's ability to repurchase property via Subchapter E as it is merely a matter of form. The decision to finalize the Condemnation Lawsuit by deed (as opposed to judgment) should not constitute a forfeiture of a landowner's Subchapter E repurchase rights. The State's argument is also contrary to public policy as it would discourage parties from resolving cases outside of trial, especially since settlement by deed and dismissal as opposed to trial (and even judgment) requires less judicial resources. *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 178 (Tex. 1997) ("Texas law favors and encourages voluntary settlements and orderly dispute resolution.").

In *Alamo Heights*, the court considered whether Chapter 21 relocation provisions applied to property acquired by a school district when it purchased the property through another entity to avoid revealing its identity and therefore did not follow Chapter 21 procedure or initiate eminent domain. *Alamo Heights*, 705 S.W.3d at 322-23, 335. After considering the placement of these relocation provisions in the Chapter 21 statutory scheme governing eminent domain, the court determined that they only apply to eminent domain proceedings. *Id.* at 335-43. The court then held that the property was *not* acquired by condemnation because the district "did not use its eminent domain authority to purchase the apartment complex," *Id.* at 343, noting that "preliminary steps…such as making a good faith offer and informing the prospective seller of their

rights" are "…predicate steps [that] must occur as an important part of the condemnation process[,]" and those did not occur here. *Id.* at 339. The court went on to say,

> And while true that the landowner might accept the governmental entity's good faith offer—and a condemnation suit might never be filed—that does not mean that condemnation was never a part of the process. A landowner negotiating with a governmental entity is surely on a different footing from those in a typical arm's length negotiations. A landowner who rejects the government's offer cannot always just walk away from the table.

Id. Because the court held that these sections apply only to condemnation proceedings and because the district acquired the property without use of Chapter 21 procedure, the court held that the residents' claims could not survive. *Id.* at 343.

The reasoning in *Alamo Heights* regarding context and the involuntary nature of eminent domain practice supports the lower court's finding that the State acquired the Subject Property through eminent domain. The State initiated eminent domain against Landowners and just because Landowners settled with the State "does not mean that condemnation was never a part of the process." *Id.* at 339.

For these reasons, Landowners' decision to settle the Condemnation Lawsuit by one form over another should not impact eligibility to repurchase the Surplus Land under the repurchase statutes.

d. The interpretation of section 21.101(a)'s "through eminent domain" should be construed for the benefit of landowners.

Although there is a scarcity of case law regarding Chapter 21, Subchapter E specifically, the Texas Supreme Court has held that, in interpreting Chapter 21, courts should liberally construe the chapter's protections for the benefit of landowners. *See State v. Bristol Hotel Asset Co.*, 65 S.W.3d 638, 647 (Tex. 2001) ("We liberally construe the Property Code's protections for the landowner's benefit."); *John v. State*, 826 S.W.2d 138, 140 (Tex. 1992); *State v. PR Invs. & Specialty Retailers, Inc.*, 180 S.W.3d 654, 665 (Tex.App.—Houston [14th Dist.] 2005) (*en banc*), *aff'd*, 251 S.W.3d 472 (Tex. 2008) ("Chapter 21 of the Texas Property Code sets forth the procedures for condemnation proceedings … In construing this statute, we must keep in mind that the procedures for condemnation should be strictly followed and their protections liberally construed for the benefit of landowners.").

This principle should not only extend to the sovereign immunity analysis but also to the interpretation of section 21.101(a) to conclude that the State's actions here (suing Pusok to condemn the Subject Property which concluded by settlement) amounted to acquisition of the Subject Property "through eminent domain." Otherwise, a landowner would forfeit its repurchase rights merely because it chose to settle by one form over another.

***

While the State cites a handful of statutes for the proposition that "[o]ther Texas statutes also recognize a distinction between property that is purchased and property that is acquired by eminent domain…", these statutes are, as the lower court noted, outside of Chapter 21 and in different codes altogether. *JRJ Pusok I,* 693 S.W.3d at 685. The *State v. Holland* opinion, cited by the State, also fails to contradict the lower court's ruling on this issue. In this case, a patent holder brought an inverse condemnation claim against the State resulting from its use of the holder's patent technology. 221 S.W.3d 639 (Tex. 2007). The issue in *Holland* was narrow and dealt with whether the State had the requisite intent to support an inverse claim. *Id.* at 643. The Court held that because the "State accepted [the holder's] product and his services under color of its contracts" with the holder's companies, the State lacked the requisite intent and was not subject to liability under such a claim. *Id.* at 644.

Moreover, the State is correct that section 203.051(a) provides that the Texas Transportation Commission is authorized to obtain property "by purchase" or "by the exercise of eminent domain," but that does further the State's argument. Just as in the *Alamo Heights* case, as well as many more instances, an entity can acquire property without initiating the eminent domain process. Here though, the State followed Chapter 21 procedure by not only sending offer letters but filing the Condemnation Lawsuit.

In the Condemnation Lawsuit, the State used its inherent power to take Landowners' property for public use, in exchange for compensation and thus acquired it "through eminent domain." Nothing within the meaning of this phrase requires the

conclusion that the State had to acquire the Subject Property by judgment—instead of agreement after the State used its condemnation power in filing the Condemnation Lawsuit—to be afforded repurchase rights.

3. The repurchase statutes do not preclude Pusok from purchasing a portion of the property acquired rather than the entirety.

Without any authority or support, the State claims that Pusok's repurchase claim is barred because Pusok seeks to repurchase a portion of the property acquired rather than the property in entirety. The State's argument is without merit. First, the State's position does not support the Legislature's intent. The repurchase statutes were enacted as a means of returning some power to property owners after their land was acquired by the government and as a means of curbing speculative takings. Act of June 1, 2003, 78th Leg., R.S., ch.1307, 2003 Tex. Gen. Laws 4739-4740 (S.B. 1708), **Tab 1**; Act of May 6, 2011, 82d Leg., R.S., ch. 81, § 19, 2011 Tex. Gen. Laws 354, 361-362 (S.B. 18), **Tab 2**; House Research Organization, Bill Analysis, S.B. 18, 82d Leg., R.S. (2011), **Tab 3** at p. 3-4, 9. Should the repurchase statutes only apply to the entirety of the property acquired, condemnors would be incentivized to acquire more property than necessary and make some sort of use of a mere percentage to insulate themselves from landowner recourse. This interpretation would not only give rise to significant abuse and malfeasance but undermine the entire purpose of Subchapter E.

Prayer

Pusok respectfully asks the Court to deny the State's petition for review and that Pusok receive all other relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3) and based on a word count run in Microsoft Word, I hereby certify that this brief contains 12,546 words, not including Rule 9.4(i)(1)'s exempted portions. This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text, except for any footnotes, which are in 12-point typeface.

/s/ Caroline H. Russe

CERTIFICATE OF SERVICE

On the 25th day of April 2025, I electronically filed this Respondent's Brief on the Merits with the Clerk of Court using the eFile.TXCourts.gov electronic filing system which will send notification of such filing to the following:

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APPENDIX

Tab 1:	Act of June 1, 2003, 78th Leg., R.S., ch. 1307, 2003 Tex. Gen. Laws 4739-4740 (S.B. 1708)
Tab 2:	Act of May 6, 2011, 82d Leg., R.S., ch. 81, § 19, 2011 Tex. Gen. Laws 354, 361-362 (S.B. 18)
Tab 3:	House Research Organization, Bill Analysis, S.B. 18, 82d Leg., R.S. (2011)
Tab 4:	Fiscal Note, S.B. 18, 82d Leg., R.S. (May 4, 2011)

TAB “1”

SECTION 9. Subchapter C, Chapter 24, Government Code, is amended by adding Section 24.566 to read as follows:

Sec. 24.566. 422ND JUDICIAL DISTRICT (KAUFMAN COUNTY). The 422nd Judicial District is composed of Kaufman County.

SECTION 10. (a) The 413th and 416th judicial districts are created September 1, 2003.

(b) The 417th Judicial District is created September 15, 2004.

(c) The 414th, 415th, 419th, 420th, 421st, and 422nd judicial districts are created September 1, 2005.

SECTION 11. (a) Except as provided by Subsections (b) and (c) of this section, this Act takes effect September 1, 2003.

(b) Section 5 of this Act takes effect September 15, 2004.

(c) Sections 2, 3, 6, 7, 8, and 9 of this Act take effect September 1, 2005.

Passed the Senate on May 15, 2003: Yeas 31, Nays 0; May 31, 2003, Senate refused to concur in House amendment and requested appointment of Conference Committee; May 31, 2003, House granted request of the Senate; June 1, 2003, Senate adopted Conference Committee Report by a viva-voce vote; passed the House, with amendment, on May 28, 2003, by a non-record vote; May 31, 2003, House granted request of the Senate for appointment of Conference Committee; June 1, 2003, House adopted Conference Committee Report by a non-record vote.

Approved June 21, 2003.

Effective September 1, 2003, except § 5, effective September 15, 2004 and §§ 2, 3, 6 through 9, effective September 1, 2005.

CHAPTER 1307

S.B. No. 1708

AN ACT

relating to the repurchase of real property acquired by a governmental entity through eminent domain.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Subchapter B, Chapter 21, Property Code, is amended by adding Section 21.023 to read as follows:

Sec. 21.023. DISCLOSURE OF INFORMATION REQUIRED AT TIME OF ACQUISITION. A governmental entity shall disclose in writing to the property owner, at the time of acquisition of the property through eminent domain, that:

(1) the owner or the owner's heirs, successors, or assigns are entitled to repurchase the property if the public use for which the property was acquired through eminent domain is canceled before the 10th anniversary of the date of acquisition; and

(2) the repurchase price is the fair market value of the property at the time the public use was canceled.

SECTION 2. Chapter 21, Property Code, is amended by adding Subchapter E to read as follows:

SUBCHAPTER E. REPURCHASE OF REAL PROPERTY FROM GOVERNMENTAL ENTITY

Sec. 21.101. APPLICABILITY. (a) Except as provided in Subsection (b), this subchapter applies only to a real property interest acquired by a governmental entity through eminent domain for a public use that was canceled before the 10th anniversary of the date of acquisition.

(b) This subchapter does not apply to a right-of-way under the jurisdiction of:

(1) a county;

(2) a municipality; or

(3) the Texas Department of Transportation.

Sec. 21.102. NOTICE TO PREVIOUS PROPERTY OWNER AT TIME OF CANCELLATION OF PUBLIC USE. Not later than the 180th day after the date of the cancellation of the public use for which real property was acquired through eminent domain from a property owner under Subchapter B, the governmental entity shall send by certified mail, return receipt requested, to the property owner or the owner's heirs, successors, or assigns a notice containing:

(1) an identification, which is not required to be a legal description, of the property that was acquired;

(2) an identification of the public use for which the property had been acquired and a statement that the public use has been canceled; and

(3) a description of the person's right under this subchapter to repurchase the property.

Sec. 21.103. RESALE OF PROPERTY; PRICE. (a) Not later than the 180th day after the date of the postmark on the notice sent under Section 21.102, the property owner or the owner's heirs, successors, or assigns must notify the governmental entity of the person's intent to repurchase the property interest under this subchapter.

(b) As soon as practicable after receipt of the notification under Subsection (a), the governmental entity shall offer to sell the property interest to the person for the fair market value of the property at the time the public use was canceled. The person's right to repurchase the property expires on the 90th day after the date on which the governmental entity makes the offer.

SECTION 3. (a) Subchapter E, Chapter 21, Property Code, as added by this Act, applies only to a real property interest acquired by a governmental entity on or after the effective date of this Act.

(b) A real property interest that was acquired by a governmental entity before the effective date of this Act through eminent domain for a public use is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 4. This Act takes effect January 1, 2004.

Passed the Senate on May 16, 2003: Yeas 31, Nays 0; May 31, 2003, Senate refused to concur in House amendments and requested appointment of Conference Committee; May 31, 2003, House granted request of the Senate; June 1, 2003, Senate adopted Conference Committee Report by a viva-voce vote; passed the House, with amendments, on May 28, 2003, by a non-record vote; May 31, 2003, House granted request of the Senate for appointment of Conference Committee; June 1, 2003, House adopted Conference Committee Report by a non-record vote.

Approved June 21, 2003.

Effective January 1, 2004.

CHAPTER 1308

S.B. No. 1915

AN ACT

relating to the terms of court of the 9th Judicial District.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Subsection (c), Section 24.109, Government Code, is amended to read as follows:

(c) The terms of the 9th District Court begin:

TAB “2”

CHAPTER 81

S.B. No. 18

AN ACT

relating to the use of eminent domain authority.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Subsection (a), Section 11.155, Education Code, is amended to read as follows:

(a) An independent school district may, by the exercise of the right of eminent domain, acquire the fee simple title to real property [~~for the purpose of securing sites~~] on which to construct school buildings or for any other *public use* [~~purpose~~] necessary for the district.

SECTION 2. Chapter 2206, Government Code, is amended to read as follows:

CHAPTER 2206. [~~LIMITATIONS ON USE OF~~] EMINENT DOMAIN

SUBCHAPTER A. LIMITATIONS ON PURPOSE AND USE OF PROPERTY ACQUIRED THROUGH EMINENT DOMAIN

Sec. 2206.001. LIMITATION ON EMINENT DOMAIN FOR PRIVATE PARTIES OR ECONOMIC DEVELOPMENT PURPOSES. (a) This section applies to the use of eminent domain under the laws of this state, including a local or special law, by any governmental or private entity, including:

(1) a state agency, including an institution of higher education as defined by Section 61.003, Education Code;

(2) a political subdivision of this state; or

(3) a corporation created by a governmental entity to act on behalf of the entity.

(b) A governmental or private entity may not take private property through the use of eminent domain if the taking:

(1) confers a private benefit on a particular private party through the use of the property;

(2) is for a public use that is merely a pretext to confer a private benefit on a particular private party; [~~or~~]

(3) is for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas under:

(A) Chapter 373 or 374, Local Government Code, other than an activity described by Section 373.002(b)(5), Local Government Code; or

(B) Section 311.005(a)(1)(I), Tax Code*; or*

(4) is not for a public use.

(c) This section does not affect the authority of an entity authorized by law to take private property through the use of eminent domain for:

(1) transportation projects, including, but not limited to, railroads, airports, or public roads or highways;

(2) entities authorized under Section 59, Article XVI, Texas Constitution, including:

(A) port authorities;

(B) navigation districts; and

(C) any other conservation or reclamation districts that act as ports;

(3) water supply, wastewater, flood control, and drainage projects;

(4) public buildings, hospitals, and parks;

(5) the provision of utility services;

(6) a sports and community venue project approved by voters at an election held on or before December 1, 2005, under Chapter 334 or 335, Local Government Code;

(7) the operations of:

(A) a common carrier *pipeline* [~~subject to Chapter 111, Natural Resources Code, and Section B(3)(b), Article 2.01, Texas Business Corporation Act~~]; or

(B) an energy transporter, as that term is defined by Section 186.051, Utilities Code;

(8) a purpose authorized by Chapter 181, Utilities Code;

(9) underground storage operations subject to Chapter 91, Natural Resources Code;

(10) a waste disposal project; or

(11) a library, museum, or related facility and any infrastructure related to the facility.

(d) This section does not affect the authority of a governmental entity to condemn a leasehold estate on property owned by the governmental entity.

(e) The determination by the governmental or private entity proposing to take the property that the taking does not involve an act or circumstance prohibited by Subsection (b) does not create a presumption with respect to whether the taking involves that act or circumstance.

Sec. 2206.002. LIMITATIONS ON EASEMENTS. (a) This section applies only to an easement acquired by an entity for the purpose of a pipeline to be used for oil or gas exploration or production activities.

(b) A property owner whose property is acquired through the use of eminent domain under Chapter 21, Property Code, for the purpose of creating an easement through that owner's property may construct streets or roads, including gravel, asphalt, or concrete streets or roads, at any locations above the easement that the property owner chooses.

(c) The portion of a street or road constructed under this section that is within the area covered by the easement:

(1) must cross the easement at or near 90 degrees; and

(2) may not:

(A) exceed 40 feet in width;

(B) cause a violation of any applicable pipeline regulation; or

(C) interfere with the operation and maintenance of any pipeline.

(d) At least 30 days before the date on which construction of an asphalt or concrete street or road that will be located wholly or partly in an area covered by an easement used for a pipeline is scheduled to begin, the property owner must submit plans for the proposed construction to the owner of the easement.

(e) Notwithstanding the provisions of this section, a property owner and the owner of the easement may agree to terms other than those stated in Subsection (c).

SUBCHAPTER B. PROCEDURES REQUIRED TO INITIATE EMINENT DOMAIN PROCEEDINGS

Sec. 2206.051. SHORT TITLE. This subchapter may be cited as the Truth in Condemnation Procedures Act.

Sec. 2206.052. APPLICABILITY. The procedures in this subchapter apply only to the use of eminent domain under the laws of this state by a governmental entity.

Sec. 2206.053. VOTE ON USE OF EMINENT DOMAIN. (a) Before a governmental entity initiates a condemnation proceeding by filing a petition under Section 21.012, Property Code, the governmental entity must:

(1) authorize the initiation of the condemnation proceeding at a public meeting by a record vote; and

(2) include in the notice for the public meeting as required by Subchapter C, Chapter 551, in addition to other information as required by that subchapter, the consideration of the use of eminent domain to condemn property as an agenda item.

(b) A single ordinance, resolution, or order may be adopted for all units of property to be condemned if:

(1) the motion required by Subsection (e) indicates that the first record vote applies to all units of property to be condemned; and

(2) the minutes of the governmental entity reflect that the first vote applies to all of those units.

(c) If more than one member of the governing body objects to adopting a single ordinance, resolution, or order by a record vote for all units of property for which condemnation proceedings are to be initiated, a separate record vote must be taken for each unit of property.

(d) For the purposes of Subsections (a) and (c), if two or more units of real property are owned by the same person, the governmental entity may treat those units of property as one unit of property.

(e) The motion to adopt an ordinance, resolution, or order authorizing the initiation of condemnation proceedings under Chapter 21, Property Code, must be made in a form substantially similar to the following: "I move that the (name of governmental entity) authorize the use of the power of eminent domain to acquire (describe the property) for (describe the public use)." The description of the property required by this subsection is sufficient if the description of the location of and interest in the property that the governmental entity seeks to acquire is substantially similar to the description that is or could properly be used in a petition to condemn the property under Section 21.012, Property Code.

(f) If a project for a public use described by Section 2206.001(c)(3) will require a governmental entity to acquire multiple tracts or units of property to construct facilities connecting one location to another location, the governing body of the governmental entity may adopt a single ordinance, resolution, or order by a record vote that delegates the authority to initiate condemnation proceedings to the chief administrative official of the governmental entity.

(g) An ordinance, resolution, or order adopted under Subsection (f) is not required to identify specific properties that the governmental entity will acquire. The ordinance, resolution, or order must identify the general area to be covered by the project or the general route that will be used by the governmental entity for the project in a way that provides property owners in and around the area or along the route reasonable notice that the owners' properties may be subject to condemnation proceedings during the planning or construction of the project.

SUBCHAPTER C. EXPIRATION OF CERTAIN EMINENT DOMAIN AUTHORITY

Sec. 2206.101. REPORT OF EMINENT DOMAIN AUTHORITY; EXPIRATION OF AUTHORITY. (a) This section does not apply to an entity that was created or that acquired the power of eminent domain on or after December 31, 2012.

(b) Not later than December 31, 2012, an entity, including a private entity, authorized by the state by a general or special law to exercise the power of eminent domain shall submit to the comptroller a letter stating that the entity is authorized by the state to exercise the power of eminent domain and identifying each provision of law that grants the entity that authority. The entity must send the letter by certified mail, return receipt requested.

(c) The authority of an entity to exercise the power of eminent domain expires on September 1, 2013, unless the entity submits a letter in accordance with Subsection (b).

(d) Not later than March 1, 2013, the comptroller shall submit to the governor, the lieutenant governor, the speaker of the house of representatives, the presiding officers of the appropriate standing committees of the senate and the house of representatives, and the Texas Legislative Council a report that contains:

(1) the name of each entity that submitted a letter in accordance with this section; and

(2) a corresponding list of the provisions granting eminent domain authority as identified by each entity that submitted a letter.

(e) The Texas Legislative Council shall prepare for consideration by the 84th Legislature, Regular Session, a nonsubstantive revision of the statutes of this state as necessary to reflect the state of the law after the expiration of an entity's eminent domain authority effective under Subsection (c).

SECTION 3. Subsection (a), Section 251.001, Local Government Code, is amended to read as follows:

(a) When the governing body of a municipality considers it necessary, the municipality may exercise the right of eminent domain for a public *use* [~~purpose~~] to acquire public or private property, whether located inside or outside the municipality, for any of the following *uses* [~~purposes~~]:

(1) the providing, enlarging, or improving of a *municipally owned* city hall; police station; jail or other law enforcement detention facility; fire station; library; school or other educational facility; academy; auditorium; hospital; sanatorium; market house; slaughterhouse; warehouse; elevator; railroad terminal; airport; ferry; ferry landing; pier; wharf; dock or other shipping facility; loading or unloading facility; alley, street, or other roadway; park, playground, or other recreational facility; square; water works system, including reservoirs, other water supply sources, watersheds, and water storage, drainage, treatment, distribution, transmission, and emptying facilities; sewage system including sewage collection, drainage, treatment, disposal, and emptying facilities; electric or gas power system; cemetery; and crematory;

(2) the determining of riparian rights relative to the municipal water works;

(3) the straightening or improving of the channel of any stream, branch, or drain;

(4) the straightening, widening, or extending of any alley, street, or other roadway; and

(5) [~~for~~] any other municipal *public use* [~~purpose~~] the governing body considers advisable.

SECTION 4. Subsection (a), Section 261.001, Local Government Code, is amended to read as follows:

(a) A county may exercise the right of eminent domain to condemn and acquire land, an easement in land, or a right-of-way if the acquisition is necessary for the construction of a jail, courthouse, hospital, or library, or for another public *use* [~~purpose~~] authorized by law.

SECTION 5. Subsection (c), Section 263.201, Local Government Code, is amended to read as follows:

(c) The declaration of taking must contain:

(1) a declaration that the land or interest in land described in the original petition is taken for a public *use* [~~purpose~~] and for ultimate conveyance to the United States;

(2) a description of the land sufficient for the identification of the land;

(3) a statement of the estate or interest in the land being taken;

(4) a statement of the public use to be made of the land;

(5) a plan showing the land being taken; and

(6) a statement of the amount of damages awarded by the special commissioners, or by the jury on appeal, for the taking of the land.

SECTION 6. Section 273.002, Local Government Code, is amended to read as follows:

Sec. 273.002. CONDEMNATION. Condemnation of property under this chapter shall be in accordance with state law relating to eminent domain, which may be Chapter 21, Property Code, or any other state law governing and relating to the condemnation of land for public *use* [~~purposes~~] by a municipality.

SECTION 7. Section 21.0111, Property Code, is amended to read as follows:

Sec. 21.0111. DISCLOSURE OF *CERTAIN* INFORMATION REQUIRED; *INITIAL OFFER*. (a) *An* [~~A governmental~~] entity with eminent domain authority that wants to acquire real property for a public use shall, *by certified mail, return receipt requested,* disclose to the property owner at the time an offer to purchase *or lease the property* is made any and all [~~existing~~] appraisal reports produced or acquired by the [~~governmental~~] entity

relating specifically to the owner's property and *prepared in the 10 years preceding the date of the* [~~used in determining the final valuation~~] offer.

(b) A property owner shall disclose to the [~~acquiring governmental~~] entity *seeking to acquire the property* any and all *current and* existing appraisal reports produced or acquired by the property owner relating specifically to the owner's property and used in determining the owner's opinion of value. Such disclosure shall take place *not later than the earlier of:*

(1) the 10th day after the date [~~within 10 days~~] of receipt of *an* appraisal *report; or*

(2) the third business day before the date of a special commissioner's hearing if an appraisal report is to be used at the [~~reports but no later than 10 days prior to the special commissioner's~~] hearing.

(c) An entity seeking to acquire property that the entity is authorized to obtain through the use of eminent domain may not include a confidentiality provision in an offer or agreement to acquire the property. The entity shall inform the owner of the property that the owner has the right to:

(1) discuss any offer or agreement regarding the entity's acquisition of the property with others; or

(2) keep the offer or agreement confidential, unless the offer or agreement is subject to Chapter 552, Government Code.

(d) A subsequent bona fide purchaser for value from the *acquiring* [~~governmental~~] entity may conclusively presume that the requirement of this section has been met. This section does not apply to acquisitions of real property for which *an* [~~a governmental~~] entity does not have eminent domain authority.

SECTION 8. Subchapter B, Chapter 21, Property Code, is amended by adding Section 21.0113 to read as follows:

Sec. 21.0113. BONA FIDE OFFER REQUIRED. (a) An entity with eminent domain authority that wants to acquire real property for a public use must make a bona fide offer to acquire the property from the property owner voluntarily.

(b) An entity with eminent domain authority has made a bona fide offer if:

(1) an initial offer is made in writing to a property owner;

(2) a final offer is made in writing to the property owner;

(3) the final offer is made on or after the 30th day after the date on which the entity makes a written initial offer to the property owner;

(4) before making a final offer, the entity obtains a written appraisal from a certified appraiser of the value of the property being acquired and the damages, if any, to any of the property owner's remaining property;

(5) the final offer is equal to or greater than the amount of the written appraisal obtained by the entity;

(6) the following items are included with the final offer or have been previously provided to the owner by the entity:

(A) a copy of the written appraisal;

(B) a copy of the deed, easement, or other instrument conveying the property sought to be acquired; and

(C) the landowner's bill of rights statement prescribed by Section 21.0112; and

(7) the entity provides the property owner with at least 14 days to respond to the final offer and the property owner does not agree to the terms of the final offer within that period.

SECTION 9. Section 21.012, Property Code, is amended to read as follows:

Sec. 21.012. CONDEMNATION PETITION. (a) If *an entity* [~~the United States, this state, a political subdivision of this state, a corporation~~] with eminent domain authority[~~, or an irrigation, water improvement, or water power control district created by law~~] wants to acquire real property for public use but is unable to agree with the owner of the property on

the amount of damages, the [~~condemning~~] entity may begin a condemnation proceeding by filing a petition in the proper court.

(b) The petition must:

(1) describe the property to be condemned;

(2) state *with specificity* the *public use* [~~purpose~~] for which the entity intends to *acquire* [~~use~~] the property;

(3) state the name of the owner of the property if the owner is known;

(4) state that the entity and the property owner are unable to agree on the damages; [~~and~~]

(5) if applicable, state that the entity provided the property owner with the landowner's bill of rights statement in accordance with Section 21.0112; *and*

(6) state that the entity made a bona fide offer to acquire the property from the property owner voluntarily as provided by Section 21.0113.

(c) An entity that files a petition under this section must provide a copy of the petition to the property owner by certified mail, return receipt requested.

SECTION 10. Subsection (a), Section 21.014, Property Code, is amended to read as follows:

(a) The judge of a court in which a condemnation petition is filed or to which an eminent domain case is assigned shall appoint three disinterested *real property owners* [~~freeholders~~] who reside in the county as special commissioners to assess the damages of the owner of the property being condemned. The judge appointing the special commissioners shall give preference to persons agreed on by the parties. *The judge shall provide each party a reasonable period to strike one of the three commissioners appointed by the judge.* If a person fails to serve as a commissioner *or is struck by a party to the suit*, the judge *shall* [~~may~~] appoint a replacement.

SECTION 11. Subsection (a), Section 21.015, Property Code, is amended to read as follows:

(a) The special commissioners in an eminent domain proceeding shall promptly schedule a hearing for the parties at the earliest practical time *but may not schedule a hearing to assess damages before the 20th day after the date the special commissioners were appointed. The special commissioners shall schedule a hearing for the parties* [~~and~~] at a place that is as near as practical to the property being condemned or at the county seat of the county in which the proceeding is being held.

SECTION 12. Subsection (b), Section 21.016, Property Code, is amended to read as follows:

(b) Notice of the hearing must be served on a party not later than the *20th* [~~11th~~] day before the day set for the hearing. A person competent to testify may serve the notice.

SECTION 13. Section 21.023, Property Code, is amended to read as follows:

Sec. 21.023. DISCLOSURE OF INFORMATION REQUIRED AT TIME OF ACQUISITION. *An* [~~A governmental~~] entity *with eminent domain authority* shall disclose in writing to the property owner, at the time of acquisition of the property through eminent domain, that:

(1) the owner or the owner's heirs, successors, or assigns *may be* [~~are~~] entitled to:

(A) repurchase the property *under Subchapter E* [~~if the public use for which the property was acquired through eminent domain is canceled before the 10th anniversary of the date of acquisition~~]; *or*

(B) request from the entity certain information relating to the use of the property and any actual progress made toward that use; and

(2) the repurchase price is the *price paid to the owner by the entity at the time the entity acquired the property through eminent domain* [~~fair market value of the property at the time the public use was canceled~~].

SECTION 14. Subchapter B, Chapter 21, Property Code, is amended by adding Section 21.025 to read as follows:

Sec. 21.025. PRODUCTION OF INFORMATION BY CERTAIN ENTITIES. (a) Notwithstanding any other law, an entity that is not subject to Chapter 552, Government Code, and is authorized by law to acquire private property through the use of eminent domain is required to produce information as provided by this section if the information is:

(1) requested by a person who owns property that is the subject of a proposed or existing eminent domain proceeding; and

(2) related to the taking of the person's private property by the entity through the use of eminent domain.

(b) An entity described by Subsection (a) is required under this section only to produce information relating to the condemnation of the specific property owned by the requestor as described in the request. A request under this section must contain sufficient details to allow the entity to identify the specific tract of land in relation to which the information is sought.

(c) The entity shall respond to a request in accordance with the Texas Rules of Civil Procedure as if the request was made in a matter pending before a state district court.

(d) Exceptions to disclosure provided by this chapter and the Texas Rules of Civil Procedure apply to the disclosure of information under this section.

(e) Jurisdiction to enforce the provisions of this section resides in:

(1) the court in which the condemnation was initiated; or

(2) if the condemnation proceeding has not been initiated:

(A) a court that would have jurisdiction over a proceeding to condemn the requestor's property; or

(B) a court with eminent domain jurisdiction in the county in which the entity has its principal place of business.

(f) If the entity refuses to produce information requested in accordance with this section and the court determines that the refusal violates this section, the court may award the requestor's reasonable attorney's fees incurred to compel the production of the information.

SECTION 15. Subsection (d), Section 21.042, Property Code, is amended to read as follows:

(d) In estimating injury or benefit under Subsection (c), the special commissioners shall consider an injury or benefit that is peculiar to the property owner and that relates to the property owner's ownership, use, or enjoyment of the particular parcel of real property, *including a material impairment of direct access on or off the remaining property that affects the market value of the remaining property,* but they may not consider an injury or benefit that the property owner experiences in common with the general community, *including circuity of travel and diversion of traffic. In this subsection, "direct access" means ingress and egress on or off a public road, street, or highway at a location where the remaining property adjoins that road, street, or highway.*

SECTION 16. Subsections (a) and (b), Section 21.046, Property Code, are amended to read as follows:

(a) A department, agency, instrumentality, or political subdivision of this state *shall* [~~may~~] provide a relocation advisory service for an individual, a family, a business concern, a farming or ranching operation, or a nonprofit organization *that* [~~if the service~~] is compatible with the Federal Uniform Relocation Assistance *and Real Property Acquisition Policies Act of 1970* [~~Advisory Program~~], *42 U.S.C.A. 4601* [~~23 U.S.C.A. 501~~], et seq.

(b) This state or a political subdivision of this state *shall* [~~may~~], as a cost of acquiring real property, pay moving expenses and rental supplements, make relocation payments, provide financial assistance to acquire replacement housing, and compensate for expenses incidental to the transfer of the property if an individual, a family, the personal property of a business, a farming or ranching operation, or a nonprofit organization is displaced in connection with the acquisition.

SECTION 17. The heading to Section 21.047, Property Code, is amended to read as follows:

Sec. 21.047. ASSESSMENT OF COSTS *AND FEES.*

SECTION 18. Section 21.047, Property Code, is amended by adding Subsection (d) to read as follows:

(d) If a court hearing a suit under this chapter determines that a condemnor did not make a bona fide offer to acquire the property from the property owner voluntarily as required by Section 21.0113, the court shall abate the suit, order the condemnor to make a bona fide offer, and order the condemnor to pay:

(1) all costs as provided by Subsection (a); and

(2) any reasonable attorney's fees and other professional fees incurred by the property owner that are directly related to the violation.

SECTION 19. Subchapter E, Chapter 21, Property Code, is amended to read as follows:

SUBCHAPTER E. REPURCHASE OF REAL PROPERTY FROM *CONDEMNING* [~~GOVERNMENTAL~~] ENTITY

Sec. 21.101. *RIGHT OF REPURCHASE* [~~APPLICABILITY~~]. (a) *A person from whom* [~~Except as provided in Subsection (b), this subchapter applies only to~~] a real property interest *is* acquired by *an* [~~a governmental~~] entity through eminent domain for a public use, *or that person's heirs, successors, or assigns, is entitled to repurchase the property as provided by this subchapter if:*

(1) the public use for which the property was acquired through eminent domain is [~~that was~~] canceled *before the property is used for that public use;*

(2) no actual progress is made toward the public use for which the property was acquired between the date of acquisition and the 10th anniversary of that date; or

(3) the property becomes unnecessary for the public use for which the property was acquired, or a substantially similar public use, before the 10th anniversary of the date of acquisition.

(b) *In this section, "actual progress" means the completion of two or more of the following actions:*

(1) the performance of a significant amount of labor to develop the property or other property acquired for the same public use project for which the property owner's property was acquired;

(2) the provision of a significant amount of materials to develop the property or other property acquired for the same public use project for which the property owner's property was acquired;

(3) the hiring of and performance of a significant amount of work by an architect, engineer, or surveyor to prepare a plan or plat that includes the property or other property acquired for the same public use project for which the property owner's property was acquired;

(4) application for state or federal funds to develop the property or other property acquired for the same public use project for which the property owner's property was acquired;

(5) application for a state or federal permit to develop the property or other property acquired for the same public use project for which the property owner's property was acquired;

(6) the acquisition of a tract or parcel of real property adjacent to the property for the same public use project for which the owner's property was acquired; or

(7) for a governmental entity, the adoption by a majority of the entity's governing body at a public hearing of a development plan for a public use project that indicates that the entity will not complete more than one action described by Subdivisions (1)–(6) before the 10th anniversary of the date of acquisition of the property [~~This subchapter does not apply to a right-of-way under the jurisdiction of:~~

[~~(1) a county;~~

[~~(2) a municipality; or~~

[~~(3) the Texas Department of Transportation~~].

(c) A district court may determine all issues in any suit regarding the repurchase of a real property interest acquired through eminent domain by the former property owner or the owner's heirs, successors, or assigns.

Sec. 21.102. NOTICE TO PREVIOUS PROPERTY OWNER *REQUIRED* [~~AT TIME OF CANCELLATION OF PUBLIC USE~~]. Not later than the 180th day after the date *an entity that acquired a real property interest through eminent domain determines that the former property owner is entitled to repurchase the property under Section 21.101* [~~of the cancellation of the public use for which real property was acquired through eminent domain from a property owner under Subchapter B~~], the [~~governmental~~] entity shall send by certified mail, return receipt requested, to the property owner or the owner's heirs, successors, or assigns a notice containing:

(1) an identification, which is not required to be a legal description, of the property that was acquired;

(2) an identification of the public use for which the property had been acquired and a statement that:

(A) the public use *was* [~~has been~~] canceled *before the property was used for the public use;*

(B) no actual progress was made toward the public use; or

(C) the property became unnecessary for the public use, or a substantially similar public use, before the 10th anniversary of the date of acquisition; and

(3) a description of the person's right under this subchapter to repurchase the property.

Sec. 21.1021. REQUESTS FOR INFORMATION REGARDING CONDEMNED PROPERTY. (a) On or after the 10th anniversary of the date on which real property was acquired by an entity through eminent domain, a property owner or the owner's heirs, successors, or assigns may request that the condemning entity make a determination and provide a statement and other relevant information regarding:

(1) whether the public use for which the property was acquired was canceled before the property was used for the public use;

(2) whether any actual progress was made toward the public use between the date of acquisition and the 10th anniversary of that date, including an itemized description of the progress made, if applicable; and

(3) whether the property became unnecessary for the public use, or a substantially similar public use, before the 10th anniversary of the date of acquisition.

(b) A request under this section must contain sufficient detail to allow the entity to identify the specific tract of land in relation to which the information is sought.

(c) Not later than the 90th day following the date of receipt of the request for information, the entity shall send a written response by certified mail, return receipt requested, to the requestor.

Sec. 21.1022. LIMITATIONS PERIOD FOR REPURCHASE RIGHT. Notwithstanding Section 21.103, the right to repurchase provided by this subchapter is extinguished on the first anniversary of the expiration of the period for an entity to provide notice under Section 21.102 if the entity:

(1) is required to provide notice under Section 21.102;

(2) makes a good faith effort to locate and provide notice to each person entitled to notice before the expiration of the deadline for providing notice under that section; and

(3) does not receive a response to any notice provided under that section in the period for response prescribed by Section 21.103.

Sec. 21.103. RESALE OF PROPERTY; PRICE. (a) Not later than the 180th day after the date of the postmark on *a* [~~the~~] notice sent under Section 21.102 *or a response to a request made under Section 21.1021 that indicates that the property owner, or the owner's heirs, successors, or assigns, is entitled to repurchase the property interest in accordance with Section 21.101*, the property owner or the owner's heirs, successors, or assigns must

notify the [~~governmental~~] entity of the person's intent to repurchase the property interest under this subchapter.

(b) As soon as practicable after receipt of *a notice of intent to repurchase* [~~the notification~~] under Subsection (a), the [~~governmental~~] entity shall offer to sell the property interest to the person for the *price paid to the owner by the entity at the time the entity acquired the property through eminent domain* [~~fair market value of the property at the time the public use was canceled~~]. The person's right to repurchase the property expires on the 90th day after the date on which the [~~governmental~~] entity makes the offer.

SECTION 20. Section 202.021, Transportation Code, is amended by adding Subsection (j) to read as follows:

(j) The standard for determination of the fair value of the state's interest in access rights to a highway right-of-way is the same legal standard that is applied by the commission in the:

(1) acquisition of access rights under Subchapter D, Chapter 203; and

(2) payment of damages in the exercise of the authority, under Subchapter C, Chapter 203, for impairment of highway access to or from real property where the real property adjoins the highway.

SECTION 21. Section 54.209, Water Code, is amended to read as follows:

Sec. 54.209. LIMITATION ON USE OF EMINENT DOMAIN. A district may not exercise the power of eminent domain outside the district boundaries to acquire:

(1) a site for a water treatment plant, water storage facility, wastewater treatment plant, or wastewater disposal plant;

(2) a site for a park, swimming pool, or other recreational facility, *as defined by Section 49.462* [~~except a trail~~];

(3) [~~a site for a trail on real property designated as a homestead as defined by Section 41.002, Property Code; or~~

[~~(4)~~] an exclusive easement through a county regional park; *or*

(4) a site or easement for a road project.

SECTION 22. Section 1, Chapter 178 (S.B. 289), Acts of the 56th Legislature, Regular Session, 1959 (Article 3183b–1, Vernon's Texas Civil Statutes), is amended to read as follows:

Sec. 1. *Except as provided by this section, and notwithstanding any other law, any* [~~Any~~] nonprofit corporation incorporated under the laws of this state for purely charitable purposes and which is directly affiliated or associated with a medical center having a medical school recognized by the Council on Medical Education and Hospitals of the American Medical Association as an integral part of its establishment, and which has for a purpose of its incorporation the provision or support of medical facilities or services for the use and benefit of the public, and which is situated in any county of this state having a population in excess of six hundred thousand (600,000) inhabitants according to the most recent Federal Census shall have the power of eminent domain and condemnation for the purposes set forth in Section 2 and Section 3 of this Act. *A charitable corporation described by this section may not exercise the power of eminent domain and condemnation to acquire a detached, single-family residential property or a multifamily residential property that contains eight or fewer dwelling units.*

SECTION 23. (a) Section 552.0037, Government Code, is repealed.

(b) Section 21.024, Property Code, is repealed.

SECTION 24. Section 11.155, Education Code, Chapter 2206, Government Code, Sections 251.001, 261.001, 263.201, and 273.002, Local Government Code, Chapter 21, Property Code, and Section 1, Chapter 178 (S.B. 289), Acts of the 56th Legislature, Regular Session, 1959 (Article 3183b–1, Vernon's Texas Civil Statutes), as amended by this Act, apply only to a condemnation proceeding in which the petition is filed on or after the effective date of this Act and to any property condemned through the proceeding. A condemnation proceeding in which the petition is filed before the effective date of this Act and any property condemned through the proceeding are governed by the law in effect immediately before that date, and that law is continued in effect for that purpose.

SECTION 25. The change in law made by this Act to Section 202.021, Transportation Code, applies only to a sale or transfer under that section that occurs on or after the effective date of this Act. A sale or transfer that occurs before the effective date of this Act is governed by the law applicable to the sale or transfer immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 26. The changes in law made by this Act to Section 54.209, Water Code, apply only to a condemnation proceeding in which the petition is filed on or after the effective date of this Act. A condemnation proceeding in which the petition is filed before the effective date of this Act is governed by the law in effect on the date the petition was filed, and that law is continued in effect for that purpose.

SECTION 27. This Act takes effect September 1, 2011.

Passed the Senate on February 9, 2011: Yeas 31, Nays 0; April 19, 2011, Senate refused to concur in House amendments and requested appointment of Conference Committee; April 28, 2011, House granted request of the Senate; May 6, 2011, Senate adopted Conference Committee Report by the following vote: Yeas 30, Nays 0; passed the House, with amendments, on April 14, 2011: Yeas 144, Nays 0, one present not voting; April 28, 2011, House granted request of the Senate for appointment of Conference Committee; May 5, 2011, House adopted Conference Committee Report by the following vote: Yeas 145, Nays 0, two present not voting.

Approved May 19, 2011.

Effective September 1, 2011.

CHAPTER 82

S.B. No. 265

AN ACT

relating to training for employees and operators of certain child-care facilities.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. Section 42.0421, Human Resources Code, is amended by adding Subsections (f) and (g) to read as follows:

(f) The training required by this section must be appropriately targeted and relevant to the age of the children who will receive care from the individual receiving training and must be provided by a person who:

(1) is a training provider registered with the Texas Early Care and Education Career Development System's Texas Trainer Registry that is maintained by the Texas Head Start State Collaboration Office;

(2) is an instructor at a public or private secondary school or at a public or private institution of higher education, as defined by Section 61.801, Education Code, who teaches early childhood development or another relevant course, as determined by rules adopted by the commissioner of education and the commissioner of higher education;

(3) is an employee of a state agency with relevant expertise;

(4) is a physician, psychologist, licensed professional counselor, social worker, or registered nurse;

(5) holds a generally recognized credential or possesses documented knowledge relevant to the training the person will provide;

(6) is a registered family home care provider or director of a day-care center or group day-care home in good standing with the department, if applicable, and who:

(A) has demonstrated core knowledge in child development and caregiving; and

(B) is only providing training at the home or center in which the provider or director and the person receiving training are employed; or

TAB “3”

SUBJECT: Revising standards for use of eminent domain power

COMMITTEE: Land and Resource Management — committee substitute recommended

VOTE: 9 ayes — Oliveira, Kleinschmidt, Anchia, R. Anderson, Brown, Garza, Kolkhorst, Lavender, Margo

0 nays

SENATE VOTE: On final passage, February 9 — 31–0

WITNESSES: For — Kirby Brown, Texas Wildlife Association; Lee Christie, Tarrant Regional Water District; Richard Cortese, Texas Farm Bureau; Ron Kerr, Gas Processors Association; James Mann, Texas Pipeline Association; George Nachtigall, Harris County (*Registered, but did not testify:* Kathy Barber, National Federal of Independent Businesses; Steve Bresnen, North Harris County Regional Water Authority; Robert Doggett, Texas Housing Justice League; Tommy Engelke, Texas Agricultural Cooperative Council; John W. Fainter, Jr, Association of Electric Companies of Texas, Inc.; Marida Favia del Core Borromeo, Exotic Wildlife Association; Jimmy Gaines, Texas Landowners Council; Luis Gonzalez, Texas Self Storage Association; Carlos Higgins, Texas Silver Haired Legislature; Robert Howard, South Texans' Property Rights Association; Mark Lehman, Texas Association of Realtors; David Mintz, Texas Apartment Association; Scott Norman, Texas Association of Builders; Patrick Nugent, Texas Pipeline Association; David Oefinger, Texas Pest Management Association, Inc.; Jim Reaves, Texas Nursery and Landscape Association; Steve Salmon, Texas Riverside and Land Owners Coalition; Steve Salmon, Texas Sheep and Goat Raisers Association; Jason Skagos, Texas and Southwestern Cattle Raisers Association; Ed Small, Texas Forestry Association, City of Lufkin; Robert Strauser, Port of Houston Authority, Texas Ports Association; Bob Turner, Texas Poultry Federation and Texas Sheep and Goat Raisers Association; Josh Winegarner, Texas Cattle Feeders Association; Eric Wright, Northeast Texas Water Coalition)

Against — Frank Turner, City of Plano; Ryan Rittenhouse, Public Citizen, Inc.; Debra Medina, We Texans; Steve Hodges, Norbert Hart, and Eric Friedland, City of San Antonio; Terri Hall, Texans Uniting for Reform

and Freedom; Paul Barkhurst; Don Dixon (*Registered, but did not testify:* Barry Henson, Margaret Henson, Darrel Mulloy, Marilyn Mulloy)

On — Ted Gorski, Jr., City of Fort Worth; Scott Houston, Texas Municipal League; Bill Peacock, Texas Public Policy Foundation; Amadeo Saenz, Texas Department of Transportation

BACKGROUND:

The Fifth Amendment to the U.S. Constitution prohibits the taking of private property for public use without just compensation and is commonly referred to as the "takings clause." In June 2005, the U.S. Supreme Court ruled in *Kelo v. City of New London*, 545 U.S. 469 (2005), that the proposed use of property by the city of New London, Conn. for a private economic development project qualified as a "public use" within the meaning of the U.S. Constitution's takings clause.

Following the *Kelo* decision, the 79th Texas Legislature, in its second called session in 2005, enacted SB 7 by Janek, which prohibits governmental or private entities from using the power of eminent domain to take private property if the taking:

- confers a private benefit on a particular private party through the use of the property;
- is for a public use that merely is a pretext to confer a private benefit on a particular private party; or
- is for economic development purposes, unless economic development is a secondary purpose that results from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas.

The 80th Legislature in 2007 enacted HB 2006 by Woolley, which would have modified eminent domain processes. The bill was vetoed by the governor, who cited potentially higher costs to governmental entities from requiring compensation to landowners for diminished access to roadways and for factors such as changes in traffic patterns and road visibility.

In November 2009, voters approved Proposition 11 (HJR 14 by Corte), which amended Texas Constitution, Art. 1, sec. 17 to restrict taking property to the purpose of ownership, use, and enjoyment by the state, a local government, or the public at large or by an entity given the authority of eminent domain under the law or for the elimination of urban blight on

a particular parcel. The amendment did not include as a public use the taking of property for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues.

Property Code, ch. 21, subch. C establishes the legitimate bases for assessing damages to a property owner resulting from a condemnation. For this determination, special commissioners are instructed to admit evidence on the value of the property being condemned, the injury to the property owner, the impact on the property owner's remaining property, and the use for which the property was condemned.

Property Code, ch. 21, subch. E provides an opportunity for property owners to repurchase land taken through eminent domain for a public use that was canceled before the 10th anniversary of the date of acquisition. The possessing governmental entity is required to offer to sell the property to the previous owner or the owner's heirs for the fair market value of the property at the time the public use was canceled. The repurchase provision does not apply to right of way held by municipalities, counties, or the Texas Department of Transportation (TxDOT).

DIGEST:

CSSB 18 would modify processes and requirements governing eminent domain, including evidence to be considered by special commissioners in making decisions on damages awards, the rights of property owners to repurchase taken property, the requirement of a bona fide offer to purchase property, and landowners' right to access information from an entity taking their property.

CSSB 18 would add a statutory prohibition against a government or private entity taking land that was not for a public use. The bill would require governmental entities to pay relocation expenses for displaced property owners and provide a relocation advisory service.

Assessments and damages. Special commissioners, in assessing actual damages to a property owner from a condemnation, would have to take into account a material impairment of direct access on or off the remaining property that affected the market value of the remaining property, but they could not consider circuity of travel and diversion of traffic that were common to many properties.

If special commissioners awarded damages to a property owner for a taking that were greater than 110 percent of the original damages the

condemning entity offered to pay before the proceedings, the property owner would be entitled to attorney's fees and other fees in addition to costs in current law.

A condemning entity and a property owner in a trial to assess damages caused by the taking could each strike one of three special commissioners appointed by a judge. A judge would replace any stricken commissioners. The special commissioners would have to wait at least 20 days after being appointed to schedule a hearing.

Determinations of fair value of the state's interest in access rights to a highway right-of-way would be the same as standards used by the Texas Transportation Commission in acquiring access rights under provisions governing acquisition of property and payment of damages related to access.

Right of repurchase. An owner of property taken through eminent domain could repurchase the property from any entity at the original price paid to the owner if the public use for which the property was taken was canceled before the property was used for that purpose or if, within 10 years after the taking, the property became unnecessary for the public use for which it was acquired or no "actual progress" was made toward the public use. "Actual progress" would be defined as completing two or more of the following actions on the property or another property taken for the same public use:

- performing significant labor to develop the property;
- acquiring significant materials to develop the property;
- contracting significant work from an architect or similar professional;
- applying for state or federal funds to develop the property;
- applying for a state or federal permit to develop the property;
- acquiring an adjacent property for the same public use that prompted the taking of the original property; and
- for a governmental entity, the adoption of a development plan indicating the entity would not complete more than one action before the 10th anniversary of taking the property.

Suits over the right of repurchase could be settled in a district court. The bill would establish procedures for providing notice to property owners informing them of their right to repurchase and allowing former owners to

request a determination of whether they were entitled to repurchase the property if sufficient progress were not made at least 10 years after a taking.

The right of repurchase would expire after one year if an entity made a good faith effort to locate a property owner and did not receive a response.

Bona fide offer. The bill would require an entity with eminent domain authority to make a bona fide offer to acquire property from an owner voluntarily. Under the bill, an entity with eminent domain authority would have made a bona fide offer if:

- an initial and final offer were made in writing to a property owner;
- a final offer was made in writing at least 30 days after the initial offer;
- the entity, before making a final offer, obtained an appraisal from a certified appraiser of the value of the property being taken and any damages to any remaining property;
- the final offer was equal to or greater than the amount of the written appraisal obtained by the entity;
- the entity provided a copy of the written appraisal, a copy of the deed or other instrument conveying the sought-after property, and the Texas landowner's bill of rights document; and
- the entity provided the property owner with at least 14 days to respond to the final offer and the property owner did not agree to the terms of the final offer within that time.

The entity would have to include a statement affirming that it made a bona fide offer in a petition to take a property. If a court hearing a suit determined that a condemning authority did not make a bona fide offer, the court would abate the suit, require the entity to make a bona fide offer, and order the condemning entity to pay costs currently authorized in law and reasonable attorney's fees incurred by the property owner directly related to the failure to make a bona fide offer.

Eminent domain process. CSSB 18 would require a governmental entity to approve the use of eminent domain at a public meeting by a record vote. It also would establish procedures for voting on specific properties and groups of properties.

The bill would expand disclosure requirements to include all entities with the power of eminent domain instead of only governments. An entity could not include a confidentiality provision in an offer or agreement to take property. The entity would have to inform a property owner of his or her right to discuss the offer with others or to keep the offer confidential. An offer to purchase or lease a property would have to be sent by certified mail and would have to include any appraisal reports acquired in the preceding 10 years.

An entity wishing to condemn a property for a pipeline would have to provide notice to the relevant county commissioners court before beginning negotiations with the property owner.

The bill would require that an entity authorized to take property, but not subject to open records laws, produce information related to the taking at the property owner's request. It would repeal Government Code, sec. 552.0037, which subjects non-governmental entities with eminent domain authority to open records laws, and Property Code, sec. 21.024, which requires critical infrastructure entities with eminent domain authority to produce certain information relating to a condemnation to the owner of the property.

General provisions. Entities that were created or that acquired the power of eminent domain before December 31, 2012, would have to submit a letter to the comptroller acknowledging that the entity was authorized by the state to exercise the power of eminent domain and identifying the legal source for that authority. An entity that did not submit a letter by September 1, 2013, would have its authority to exercise eminent domain suspended until it submitted the letter. The comptroller would submit to state leaders a report with the name of each entity that submitted a letter and a corresponding list of provisions granting the identified authority.

A property owner whose property was taken for an easement for a gas or oil pipeline could construct a road at any location above the easement. The road would have to be perpendicular to the easement, and it could not be more than 40 feet wide or interfere with the operation and maintenance of a pipeline.

The bill would prohibit certain medical centers established in Vernon's Texas Civil Statutes, Art. 3183b-1, from exercising the power of eminent domain to take single-family residential properties and multi-family

residential properties with fewer than nine units. It would also prohibit a municipal utility district from taking property for a site or easement for a road outside of its boundaries.

The changes made to hospital districts, municipal utility districts, and standards for determining fair value of highway right-of-way would apply only to condemnation proceedings filed on or after the bill's effective date.

The bill would take effect September 1, 2011.

SUPPORTERS SAY:

CSSB 18 would provide a balance between protections for private property owners and the needs of taxpayers generally. Texas was among the fastest-growing states in the union in the last decade, according to the 2010 U.S. Census. Such strong growth creates many new public needs, such as schools, roads, and utilities, that often can be built only by taking property through eminent domain authority. While the vast majority of land is acquired without the need for eminent domain, it is important to protect those owners that refuse an initial offer to purchase their land. CSSB 18 would establish these protections without imposing unacceptable costs on Texas taxpayers.

The bill would add fairness to state statutes governing the right of repurchase, expand the range of damages that could be considered in eminent domain proceedings to ensure just compensation to property owners subject to condemnation, and protect property owners in a variety of other respects where they have proven vulnerable.

Uses of eminent domain. CSSB 18 is the culmination of years of hard work on behalf of a wide range of parties to forge a consensus on eminent domain reform. The bill would be a clear improvement over current law and would address most of the lingering concerns about the use of eminent domain authority.

The bill would retain language authorizing the use of eminent domain for "public purposes" that could have unintended consequences if changed. It would add to the statutes a requirement similar to one added to the Texas Constitution in 2009 that land be taken only for a public use. The public use language in the bill would help protect property owners against abuse without going too far and requiring that land be taken only for a "necessary" use. Adding a requirement that all takings be necessary could create substantial legal confusion and put condemning authorities in the

position of having to defend the necessity of each use of eminent domain authority in a court. This would be a major cost to taxpayers, encouraging excessive litigation and potentially tying up critical public projects, neither of which Texans can afford. Adding the term "necessary" to the public use requirement would not resolve any clear and current example of eminent domain abuse in the state.

Damages and assessments. Expanding to a reasonable extent the range of plausible damages that could be awarded to property owners is necessary to ensuring just compensation for those subject to condemnation. CSSB 18 would do this by allowing special commissioners, who are appointed to determine adequate awards for property owners, to consider a "material impairment of direct access" to a property. This would expand the current practice of allowing special commissioners to consider only "material and substantial" impairments to access to a property. Eliminating the term "substantial" would require special commissioners to award damages for impaired access to a property, such as eliminating one entrance and exit to and from a parking lot that has other entrances and exits. Current legal practice does not allow special commissioners to consider these types of damages, although they often have a clear market value. The bill would provide a good balance because it is careful not to open the floodgates to the litigation that could follow a further expansion of permissible damages.

One issue often raised is that providing property owners with a broader range of damages could lead to higher costs for condemning authorities. Current statutes and the nature of the relationship between property owners and the powerful entities with eminent domain authority, however, have created an imbalance against the property owner, who often has little recourse and must go to great lengths just to receive a tolerable, let alone just, offer.

Expanding the range of damages would help restore balance by leading to more reasonable judgments in court and sending a message to condemning entities to consider the expanded range of damages in crafting their initial offers. Expanding legitimate damages would encourage condemning authorities to make fair offers up front to avoid the possibility of paying a higher sum on appeal of the initial offer. This could save money for a condemning authority in the long-run.

The bill also would require an entity to provide relocation costs — a benefit current law makes optional — in an amount sufficient to cover expenses related to relocation. This would offset some of the difficulty and grief people endure when being displaced from their homes or businesses without introducing the problematic and costly concept of ensuring a property owner a comparable standard of living.

Right of repurchase. CSSB 18 would provide for the repurchase of condemned property at the price the entity paid at the time of acquisition. This change would implement authority granted by Art. 3, sec. 52j of the Texas Constitution, which was added in 2007 when Texas voters approved Proposition 7 (HJR 30 by Jackson). Allowing the repurchase price to be set at the original sale value, and not the current fair market value as currently required in the Property Code, would enable property owners to reclaim equity for appreciating property to which they were entitled. Only property owners subject to takings that wrongfully result in cancelled, absent, or unnecessary public uses would be eligible for restitution.

CSSB 18 would curtail speculative condemnations and establish an important safeguard against the excessive and reckless use of eminent domain authority. The bill would not confer any special advantage on an individual because it would allow the redress only of a taking that was not justly executed. It would create a strong disincentive against the speculative use of eminent domain by condemning authorities, including schools, municipal and county governments, state agencies, pipelines, and utilities. Condemning authorities would be discouraged from acquiring land through eminent domain for which there were no immediate plans. Takings completed on a speculative basis deprive current owners of the future value of their property.

Bona fide offers. CSSB 18 would install clear requirements for initial offers to purchase property before an entity initiated eminent domain proceedings. The bill would require specific processes, including adhering to timelines and providing relevant appraisals and other information, and it would prohibit confidentiality agreements. If a condemning entity did not meet the requirements in the bill, the entity would have to pay court costs and other costs the property owner assumed in contesting the action.

The strongest encouragement for a fair offer in the bill would be the potential that a condemning entity would have to pay attorney’s fees and other court costs if its initial offer were 10 percent less than a property

owner's final award as granted by special commissioners or a court. This would be a deterrent against making a low initial offer. A property owner would be more likely to contest an unfair offer in court if he or she could possibly recover court costs.

OPPONENTS SAY:

CSSB 18 would impose additional costs on Texas taxpayers for the legitimate exercise of eminent domain authority. Two areas in the bill would directly and substantially increase the costs of condemnation for a legitimate public use, translating in many cases to a greater cost to taxpayers. These additional costs are unnecessary because the Legislature and the voters have in recent sessions approved measures to thwart the main sources of eminent domain abuse.

The bill would expand damages that special commissioners consider when deciding on an award to include a "material" but not "substantial" impairment of direct access to a property. This would add costs to takings for transportation projects for TxDOT, mobility authorities, and local governments. TxDOT estimates this provision could have an impact of $10 million in fiscal 2012. The total impact statewide would certainly be greater. The provision also could have unintended consequences if courts were more permissive than expected in allowing for damages that were "material impairments."

CSSB 18 would allow a court to award attorney's fees to a property owner if an ultimate award were 110 percent of the initial offer made by a condemning authority. TxDOT estimates this could cost about $7 million in fiscal 2012. This requirement also would affect other entities that use eminent domain, including universities, due to additional court costs and the incentive to inflate initial offers to avoid paying court costs at the end.

Other provisions in the bill also would increase the costs to Texas taxpayers. Some institutions that do not currently pay relocation costs would have to begin doing so. An entity that had to resell a property to an original owner would lose any increased value that accrued in the property. While the costs of these provisions cannot be estimated, they are likely to add up over time and could be significant in the long term.

OTHER OPPONENTS SAY:

CSSB 18 would fall short of the eminent domain reform Texans need and deserve. The bill would not require a taking to be a "necessary" public use. It would not address enduring abuses of slum and blight powers to take property. Provisions for expanding the right of repurchase and requiring a

bona fide offer should be stronger. The bill should expand further the evidence commissioners must consider when awarding damages to a property owner to include financial damages associated with relocating to another property and maintaining a comparable standard of living or business.

Uses of eminent domain. Not restricting property takings to a "necessary" public use would be a major shortcoming of the bill. The Texas Constitution already requires that property takings be made for a public use, but it does not require that each taking be necessary to accomplish that public use. Requiring that a taking be necessary would force condemning entities to defend the taking as essential to a particular project. This would help rebalance the power relationship between condemning entities and property owners. Current law provides no firm legal ground to challenge the legitimacy of a property taking. Adding the "necessary" provision could provide a basis for a property owner to challenge a property taking in conspicuous cases of abuse.

The bill also would retain the authorization to use eminent domain for a "public purpose" instead of a public use. The confusion between "use"— which is specific to carrying out an actual government function on a property — and "purpose" — which invokes a broader role of government in promoting common goods — has allowed many abuses of eminent domain in the past. The bill should be amended to strike references to public purpose and replace them with public use.

Slum and blight. CSSB 18 would not address a nagging vulnerability with regard to eminent domain power left unaddressed by SB 7 in 2005 — exceptions for areas designated as blighted or as slums. Under current statutory provisions, municipalities may take property for economic development purposes if the taking is a secondary purpose resulting from community development or urban renewal activities to eliminate existing harm on society from slums or blighted areas.

Existing statutory definitions of slum and blight are vague at best, leaving it to the judgment of municipal officials to decipher what constitutes hazardous conditions, greater welfare, and social and economic liabilities. The current statutory definition of blight would allow a taking in cases where a property's defect was minor, such as deteriorating improvements, or was not caused by the property owner, such as inadequate infrastructure. A lack of safeguards for property owners in potentially

blighted areas has given rise to a number of abusive and reckless eminent domain practices.

Municipalities can use the blight exception to condemn properties on questionable premises. CSSB 18 should be amended to reform the definition of blight and the use of eminent domain on blighted properties and should remove all references to "slums" in statute.

Right of repurchase. The bill would actually weaken the right of repurchase in current law. Current law triggers the right of repurchase if a governmental entity cancels a public use on a parcel. The proposed bill would leave a loophole for local governments, which could enact resolutions to meet only one of the seven conditions necessary to satisfy "actual progress" in the bill. Many of the conditions necessary to achieve "actual progress" are so loosely worded that most entities could satisfy the requirements with minimal effort. The bill should be amended to tighten the "actual progress" conditions to ensure that an entity had taken real steps toward a public use.

Another related weakness of the right of repurchase provision in the bill is that it would do nothing to prevent an entity from taking a property and using it for a purpose unrelated to the original taking. This would allow speculative practices among condemning entities who may have a provisional, malleable plan in place for development. To curb this possibility, the bill should be amended to add a "fourth trigger" that would activate the repurchase provision if the eventual use of the property was not the original use for which it was taken.

Bona fide offers. The bill's provisions for bona fide offers would not adequately protect property owners. Language in HB 2006, enacted by the 80th Legislature and vetoed by the governor, would have broadly required a condemning authority to make a good faith offer. Language from that bill was permissive to allow the matter to be defined through court proceedings. CSSB 18 would provide specific conditions that, if met, would constitute a bona fide offer. The conditions in the bill are focused on small procedural matters and in large measure reflect current practices, which have proven decidedly to favor condemning entities over property owners. Bona fide offer provisions in the bill likely would compel condemning entities to minimally satisfy the provisions on paper but would not guarantee a more fair process for property owners.

The sanctions for an entity that a court determined did not operate in good faith by making a bona fide offer should be strengthened. The bill should be amended to require that a court dismiss an action for an entity that did not make a bona fide offer and prohibit that entity from filing another petition to condemn that specific property for a specified period.

NOTES:

The Legislative Budget Board (LBB) estimates the bill would have an uncertain fiscal impact to the state due to the case-by-case nature of the requirements of future condemnation proceedings. The LBB anticipates the bill would result in increased costs to acquire property through condemnation proceedings, specifically those related to highway right-of-way projects and actions by institutions of higher education.

The House committee substitute added provisions to the engrossed Senate bill that would :

- entitle property owners to attorney's fees and other fees if a final award was 110 percent of the original offer from a condemning entity;
- require pipelines with the power of eminent domain to notify a county commissioners court before beginning negotiations with a property owner;
- set an expiration on the right of repurchase after one year if an entity made a good faith effort to locate a property owner and did not receive a response; and
- limit the condemnation authority of certain hospital districts.

SB 18 by Estes, which passed the Senate, but died in the House during the 2009 regular session of the 81st Legislature, would have modified processes and requirements governing eminent domain, standards of evidence considered by special commissioners in making decisions on damages, obligations of condemning entities, and the rights of previous owners to repurchase taken property.

TAB “4”

LEGISLATIVE BUDGET BOARD
Austin, Texas

FISCAL NOTE, 82ND LEGISLATIVE REGULAR SESSION

May 4, 2011

TO: Honorable David Dewhurst, Lieutenant Governor, Senate
Honorable Joe Straus, Speaker of the House, House of Representatives

FROM: John S O'Brien, Director, Legislative Budget Board

IN RE: **SB18** by Estes (Relating to the use of eminent domain authority.), **Conference Committee Report**

There would be an indeterminate cost to the state from the provisions of the bill.

The bill would amend various statutes related to the scope and process of private property condemnation under the power of eminent domain. The bill also amends Vernon's Texas Civil Statutes regarding the eminent domain authority of certain charitable corporations in obtaining a residential property. The bill would take effect September 1, 2011.

Based on an analysis by state agencies, it is anticipated the bill would result in increased costs for the acquisition of property through condemnation proceedings, specifically those related to highway right-of-way projects and actions by institutions of higher education. Due to the number of project specific variables involved in state property acquisitions and an unknown projected number of such projects during the 2012-13 biennium, any additional costs or negative fiscal implications to the state cannot be determined.

Based on the analysis of the Texas Department of Transportation, it is assumed the bill would result in increased costs for the acquisition of highway right-of-way through condemnation, primarily due to right of repurchase provisions and the creation of new standards for the determination of damages for access and assessment of attorney and professional fees. Because the factors considered in evaluating the value of the property to be condemned and estimating damages to a property owner would vary case by case, any additional costs or negative fiscal implications to the state cannot be determined.

Institutions of higher education also reported anticipated increased costs to property acquisitions given the provisions of the bill. These additional costs include: additional record keeping and document storage requirements; obligations to make offers for property at or above appraisal values; loss of investment value from property repurchased by previous owners; and the payment of relocation services and expenses for persons displaced by the transfer of the property to the condemning entity. The fiscal impact of these requirements is indeterminate because the number and type of condemnation proceedings to be conducted during the 2012-13 biennium is unknown.

Local Government Impact

It is anticipated that the fiscal impact to local governmental entities could be significant and would vary depending on several factors: (1) the restriction on counties to regulate the placement of driveways and other access points to its roads; (2) the right to repurchase land within 10 years after condemnation, unless actual progress toward public use is made to the property under Section 21.101, which would impair a county flood control district's ability to plan and implement major flood control projects; (3) the number of tracts of land involved, because a governmental entity would be required to vote on each tract, causing an additional administrative burden on the courts and staff; and (4) whether a property owner whose property is acquired through eminent domain for the purpose of creating an easement would choose to construct items listed in the bill above the easement, causing additional expenses to a local governmental entity to make repairs to those constructed items when accessing

utilities such as a buried pipeline under the easement.

According to the Texas Association of Counties (TAC), the fiscal impact on counties that condemn and acquire properties could be significant. However, it is impossible to determine how many properties would be acquired through the condemnation process and the value of those properties. In addition, it is also impossible to know how many properties acquired through the condemnation process that would have to be acquired through another process in the future. Therefore, it is not possible to quantify the extent of the fiscal impact on counties.

According to the Texas Municipal League (TML), the negative fiscal impact to a political subdivision relating to the acquisition and compensation for real property could be significant, but would vary depending on the number of property acquisitions for which the additionally listed costs would be required, and therefore cannot be determined.

The bill would amend the Water Code to include road projects and additional recreational facilities to the list of items that a water district may not exercise the power of eminent domain outside the district boundaries.

Source Agencies: 103 Legislative Council, 305 General Land Office and Veterans' Land Board, 710 Texas A&M University System Administrative and General Offices, 720 The University of Texas System Administration, 802 Parks and Wildlife Department, 304 Comptroller of Public Accounts, 601 Department of Transportation

LBB Staff: JOB, KY, KM, JI, SZ, KJG, TP

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