

**Eminent Domain and Private Property Rights
Fall 2021**

GENERAL INFORMATION

Adjunct Professors:

Hon. Linda Storey
9819 Oak Point Dr.
Houston, Texas 77055
Office: (713) 331-5533
judge@storeymediation.com

Justin A. Hodge
Marrs Ellis & Hodge LLP
500 Dallas, St., Suite 1350
Houston, Texas 77002
Office: (713) 609-9503
jhodge@mehlaw.com

I. Schedule

- A. **Class Meetings:** Thursday, 4:00-6:00 pm.
- B. **Office Hours:** By appointment only. We are open to meet with students as schedules permit.

II. Course Materials

- A. **Required Materials:** Course-case Packet. Supplemental Materials will be circulated and/or posted electronically in advance of class and will consist of selected readings and case law from various Reference Materials.
- B. **Reference Materials:**

Selected case law. *See* Course Packet.

III. Course Description

Texas is home to eight of the nation's 15 fastest-growing cities and boasts five of the top 10 cities in the total number of new residents. This growth is not a new phenomenon. Texas has added more residents than any other state since 2000. But what happens when the infrastructure growth associated with the Texas population boom impacts private property owners?

An inherent tension exists between public projects needed to accommodate Texas's expansive growth and fundamental property rights protected by the U.S. and Texas Constitutions. Eminent domain—the power of a governmental entity (or those with its delegated authority) to take private property and convert it into public use for just compensation—is designed to balance public and private property interests. Class discussions and reading assignments will explore whether the current eminent domain framework protects property owners and the public. The subject is generally divided into two interrelated parts: (1) the origins of eminent domain, public use, and public necessity; and (2) “just” compensation (including evidentiary and procedural issues that impact value).

IV. Course Requirements.

- A. **Attendance.** Class attendance is required and will be monitored. We reserve the right to adjust your grade downward by 1/3 of a point should you have more than two unexcused absence during the course of the semester. For example, if you have more than two unexecuted absences and you receive an A-, then we reserve the right to adjust your grade downward to a B+. Please communicate with us about all absences by email.
- B. **Class Participation.** We expect students to be prepared for class. We reserve the right to adjust your final grade upward or downward 1/3 of a point for truly exceptional or poor contributions to the class during the course of the semester. For example, if you provide truly exceptional contributions to the class and receive an A-, then we reserve the right to adjust your grade upward to an A. The inverse may happen for a lack of preparation or poor contributions to the class.
- C. **Class Decorum & Laptops.** We expect you to behave in a professional manner in class. We approve of laptop use during class, but only for the purposes of taking notes and related class participation. We reserve the right to ban laptops if their use becomes a detriment to the class.
- D. **Final Examination.** Your final grade will be based on a two-hour essay examination at the end of the course. You may use the required materials, reference materials, your own outlines, or outlines you have helped prepare in collaboration with your classmates.

V. Counseling and Psychological Services (CAPS):

CAPS can help students who are having difficulties managing stress, adjusting to the demands of a professional program, or feeling sad and hopeless. You can reach CAPS (www.uh.edu/caps) by calling [713-743-5454](tel:713-743-5454) during and after business hours for routine appointments or if you or someone you know is in crisis. No appointment is necessary for the “Let's Talk” program, a drop-in consultation service at convenient locations and hours around campus. See: http://www.uh.edu/caps/outreach/lets_talk.html.

VI. Recording of Class:

Students may not record all or part of class, livestream all or part of class, or make/distribute screen captures, without advanced written consent of the instructor. If you have or think you may have a disability such that you need to record class-related activities, please contact the [Center for Students with DisABILITIES](#). If you have an accommodation to record class-related activities, those recordings may not be shared with any other student, whether in this course or not, or with any other person or on any other platform. Classes may be recorded by the instructor. Students may use instructor's recordings for their own studying and notetaking. Instructor's recordings are not authorized to be shared with *anyone* without the prior written approval of the instructor. Failure to comply with requirements regarding recordings will result in a disciplinary referral to the Dean of Students Office and may result in disciplinary action.

VII. Distance Education Disclosure

Whether this course will be distance education, or will have a physical room assigned, and if so the extent to which the instructor might use the room during the semester, is not determined at the time when registration initially opens for this course. You may see contrary indications in the UH systems where you actually register for the course. In other words, this course might be distance education with no use of a physical classroom. It might be the "HyFlex" mode in which some Law Center courses used a physical room during 2020-21. As we get closer to the start of the term/semester for this course, this course note will be updated as decisions are determined. The instructors will be involved in those decisions, but decisions about modalities may not be invariant throughout the term/semester or between now and when the course starts.

VIII. Syllabus Changes:

Due to the changing nature of the COVID-19 pandemic, please note that the instructor may need to make modifications to the course syllabus and may do so at any time. Notice of such changes will be announced as quickly as possible via Blackboard or email.

TENTATIVE READING ASSIGNMENTS

I.

Overview: Origins of Eminent Domain

Class No. 1

Topic: Course Introduction and What Is Property?

What is a taking?

Who has the power to condemn? Why?

Kelo v. City of New London, 545 U.S. 469 (2005)

Kelo Reactions

County of Wayne v. Hathcock, 684 N.W. 2d 765 (Mich. 2004)

TEX. GOV'T CODE § 2206.001 (b)(1)

Texas Constitutional Article I, § 17 and Proposition 11 (2009).

Other State Reactions

II.

Public Use & Public Necessity

Class No. 2

Topics: Public Use vs. Public Necessity—Who Decides What's Needed and How Is It Decided?

Boom Co. v. Patterson, 98 U.S. 403 (1878).

Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

City of Austin v. Whittington, 384 S.W.3d 766 (Tex. 2012).

Maher v. Lasater, 354 S.W.2d 923 (Tex. 1962).

III.

Administrative Phase

Class No. 3

Topic: Pre-Condemnation Negotiations, Final Offer, Filing Requirements, the Special Commissioners' Hearing, Procedural Deadlines, and Jurisdiction.

TEX. PROP. CODE ch. 21

Senate Bill 18

In re Lazy W District No. 1, 2016 WL 3157559 (Tex. 2016).

Hubenak v. San Jacinto Gas Transmission Co., 141 S.W.3d 172 (Tex. 2004).

Pappas Restaurants, Inc. v. State, 2016 WL 3900720 (Tex.App.—Houston [1st Dist] 2016, no pet. h.).

State v. Bristol Hotel Asset Co., 65 S.W.3d 638 (Tex. 2001).

IV.
Physical Taking vs. Regulatory Taking

Class No. 4

Topic: Physical Takings, Regulatory Takings, and Inverse Condemnation

Penn Cent. Trans. Co. v. City of New York, 438 U.S. 104 (1978).
First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 US 304 (1987).
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).
Dolan v. City of Tigard, 512 U.S. 374 (1994).
Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).
Sheffield Development v. City of Glenn Heights, 140 S.W.3d 660 (Tex. 2004).
Horne v. Dept. of Agric., 135 S.Ct. 2419 (2015).

V.
Judicial Phase and
“Just” Compensation

Class No. 5

Topics: How Court’s Determine “Just” Compensation - Highest and Best Use

State v. Carpenter, 89 S.W.2d 979 (Tex. 1936).
Kimball Laundry Co. v. United States, 338 U.S. 1 (1949).
United States v. 564.54 Acres of Land, 441 U.S. 506 (1979).
City of Austin v. Cannizzo, 267 S.W.2d 808 (Tex. 1954).
Religious of Sacred Heart of Texas v. City of Houston, 836 S.W.2d 606 (Tex. 1992).
State v. Windham, 837 S.W.2d 73 (Tex. 1992).
Olson v. United States, 292 U.S. 246 (1934).

Class No. 6

Topic: Limitations on “Just” Compensation—Why Some Market Damages Are Not Recoverable

City of Austin v. Avenue Corp., 704 S.W.2d 11 (Tex. 1986).
State v. Schmidt, 867 S.W.2d 769 (Tex. 1993).
City of Harlingen v. Sharboneau, 48 S.W.3d 177 (Tex. 2001).
State v. Dawmar Partners, Ltd., 267 S.W.3d 875 (Tex. 2008).
Interstate Northborough P’ship v. State, 66 S.W.3d 213 (Tex. 2001).

Class No. 7

Topic: Billboards, the Property Owner Rule, and Jury Charge

State v. Central Expressway Sign Associates, 302 S.W.3d 866 (Tex. 2009).
State v. Clear Channel Outdoor, Inc., 463 S.W.3d 488 (Tex. 2015).
Westgate, Ltd. v. State, 843 S.W.2d 448 (Tex. 1992).
State v. Petropoulos, 346 S.W.3d 525 (Tex. 2011).
State v. Whataburger, Inc., 60 S.W.3d 256 (Tex.App.—Houston [14th Dist] 2001, pet. denied).

Class No. 8

Topic: Admissibility of Market Evidence, the Economic Unit, Burden of Proof of Damages, Leaseholds, and Cross Examination of Appraisers

In re State, 355 S.W.3d 611 (Tex. 2011).
American Guaranty Life, Health and Accident Insurance Co. v. State, 332 S.W.2d 135 (Tex. Civ. App.—Austin 1960, writ ref'd n.r.e.).
City of Houston v. Priester, 302 S.W.2d 948 (Tex. Civ. App.—Galveston 1957, no writ)
State v. Reina, 218 S.W.3d 247 (Tex.App.—Houston [14th Dist.] 2007, no pet.).
State v. Target Corp., 194 S.W.3d 46 (Tex.App.—Waco 2006, no pet.).
Dallas Cty. v. Crestview Corners Car Wash, 370 S.W.3d 25 (Tex.App.—Dallas 2012, pet. denied).
State v. Windham, 837 S.W.2d 73 (Tex. 1992).
Ex Parte Shepperd, 513 S.W.2d 813 (Tex. 1974).
Reid Road Municipal Utility District No. 2 v. Speedy Stop, 337 S.W.3d 846 (Tex. 2011).

Class No. 9

Topic: Date of Taking, Project Influence, and Value to the Taker

City of Fort Worth v. Corbin, 504 S.W.2d 828 (Tex. 1974).
Barshop v. City of Houston, 442 S.W.2d 682 (Tex. 1969).
Caffe Ribs, Inc. v. State, 487 S.W.3d 137 (Tex. 2016).
Enbridge Pipelines (E. Tex.) L.P. v. Avinger Timber, LLC, 386 S.W.3d 256 (Tex. 2012).

Class No. 10

Topic: Delegation of Power — Easements (Pipelines, Power lines, and Utility Lines)

Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623 (Tex. 2002).
United States v. 8.41 Acres of Land, 680 F.2d 388 (5th Cir. 1982).
Bauer v. Lavaca-Navidad River Authority, 704 S.W.2d 107 (Tex.App.—Corpus Christi 1985, writ ref'd n.r.e.).
TEX. GOV'T CODE §2206.001 *et seq.*
Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC, 363 S.W.3d 192 (Tex. 2012) (Denbury I).
Denbury Green Pipeline-Texas, LLC vs. Texas Rice Land Partners, Ltd., 2017 WL 65470, (Tex. 2017) (Denbury II).
Crosstex DC Gathering Co., J.V. v. Button, Cause No. 02–11–00067–CV 2013 WL 257355 (Tex.App.—Fort Worth Jan. 24, 2013, no pet.).
LaSalle Pipeline, LP v. Donnell Lands, L.P., 336 S.W.3d 306 (Tex. App.—San Antonio 2010, pet. denied).
Houston Lighting and Power Co. v. Klein Ind. School Dist. 739 S.W.2d 508 (Tex.App.—Houston [14th Dist.] 1987, writ denied).

Class No. 11**Topic: Federal Condemnation Actions**

FED. RULE CIV. P. 71.1.

Natural Gas Act of 1938, 15 U.S.C. § 717f(h) (2016).

Kirby Forest Indus., Inc. v. United States, 467 U.S. 1 (1984).

East Tennessee Natural Gas Co. v. Sage, 361 F.3d 808 (4th Cir. 2004).

Northern Border Pipeline v. 86.72 Acres of Land, 144 F.3d 469 (7th Cir. 1998).

Transwestern v. 17.19 Acres of Property, 550 F.3d 770 (9th Cir. 2008).

Knick v. Twp. of Scott, 588 U.S. ____ (2019).

VI.**Current Trends, Disputed, and Future Issues****Class No. 12****Topic: Flooding Cases and Water Rights**

Tarrant Regional Water Dist. v. Gragg, 151 S.W.3d 546 (Tex. 2004).

Harris County Flood Control District v. Kerr, 499 S.W.3d 793 (2016).

United States v. Sponenbarger, 308 U.S. 256 (1939).

Arkansas Game and Fish Com'n v. U.S., 568 U.S. 23 (2012).

Edwards Aquifer Auth. v. Day, 369 S.W.3d 814 (Tex. 2012).

Class No. 13**Topic: Emergencies, Police Power, Commandeering, And Compensation: Essential Reading**

National Bd of YMCA v. United States, 395 U.S. 85 (1969)

Armstrong v. United States, 364 U.S. 40 (1960)

Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

Miller v. Schoene, 276 U.S. 272 (1929).

Final Exam