



VIEW REVIEW

**THE
ROAD TO
ECONOMIC
DEVELOPMENT**

Property acquisition and economic development. These two concepts lead us to a question:

What is the cost of progress?

The cost of progress made national headlines in 2005 with the case of Kelo vs. City of New London, in which the U.S. Supreme Court granted local governments the authority to seize private

property for private economic development for "public use," as interpreted in the Takings Clause of the Fifth Amendment. The issue of property acquisition resurfaces as we examine the proposed development of the Trans-Texas Corridor and its potential positive and negative impacts on property owners in the path of this development.

My Land
is NOT
your land!



The Trans-Texas Corridor (TTC) program is a proposed multi-use transportation system that will incorporate existing and new highways, railways and utility right-of-ways. The goal of the TTC program is to solve current mobility problems while anticipating and planning solutions to our long term transportation needs.

Specific routes for TTC projects will be determined where unique regional needs indicate they are needed. However, upgrading and making the best use of existing corridors and current infrastructure is certainly the highest priority.

As envisioned, individual TTC facilities could ultimately include one or more of the following elements:

- > *separate lanes for passenger vehicles*
- > *dedicated large truck lanes*
- > *freight railways*
- > *passenger railways*
- > *utilities including wind generated electric lines, oil and gas pipelines, and transmission lines for broadband and other telecommunications services*

Plans call for the TTC program to be developed in phases as needed. Route selection will result from collaboration between TxDOT, regions, local communities and advisory committees. TxDOT will oversee planning, construction and ongoing maintenance, while private vendors may be responsible for majority of the daily operations.

The proposed TTC-35 corridor generally parallels I-35. Where possible, TTC-35 will develop from existing infrastructure. The initial study area is approximately 600 miles long, extending from north of Dallas/Fort Worth to Mexico and possibly the Gulf Coast. Utilizing the TTC financing tools, projects along the corridor will develop further as local needs demand.

The TTC-35 right of way acquisition process will be no different from the process used to acquire right of way for any other road. As with other projects, TTC-35 right of way acquisition procedures would include an independent appraisal and determination of fair market value, an offer and opportunity for negotiation, and the same due process rights to a special commissioners hearing

and jury trial if the property owner is not satisfied with the TxDOT offer.

Property owners whose land is acquired or adversely affected by any public project will receive all of the compensation the state constitution guarantees and the Texas courts have deemed appropriate over the years. Generally, that includes the fair market value of the property acquired, plus all compensable damages special or unique to the owner's remaining property, which may include deprivation of reasonable access, loss of or damage to improvements including fences.

With a project of this magnitude, we provide additional information that may clarify questions or concerns of the public.

MYTH: All land will be acquired under eminent domain at pennies on the dollar.

REALITY: Any land needed will be purchased and property owners will be paid fair market value. There will be an independent appraisal, an offer, and opportunity for negotiation. If the property owner is still not satisfied with the TxDOT offer, he or she has the same due process rights to a special commissioners hearing and jury trial through the judicial system.

MYTH: TxDOT has the authority to condemn property for private use and operate commercial facilities associated with the Trans-Texas Corridor.

REALITY: TxDOT can only acquire property for transportation purposes. If customer service facilities are needed, such as gas stations or convenient stores, TxDOT may acquire the land but the private sector will provide those services. In other words, any competition will be among private businesses and the landowner retains development

rights. According to state law, no developer of TTC projects will be allowed to operate these facilities.

MYTH: TxDOT will transfer its eminent domain authority to a private entity hired to develop the corridor.

REALITY: TxDOT cannot delegate the power of eminent domain to a private or third party. A developer for the TTC will not be condemning land.

MYTH: All land will be owned by the Spanish government.

REALITY: Projects under the TTC program are state-owned and any land purchased or transportation improvements built will be done in the name of the state. All property acquired will be the property of the State of Texas. Should Cintra Zachry or another private group develop any portion of TTC-35, their role will be to finance, design, build, maintain, operate and collect a portion of tolls for a period of time.

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REVIEW:

AVANT & MITCHELL, LP

What is the practical impact of the Trans-Texas Corridor plan?

For decades Texas has been justified in boasting that it maintained one of the finest and largest road systems in the country. Although property acquisition to build roadways is not new, the Trans-Texas Corridor (TTC) is a new type of project that encompasses more than the movement of cars and trucks – it is a concentrated right of way for motor vehicles, pipeline products, utilities, high-speed rail and associated private services within an area approximately a quarter of a mile wide with minimal interaction with or access to the area it traverses. With a broad corridor design (perhaps 1,200 feet wide), its primary function is to connect regions, not for local use. Local areas may reap few, if any, of the benefits. Opinions in the general population vary. However, when the bulldozer is at the doorstep, local owners may become painfully aware that the project affects local land use and compensation factors in unique and, sometimes, detrimental ways.

The current TTC plan involves a privately operated toll road system that is new to rural Texas. There are features that are substantially different from an open public highway system of free roadways, which are fully owned by the Texas citizens and available for unlimited use. The impact in communities near the TTC pathway may even have a chilling effect on improvement of “competing roadways” that are available for local use.

TTC is a large-scale experiment incorporating sweeping changes in concept, design as well as funding. The long-term transfer of public rights and control of roads to private entities involves the transfer of public rights and powers, by contract, to privately owned companies. Functions will be performed by contractors that historically were performed by career public servants who were under direct governmental regulation and control. Although the legislature has previously granted the power to

condemn to certain privately held companies, the scale of the TTC project is unprecedented in its potential impact. Actual condemnation suits are expected to be handled by the Office of the Attorney General, but the “negotiation” stages of land acquisition are expected to be handled by TTC contractors. Land owners evaluating an offer received from the contractor, must evaluate it within the specialized context of a TTC project.

When the dozer is at the door: Are the TTC differences likely to affect individual condemnees?

The first and most important factor that an owner should keep in mind is that the process of acquisition of right of way is a power that is aggressively used. The individuals may be nice people, but the process is adversarial. There is no government employee or private contractor charged with assuring that the “property owners will be paid fair market value”.

Condemnees are not required to agree to a value, but must stand up for their rights to fair compensation. Failure to understand and evaluate the specialized appraisal and land use questions that are unique to condemnation practice, and often unique to their parcel of land, can and often do result in undercompensation.

Initial contact and communication will typically be from a private contractor or “negotiator” who, after requesting entry to perform inspections and surveys, may make an offer to purchase based upon an inadequately supported appraisal, or ask for a response to the offer on a tight timeline – usually ten days.

The body of appellate decisions used to protect governmental entities acquiring land for projects that benefit the public is likely to be applied to TTC acquisitions, without practical distinction, in most cases. There is little likelihood that an individual owner will prevail on the Courts to “stop” a taking. Factors that demonstrably reduce

property value, such as excess noise, proximity, visibility, limitation of access, inability to market a property that lies in the pathway and condemnation blight will be hotly contested or excluded from the compensation offered. Access provisions (meaning the right to get to and from property that fronts the TTC) are in many locations so different from our traditional public facilities that values may be impacted negatively.

The extended time frame for completion (estimated at 50 years) and uncertainty will impact those citizens that lie in the proposed pathways, and may impair development plans, the ability to lease, sell or finance improvements during years of waiting.

In conclusion, the TTC project involves sweeping changes to known Texas condemnation paradigms. The economic, environmental, and political overtones of the TTC project will undeniably change the landscape of Texas eminent domain practice for years to come. The TTC concept may well be modified in the years to come, but the long-term contractual obligations to Cintra-Zachry and other companies are designed to commit future administrations. Although the TTC designers will have long since retired before Texans see the final result of this experiment, the impact upon individual owners has already begun.

Jeff Avant and Elliott Mitchell are condemnation attorneys each with over 20 years experience in appraisal disputes and condemnation law. They have represented landowners as well as condemnors, including TxDOT, before forming Avant & Mitchell, LP, representing property owners, people and businesses throughout the state.

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¹ SEE Competing facilities restrictions: Section 11.3 of SH 130 Facility Concession Agreement available on the Web at ftp://ftp.dot.state.tx.us/pub/txdot-info/tta/sh130_cda/facil_concession_agmt.pdf and ftp://ftp.dot.state.tx.us/pub/txdot-info/tta/sh130_cda/exhibit_17.pdf