

## Service

Public Law

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## Texas Supreme Court Defers to Government Declaration of Public Use, at Least for Now

The Texas Supreme Court held on Friday that the City of Rowlett's condemnation of land owned by a private developer was a proper public use, even though the condemnation would help the business of a competing private developer. In a 6-3 decision, Justice Jeff Brown wrote that even though the taking "benefit[ed] Briarwood and Sprouts, ... it also benefits other nearby businesses and an untold number of daily drivers who avail themselves of the retail businesses in the area."

The condemnee, KMS Retail Rowlett, LP, owned a 9-acre tract of land in the city of Rowlett, containing a bank branch, Arby's, Starbucks and Chick-Fil-A. KMS built a private drive allowing access to these sites. KMS's tract was adjacent to a property owned by a competing developer, Briarwood. In 2014, Briarwood began negotiating with Sprouts Farmers Market to build a store on Briarwood's tract and approached the city about a proposed incentives deal to facilitate negotiations with Sprouts. The eventual deal between Briarwood and the city required Briarwood to build a "private circulation drive" that would connect KMS's adjacent tract and private drive to Briarwood's own commercial development—thereby benefitting Sprouts by providing cross-access traffic.

At issue was the city's use of eminent domain to condemn a portion of KMS's tract to allow Briarwood to extend its private drive to permit cross-access to the Sprouts tract. After special commissioners awarded KMS \$31,662 for the taking, KMS argued in a motion for summary judgment that the taking was not for a constitutional public use and violated chapter 2206 of the Government Code, and that the city's declaration of public use was fraudulent,

in bad faith, arbitrary and capricious. The trial court denied the motion and dismissed all of KMS's claims. The appellate court affirmed.

The Texas Supreme Court affirmed as well, first looking to chapter 2206 of the Government Code, which was enacted after the U.S. Supreme Court's *Kelo* decision to limit public takings for the benefit of a private party, and forbids the government from declaring a public use as a pretext when the taking actually serves a private purpose. The majority found that the taking was exempt from Chapter 2206, falling under that chapter's transportation project and public roads exceptions. Although KMS argued that the taking was "inextricably linked" to the economic-incentives deal between Briarwood and the City, the Court found that the City had properly declared the taking as a "transportation project," thereby bringing the project within the exception. Although this reading seems to permit a government entity simply to declare a transportation project and thereby avoid the prohibition against pretextual public takings, the Court stated that "sometimes that is how exceptions work, whether inadvertently or by design."

The court also held that the taking was for a public use, since the city's evidence established that the taking would provide better traffic flow and access to all the business in the area—not just the Sprouts on Briarwood's tract. And the Court rejected KMS's argument that the taking was fraudulent, in bad faith, arbitrary or capricious for a similar reason. While a showing of fraud would serve to invalidate an otherwise proper taking, this would be the case only if "the taking would actually confer *only* a private benefit." Here, the taking benefitted the public as well as Briarwood and Sprouts.

The three-justice dissent, authored by Justice Blacklock, took issue primarily with the majority's application of precedents pre-dating the 2009 changes to the Texas Takings Clause, which were intended to afford property owners greater protection after *Kelo*. The majority was of the opinion that although the impact of the 2009 amendments might need to be discussed in a future case, this was not the appropriate case since KMS had not asked the court to consider the impact of those amendments. However, the majority stated that it "welcome[d] the opportunity" to explore the question in a future case.

### **What This Means to You**

The decision's ramifications are significant for both public condemnors and private landowners. For governments seeking to condemn property, this decision indicates that a majority of the Texas Supreme Court is willing to take a deferential approach to a government's declaration of public use and necessity, even in a situation where a private party benefits in a more-than-incidental way. This deference will likely be even more pronounced in situations where the government entity is exercising condemnation for "traditional" purposes, like roads and other transportation projects.

On the other hand, when the government has declared such a taking, private landowners are boxed into a limited menu of affirmative defenses which may require significant evidence to prove—fraud, bad faith and arbitrariness. While it may be the case that the recent legislative trend has been to strengthen the ability of property owners to resist public and private takings, the Supreme Court—at least for now—appears unwilling to look behind a government entity’s declaration of public use when that public use predominates, even only slightly, over the incidental private benefit. However, the opinion also makes it clear that the door to public use challenges remains open if the condemnor does not meet all statutory requirements.

### **Contact Us**

If you have questions about this update or how it might affect your business, contact Kate David, Robert Eckels, Heidi Rasmussen, Mike Stafford or Ben Stephens.