

The State of Texas
House of Representatives

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OPINION COMMITTEE



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RQ-0113-KP

June 10, 2016

The Honorable Ken Paxton
Texas Attorney General
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Re: Request for an opinion regarding whether the Texas Central Railroad and Infrastructure, Inc. possesses the power of eminent domain to condemn property for the Texas High Speed Railway

Dear General Paxton:

Pursuant to the authority to issue advisory opinions granted to the attorney general in Section 22 of Article IV of the Texas Constitution, as that authority is more specifically described in §§402.041 *et seq* of the Government Code, this letter is being submitted to request an opinion regarding whether the Texas Central Railroad and Infrastructure, Inc. ("High Speed Rail") has been granted eminent domain power to condemn property for a project commonly referred to as the Texas High Speed Rail Project. Surveyors purporting to work for High Speed Rail have been approaching landowners in various counties between Dallas County and Harris County, including counties in House District 8, which I represent, requesting the right to survey the landowners' properties for the purpose of planning, building, maintaining and operating an electric railroad. The basis for the request to survey is that High Speed Rail purportedly has the power of eminent domain and, as such, it therefore has the right to examine and survey property in anticipation of establishing a route and acquiring property to build the railroad. In some cases, High Speed Rail has filed applications for temporary injunctions to restrain and enjoin landowners from interfering with the survey crews. High Speed Rail claims that it is a **railroad company**, as that term is defined in § 81.002 and used in §112.051 of the Texas Transportation Code. High Speed Rail also asserts that it is an **interurban electric railway company** as that term is defined in §131.011 and used in §131.012 of the Texas Transportation Code. Thus, it claims it has the eminent domain power that the Transportation Code gives those types of entities.

It would be problematic if a company that does not have the power of eminent domain was entering or directing others to enter upon property it did not have the right to condemn. Thus, this issue is of great importance to Texans, especially rural Texans, whose property is already being entered upon in preparation for the initiation of eminent domain proceedings. The issue upon which I request an opinion is one of statutory interpretation and the rules that govern your response are straightforward.

I. BASIC RULES

One of the most basic rules of statutory construction is that a court should always construe a statute to determine and give meaning to the legislature's intent. *Texas Department of Transportation v. City of Sunset Valley*, 146 S.W.3d 637 (Tex. 2004). In addition, the rules of statutory construction also provide for construing statutes in reference to other statutes, especially those relating to the same general subject matter. *See* TEX.GOV.C. §311.023(4).

Eminent domain power is an attribute of sovereignty. *Texas Highway Dept. v. Weber*, 219 S.W.2d 70, 72 (Tex. 1949). High Speed Rail is not sovereign and, therefore, it must show where it has been delegated the power by the legislature. The allegation must be expressed, or by necessary implication, and it will not be found from doubtful inferences. *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 829 (Tex. 1958). And, statutes involving

eminent domain power must be, "...strictly construed in favor of the landowner and against those corporations and arms of the State vested therewith." *Birch v. City of San Antonio*, 518 S.W.2d 540, 545 (Tex. 1975). See also *Saunders v. Titus County Fresh Water Supply Distr. No. 1*, 847 S.W.2d 424 (Tex.App.—Texarkana 1993, no writ); *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d at 831. The Texas Supreme Court recently addressed grants of eminent domain power in *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192 (Tex. 2012):

The legislative grant of eminent-domain power is strictly construed in two regards. First, strict compliance with all statutory requirements is required. (Citations omitted). Second, in instances of doubt as to the scope of the power, the statute granting such power is "strictly construed in favor of the landowner and against those corporations and arms of the State vested therewith."

Id. at 197, citing *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 831 (1958). Thus, any inferences which may be drawn from the statutory language must be construed in favor of the landowner and strictly against High Speed Rail.

II. DISCUSSION

High Speed Rail claims eminent domain power from two Texas Statutes. First, High Speed Rail claims that it is entitled to condemn property by §112.053 of the Texas Transportation Code, which gives eminent domain power to a "railroad company." Section 81.002 of the Texas Transportation Code states:

In this title [regarding railroads in general] a reference to a railroad company includes:

1. a railroad incorporated before September 1, 2007, under former Title 112, Revised Statutes; or
2. any other legal entity operating a railroad, including an entity organized under the Texas Business Corporation Act or the Texas Corporation Law provisions of the Business Organizations Code.

TEX.TRANS.C. §81.002 (emphasis added). High Speed Rail was not incorporated prior to September 1, 2007. According to the Secretary of State's records, it was incorporated in 2012. Therefore, High Speed Rail is clearly not a railroad company under subsection 1. With respect to subsection 2, High Speed Rail is not a railroad company because it is not currently operating a railroad. The verb "operating" is a present tense verb meaning that the company claiming to be a railroad company has to be operating a railroad today. To my knowledge, High Speed Rail is not currently operating a railroad and no information has been provided to landowners whose properties are being surveyed to prove that High Speed Rail is operating a railroad. Instead, High Speed Rail is making plans to operate a railroad at some point in the future. Since High Speed Rail is not a railroad company, §112.053 does not vest High Speed Rail with eminent domain power.

The other statute relied upon by High Speed Rail for its eminent domain power is §131.012 of the Transportation Code, which gives eminent domain power to an "interurban electric railway company." Section 131.011 of the Transportation Code provides that:

In this subchapter, "interurban electric railway company" means a corporation chartered under the laws of the state to conduct and operate an electric railway between two municipalities in the state.

TEX.TRANS.C. §131.011. At first glance this statute might appear to classify High Speed Rail as a type of company that has eminent domain power. But, a thoughtful analysis of Chapter 131 of the Transportation Code, and its predecessor, proves otherwise.

High Speed Rail is not an interurban electric railway company, for several reasons. First, in order to be an interurban electric railway company, High Speed Rail must first be a railroad company under §81.002. High Speed Rail is not a railroad company under §81.002, so it cannot be an interurban electric railway company. An interurban

is simply a subset of railroad companies. The words “interurban electric” describe the type of railroad company that is addressed by Chapter 131. If High Speed Rail could be an interurban electric railway company, but at the same time NOT be a railroad company, anyone could form an interurban electric railway company by simply filing the appropriate documents with the Texas Secretary of State’s office, claiming to be an interurban electric railway company; and, it would thereby acquire eminent domain power. To be qualified to be an interurban electric railway company, the company must first be a railroad company, which High Speed Rail is not.

Second, from a historical prospective, an interurban electric railway company is very different from what High Speed Rail purports to be. The statute from which §131.011 came – old Article 6540 of the Vernon’s Statutes – was originally passed in 1907. In 2009, the legislature passed a non-substantive revision that put all of the railroad laws in the Transportation Code. 2009 TEX. SESS. LAW SERV. Chapter 85 (S.B. 1540), *A Non-Substantive Revision of Statutes Relating to Railroads, Including Conforming Amendments* (Vernon’s Texas Session Law Service 2009, 81st Legislature, 2009, Regular Session). Since the revision was intended to be non-substantive, a look at the predecessor to §131.011 is helpful. Old Article 6540 provided:

An interurban electric railway company, within the meaning of this chapter, is a corporation chartered under laws of the State for the purpose of conducting and operating an electric railway between two cities or between two incorporated towns or between one city and one incorporated town in the State. . . .

TEX.REV.CIV.STAT. and ART. 6540 (repealed 2009 effective September 1, 2011). Texas law no longer recognizes a distinction between cities and incorporated towns, but old Article 6540 is instructive in that it contemplated a rail system that linked cities and “incorporated towns.” In practice, interurbans were regional railways that connected large cities with surrounding towns and rural areas. They did not provide high speed, non-stop service between the two largest metropolitan areas in Texas. This will be explained in more detail below. The reference in new §131.011 to municipalities, rather than incorporated cities and towns, simply reflects the fact that Texas law no longer acknowledges the concept of an “incorporated town.” Cities and towns are all referred to now as municipalities, including home rule municipalities and Type A, Type B and Type C general municipalities. See TEX.LOC.GOV.C. Chapters 5-9.

Since determining legislative intent is always the goal of statutory construction, the question is whether in 1907 the legislature intended an interurban electric railway company to be what High Speed Rail is today. The legislature could not have intended to give eminent domain power to a railway such as High Speed Rail under the interurban electric railway company statute because there was no such thing as High Speed Rail in existence at the time.

When the interurban statute was passed in 1907, interurbans provided a link between small and large cities throughout Central Texas. A historical document found on the Dallas Area Rapid Transit website has an excellent history of the interurban electric railway system.

See www.dart.org/newsroom/MonroeShopsHistoryandpreservation.pdf. On page 14 the historian describes interurbans:

The streetcars and the interurban lines were vital in the development of the City of Dallas and North Texas. Real estate developers used them as amenities to support the idea of suburban life where a person could easily commute to downtown to work, but return home to a pleasant residential community.

In addition, on page 17 the historian notes that the interurban was centered in the Dallas/Fort Worth area, serving smaller surrounding towns and cities. Page 24 advertises a ticket for children at half-fare, which is consistent with §132.102(a) of the Transportation Code. Importantly, and in contrast to the plans for High Speed Rail, on page 38 the historian says:

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The interurban also connected outlying farms and rural towns to the large urban centers such as Dallas and Fort Worth. With the interurban, people from small towns and rural areas had greater mobility and were able to access all the goods and services the large cities offered.

The Texas State Historical Association website also provides a good history of interurbans. *See* <https://tshaonline.org/handbook/online/articles/eqe12>. The association reports that interurbans were a series of smaller companies, which were eventually merged into larger ones, that connected metropolitan areas with smaller surrounding municipalities such as Denison, Cleburne, Corsicana, Beaumont, Port Arthur, Sherman, Belton, Temple, Terrell, etc. Further, according to the association, the last interurban railway built in the United States was the Houston Northshore Railway Company, which extended 26 miles from Houston, through Baytown, to Goose Creek. By the end of 1941, only two interurban lines continued to operate in Texas – Texas Electric and the Houston Northshore. And, even “they were both discontinued in 1948.” So, according to the Texas State Historical Association, there hasn’t been an interurban electric railway company operating in Texas in 68 years.

Several Supreme Court cases also emphasize the local nature of an interurban’s activities. *See United States v. Chicago N.S. & M.R. Co.*, 288 U.S.1 (1933) (interurban electric railways are not in all circumstances susceptible to exact definition, but tend to accommodate purely local traffic and are therefore exempt from regulation by the Interstate Commerce Commission); *Piedmont & Northern Railway Co. v. Interstate Commerce Commission*, 286 U.S. 299 (1932).

A review of all of Chapter 131 also sheds light on whether the legislature intended companies like High Speed Rail to be interurban electric railway companies. Chapter 131 regulates interurban electric railway companies and those companies do very different things than what High Speed Rail proposes to do. For example, §131.016 of the Transportation Code provides that:

The rights secured under this chapter by an interurban electric railway company are void unless the road to be constructed under the charter of the company is fully constructed from one municipality to another within 12 months of the date of the final judgment awarding the company an easement or right-of-way under Section 313.015.

TEX.TRANS.C. §131.016 (emphasis added). The time needed to construct the High Speed Rail from Dallas to Houston has been variously estimated at between three and four years. Under §131.016, any rights acquired (including property rights and the right of condemnation) would be “void”, unless the railroad contemplated by the company’s charter was constructed within one year. Obviously, interurban electric railways were originally conceived to involve much shorter lengths and localized areas of track, where construction could be completed within twelve months.

Section 131.061 of the Transportation Code provides:

An interurban electric railway company, as defined by Section 131.011, is entitled to produce, supply, and sell electric light and power to the public and to municipalities.

TEX.TRANS.C. §131.061. The reference to the generation and sale of electricity is a throwback to a time when electrical power was not uniformly available throughout all areas of the state. In order to power an interurban electric railway company, the railway company had to either purchase or generate its own electricity. Section 131.061 gave the interurban electric railway company the right to sell excess power to the public and to municipalities. Of course, that concept is foreign to electrical utilities and railroads operating today. And, this again shows that the interurban electric railway company referenced in Chapter 131 is not the same thing as High Speed Rail.

Section 131.035 of the Transportation Code provides:

A corporation described by this subchapter may not:

1. acquire, own, control, or operate a parallel or competing interurban line; or
2. purchase, lease, acquire, own, or control, directly or indirectly, the shares or certificates of stock or bonds, a franchise or other right, or the physical property or any part of the property, of any corporation in violation of the law commonly known as the antitrust law.

TEX.TRANS.C. §131.035. The reference to non-competition and antitrust laws is a reference to the state of affairs that existed in 1907 during the presidency of Teddy Roosevelt, the famous trust-busting President. Railroad monopolies, and the federal government's attempts to break up those railroad monopolies, were matters of great public interest in the first decade of the last century. Today, these provisions have no resonance, and especially no resonance with respect to High Speed Rail.

An interurban electric railway company cannot construct an electric railway on or across a street, alley, square or property of a municipality without the consent of the governing body of the municipality. TEX.TRANS.C. §131.014(b). Other provisions limit the use of eminent domain power in acquiring the property of an electric street railway company owning, controlling or operating track on a public street or alley of a municipality. TEX.TRANS.C. §131.015(b). Interestingly, using eminent domain to acquire the use of an electric street railway track puts the court or the jury in the position of defining and establishing the terms under which the easement or right of way may be used. TEX.TRANS.C. §131.015(d). It would be unheard of today to have the jury, as a fact finder, "determine" the terms of an easement. Finally, §131.017 places limitations on the use of condemned track:

Unless the company whose track is condemned under this subchapter consents, an interurban electric railway company exercising the powers granted under this chapter may not receive for transportation freight or passengers at any location on the condemned track destined to another location on the condemned track.

TEX.TRANS.C. §131.017(a). Any violation of that section will result in the forfeiture of the right to use the right of way to provide transportation. TEX.TRANS.C. §131.017(b). The intent of that provision was to keep an interurban electric railway company from taking business from another railroad using the same track as the interurban electric railway company. Once again, that provision does not describe what High Speed Rail proposes to do: operate a track dedicated to its own use. Interurban electric railway companies are throwbacks to another era.

In context, it is very clear that an interurban electric railway company is something very different than High Speed Rail. A review of Chapter 131, especially subchapter B of Chapter 131, reveals odd, nuanced, but relevant for the time, provisions that no longer have any application today. Given the requirement that statutes are to be construed against entities claiming the power of eminent domain, it is a very difficult thing to conclude that High Speed Rail has eminent domain power under Texas Statutes. That is especially true considering that to be an interurban electric railway company; High Speed Rail must first be a railroad company, which it is not.

The construction and operation of a high speed rail service is of great importance to rural Texans whose property may be taken and then burdened by the proposed railroad. Employing the rules of statutory construction here demonstrates that High Speed Rail is not a railroad company, and it was never intended to function as an interurban electric railway company.

The decision of whether to grant High Speed Rail eminent domain power is one that should be made today by the legislature. It should not be labelled into a definition created over 100 years ago to deal with a very different type of railroad, in a very different time in our state's history.

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In summary, I request that the Office of the Attorney General provide an opinion with respect to whether the sections cited above grant High Speed Rail eminent domain power to enter upon private property, and ultimately take that private property, for the construction and operation of a high speed railroad.

Thank you.

Sincerely,



Byron Cook