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Public Utilities, Eminent Domain, and Local Land Use Regulations: Has Texas Found the Proper Balance?

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PUBLIC UTILITIES, EMINENT DOMAIN, AND LOCAL LAND USE REGULATIONS: HAS TEXAS FOUND THE PROPER BALANCE?

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INTRODUCTION

For more than half a century, the state courts have disagreed about whether public utility companies possessing the power of eminent domain must comply with local land use regulations.[1] In 1978, an annotation appearing in the *American Law Reports* identified "some controversy over the question,"[2] and recent decisions from Georgia and Missouri suggest that, three decades after that annotation was written, the controversy remains active.[3] Indeed, gas drilling operations in Texas's Barnett Shale, to provide only one example, vividly demonstrate that the issue has continuing significance.[4] These operations have set the stage for potential battles between several Texas cities and public utility companies over the placement and construction of natural gas facilities within municipal limits.[5] The stakes in

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1. *Compare, e.g.*, Forsyth County v. Ga. Transmission Corp., 632 S.E.2d 101, 104 (Ga. 2006), *and* Graham Farms, Inc. v. Ind. Power & Light Co., 233 N.E.2d 656, 666 (Ind. 1968), *and* Chester County v. Phila. Elec. Co., 218 A.2d 331, 332–33 (Pa. 1966), *with* N.Y. State Elec. & Gas Corp. v. Statler, 122 N.Y.S.2d 190, 192 (N.Y. Sup. Ct. 1953), *and* State *ex rel.* Kearns v. Ohio Power Co., 127 N.E.2d 394, 399 (Ohio 1955), *and* Potomac Edison Co. v. Jefferson County Planning & Zoning Comm'n, 512 S.E.2d 576, 582 (W. Va. 1998).

2. Allan Manley, Annotation, *Applicability of Zoning Regulations to Projects of Nongovernmental Public Utility as Affected by Utility's Having Power of Eminent Domain*, 87 A.L.R.3d 1265 (1978).

3. *Compare Forsyth*, 632 S.E.2d at 104 (exempting public utility from county zoning ordinance on grounds that ordinance unconstitutionally infringed upon public utility's eminent domain power), *with* StopAquila.org v. Aquila, Inc., 180 S.W.3d 24, 41 (Mo. Ct. App. 2005) (rejecting public utility's argument that its eminent domain power was superior to local zoning regulations).

4. See Timothy Riley, Note, *Wrangling With Urban Wildcatters: Defending Texas Municipal Oil and Gas Development Ordinances Against Regulatory Takings Challenges*, 32 VT. L. REV. 349, 351–52 (2007), for a brief account of gas production in the Barnett Shale, including a natural history of the shale itself.

5. *See* Jim Magill, *Gas Pipeline Sues Texas City Over Development Rule*, GAS DAILY, Oct. 3, 2008, at 3 (commenting on "clash of competing corporate and municipal interests as gas producers expanding their operations in the gas-rich Barnett Shale of North Texas increasingly move into more densely populated communities on the outskirts of Fort Worth"), *available at* 2008 WLNR 19791300; Jeff Mosier, *Gas Company Taking Town to Court Over Drilling Denials*, DALLAS MORNING NEWS, Jul. 3, 2008, at 12B (reporting on lawsuit filed by natural gas company due to rejection by local government of 15 variance requests), *available at* 2008 WLNR 12494081; Jon Nielson, *Gas Company Lawsuit Challenges GP's Rules*, DALLAS MORNING NEWS, Oct. 3, 2008, at 7B ("[S]everal [North Texas] cities are debating how to handle the

such disputes are high inasmuch as the ability of public utilities to provide adequate service, the ability of local governments to protect their residents and communities, and the possibility for substantial profits often hang in the balance.[6]

In addressing the proper relationship between a utility's eminent domain power and a city's zoning authority,[7] the Texas appellate courts have provided seemingly mixed answers. Two decisions from the 1940s and 1950s can be read as suggesting that a utility's power of eminent domain trumps a city's zoning authority,[8] whereas a decision from the 1970s held that a utility's condemnation power is not superior to local zoning regulations.[9] The Texas Supreme Court has not addressed the issue, although it has limited the force of local land use regulations in the somewhat analogous context of a governmental entity exercising its own condemnation power.[10] Not without reason, conventional wisdom has viewed Texas law on this matter as "somewhat unclear."[11] A recent federal decision arising from the aforementioned gas drilling, however, puts these authorities in perspective and suggests that there may be a middle ground.[12]

Using Texas as a case study, this article reviews the relevant Texas law on the subject and (expanding on the reasoning employed by the recent federal decision) argues that Texas law in fact provides a constructive balance between a utility's interests and those of the local

influx of natural gas drilling in more urban areas that sit atop the Barnett Shale"), *available at* 2008 WLNR 18838683; *see also* Riley, *supra* note 4, at 349–50 ("[M]any cities have enacted their own regulatory ordinances, which often impose more stringent permitting and site location requirements, or entirely prohibit drilling in certain locations").

6. During the four-year period between 2001 and 2005, gas companies invested more than $3.4 billion in drilling operations in the Barnett Shale and recovered more than $5.3 billion from gross cumulative gas sales. Riley, *supra* note 4, at 352.

7. Although the term "zoning" is most properly identified with regulations that dictate how particular parcels of land may be used within prescribed territorial boundaries, it is used here to encompass the more wide-ranging power of local governments to regulate the use and development of land generally. *See, e.g.*, Michael B. Kent, Jr., *Forming a Tie That Binds: Development Agreements in Georgia and the Need for Legislative Clarity*, 30 ENVIRONS ENVTL. L. & POL'Y J. 1, 4 & n.10 (2006) (offering definitions of "zoning").

8. *See* Gulf, C. & S. F. Ry. Co. v. White, 281 S.W.2d 441 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.); Fort Worth & D. C. Ry. Co. v. Ammons, 215 S.W.2d 407 (Tex. Civ. App.—Amarillo 1948, writ ref'd n.r.e.).

9. *See* Porter v. Sw. Pub. Serv. Co., 489 S.W.2d 361 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.).

10. *See* City of Lubbock v. Austin, 628 S.W.2d 49, 50 (Tex. 1982) (discussing city exercising power of eminent domain not bound by own zoning ordinance absent showing that condemnation is unreasonable or arbitrary); Austin Ind. Sch. Dist. v. City of Sunset Valley, 502 S.W.2d 670 (Tex. 1973) (holding city may not exercise zoning so as to exclude facilities of public school district possessing power of eminent domain).

11. Manley, *supra* note 2, at 1272.

12. *See* Tex. Midstream Gas Servs., L.L.C. v. City of Grand Prairie, No. 3:08-CV-1724-D, 2008 WL 5000038 (N.D. Tex. Nov. 25, 2008).

government. Moreover, the balanced approach established by the Texas cases provides a model for other jurisdictions due to the incentives it provides for bargaining between the utility company, the local government, and community leaders.

I. TEXAS CASE LAW – MICROCOSM OF A NATIONAL DEBATE

As suggested above, there is a split in authority nationwide regarding whether public utilities possessing the power of eminent domain must comply with local land use regulations.[13] Because Texas appellate courts have issued decisions cited by both sides of the debate, Texas law provides a useful case study to explore the arguments and proposed solutions to the problem. To that end, the following discussion reviews the relevant Texas decisions as a means of framing the pertinent issues.

A. *Must Public Utilities Comply With Local Zoning?*

1. *Fort Worth & Denver City Railway Company v. Ammons*

The first Texas decision to consider the interplay between a utility's eminent domain power and the zoning authority of a local government was *Fort Worth & Denver City Railway Company v. Ammons*, issued in 1948.[14] That case arose from a dispute between the City of Lubbock and a railroad company over the proposed extension of an industrial spur line into an area of the city zoned for residential use.[15] The city obtained an injunction prohibiting construction of the spur line within the residential zone,[16] and the railroad appealed on the ground that its power of eminent domain, being superior to the city's zoning authority, effectively exempted the railroad from compliance with the zoning ordinance.[17]

In resolving the dispute, the court began its discussion with a comparison of the two powers in conflict. The powers of eminent domain and zoning have much in common, explained the court, inasmuch as both are exercised to prevent an individual landowner from using his

13. *Compare, e.g.*, Forsyth County v. Ga. Transmission Corp., 632 S.E.2d 101, 104 (Ga. 2006), *and* Graham Farms, Inc. v. Ind. Power & Light Co., 233 N.E.2d 656, 666 (Ind. 1968), *and* Chester County v. Phila. Elec. Co., 218 A.2d 331, 332–33 (Pa. 1966), *with* N.Y. State Elec. & Gas Corp. v. Statler, 122 N.Y.S.2d 190, 192 (N.Y. Sup. Ct. 1953), *and* State *ex rel.* Kearns v. Ohio Power Co., 127 N.E.2d 394, 399 (Ohio 1955), *and* Potomac Edison Co. v. Jefferson County Planning & Zoning Comm'n, 512 S.E.2d 576, 582 (W. Va. 1998).

14. Fort Worth & D. C. Ry. Co. v. Ammons, 215 S.W.2d 407 (Tex. Civ. App.—Amarillo 1948, writ ref'd n.r.e.).

15. *Id.* at 408–09.

16. The lawsuit initially was filed by several residents of the affected zone, but the city subsequently intervened and adopted their pleadings. *Id.* For the sake of convenience, the following discussion uses the term "city" to refer to all of the plaintiffs collectively, as well as to the City of Lubbock itself.

17. *See id.* at 409.

property in ways that harm the general welfare. Eminent domain prevents the landowner from "obstruct[ing] the public necessity by refusing to part with his property," while zoning prevents him "from using his property in a manner contrary to the general comfort and protection of the public."[18] Nonetheless, the court continued, there exist significant differences in the two powers. First, a city's zoning authority arises from a delegation of the state's police power to protect the public health, safety, comfort, and welfare.[19] A utility's power of eminent domain, however, is a delegation of the state's right to appropriate private property for public use, and is "one of the inalienable rights of sovereignty."[20] Concomitant with this right is the sovereign discretion to select which land will be put to public use, and this discretion also is delegated to the utility company along with the condemnation power itself.[21] Second, the court noted that the exercise of eminent domain requires that the affected landowner receive just compensation for the taking, whereas no compensation accompanies the usual exercise of the police power. "The absence of compensation," explained the court, "makes the police power much harsher in operation than the power of eminent domain and, hence, subject to stricter limitations."[22]

With these distinctions in mind, the court then addressed the particular dispute before it. Again noting that the railroad received its condemnation authority from the state itself, the court explained that the state had "a sovereign interest in railroads" as a means of transportation and commerce, "the same as it does in highways or streets."[23] Absent any abuse in the powers delegated to it,[24] the railroad was essentially acting as an agent of the state with respect to this interest. As a result, the court held that those portions of the city's zoning ordinance that conflicted with the railroad's location of the line must give way. In short, the city could not prevent the railroad from placing its line where the railroad deemed necessary, even if that meant the line would not be in conformity with the local zoning plan.[25] Significantly, however, the court held that, although the railroad would not have to comply with the city's zoning designation of the land in question, it would have to comply with the city's requirement to obtain a construction permit prior to building the new line.[26]

18. *Id.* at 410.
19. *Id.* at 409.
20. *Id.*
21. *Id.* at 410.
22. *Id.*
23. *Id.* at 411.
24. *See id.* at 410–11.
25. *Id.* at 411.
26. *Id.*

2. *Gulf, Colorado & Santa Fe Railway Company v. White*

Seven years after *Ammons*, another confrontation between a railroad's eminent domain power and a city's zoning authority found its way into the Texas appellate courts.[27] In early 1954, the Gulf, Colorado & Santa Fe Railway Company began extending a switch track inside the Dallas municipal limits. The city's building inspector stopped construction because the railroad had not obtained the necessary permit. The city then denied the railroad's subsequent application for a permit on the grounds that the switch track was a commercial use, but the railroad was extending the track into a residential zone. The railroad appealed this decision to the city's board of adjustment, which reversed and granted the permit subject to certain conditions. On petition for certiorari by several nearby property owners, the trial court in turn reversed the board of adjustment, a decision appealed by both the railroad and the city.[28]

As in *Ammons*, the railroad asserted that its power to condemn land for purposes of constructing the switch track essentially overcame any contrary regulations enacted by the city's zoning ordinance. In addressing that assertion, the court first noted that it made no difference that the railroad actually had not used eminent domain to acquire the land in question: "Where a company is invested with the power of eminent domain and secures property to be devoted to a public use, it is immaterial that title was acquired by a valid purchase or settlement; the rights acquired are protected to the same extent as though the property had been condemned."[29] The court then discussed *Ammons*, concluding that there was no principled distinction between the two cases. Inasmuch as the additional facilities in each case were "necessarily incident to [the] right to operate a railroad," and absent any abuse, the railroads' powers of eminent domain authorized them to place the needed facilities where they deemed best for the public services they provided.[30]

3. *Porter v. Southwestern Public Service Company*

For almost two decades after *White*, the Texas courts remained silent on the issue of whether a public utility possessing the power of condemnation must comply with local zoning. In 1972, however, the question again was raised in the case of *Porter v. Southwestern Public Service Company*.[31] In that case, after receiving a building permit from the City of Amarillo, the utility company purchased a parcel of

27. *See* Gulf, C. & S. F. Ry. Co. v. White, 281 S.W.2d 441 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.).

28. *See id.* at 442.

29. *Id.* at 449 (internal quotation marks omitted).

30. *See id.* at 450.

31. Porter v. Sw. Pub. Serv. Co., 489 S.W.2d 361 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.).

land zoned for residential use and commenced construction on an electrical substation. After the substation was 95% completed, however, the city indicated that the building permit had been issued erroneously. Therefore, the utility would have to apply for a special use permit to continue construction within the residential zone. The city subsequently denied that application on a tied vote of the commission and ordered that the substation be removed. A few months later, the city reversed course, indicating that its attorney now advised that the utility was not subject to the zoning ordinance, and on this advice, the utility completed construction. Thereafter, residents of the affected zone sued the utility company to obtain a permanent injunction forcing removal of the substation due to lack of compliance with the zoning regulations. The trial court dismissed the action, and the residents appealed.[32]

As in *Ammons* and *White*, the question facing the court concerned the proper interplay between the utility's condemnation power and the city's zoning authority. Addressing that question, the court began in the same place as did *Ammons*—with a comparison of the two powers in conflict. Like *Ammons*, the court noted that both powers were inherent in the state government and could be delegated for appropriate purposes.[33] But the court disagreed that either *Ammons* or *White* controlled the question in the present case. Important to the court's decision was the fact that, in both of those prior cases, the railroads had owned the land over which the line extensions were to be made "long before the building and zoning regulations were enacted."[34] In the present case, by contrast, the court explained that "the building and zoning regulations were enacted, and [the utility] was charged with notice thereof, before [it] purchased the land in the residential zoned area."[35] This distinction mattered, suggested the court, because although "the power [of eminent domain] *normally* carries with it the right to select the location and extent of the property to be taken," that right generally is not expressed in the statute granting the utility's condemnation power.[36] Rather, the right is merely implicit so long as it is not abused,[37] and the court indicated that the local government, via its zoning authority, was the proper entity to judge the question of abuse. In sum, "[t]he city, to which the state has specifically entrusted the police powers, has the power to inquire into the reasonableness of the manner by which eminent domain is to be exercised within its cor-

32. *See id.* at 362–63.
33. *Id.* at 363.
34. *Id.* at 364.
35. *Id.*
36. *Id.* at 363 (emphasis added).
37. *Id.*

porate limits."[38] Otherwise, "there could only be [the utility] itself to determine such standards."[39]

B. *Must Local Governments Comply With Local Zoning?*

As the foregoing discussion shows, the Texas appellate courts have offered seemingly mixed answers to the question of whether a public utility must comply with local zoning regulations. Moreover, the Texas Supreme Court has not provided any direct guidance on the matter. Nonetheless, the state high court has issued at least two decisions that bear on the question indirectly by discussing whether zoning governs the exercise of eminent domain by a local government itself.

1. *Austin Independent School District v. City of Sunset Valley*

The year after *Porter*, the Texas Supreme Court addressed whether a local school district had to comply with the zoning regulations of one of the municipalities served by that district.[40] The dispute arose when the Austin Independent School District proposed to construct athletic and transportation facilities within the municipal limits of the City of Sunset Valley. Although the city was served by the school district, only a single elementary school was located within the city limits. Moreover, the city's zoning plan required the remainder of the city to be residential, effectively prohibiting any other school facilities from being located therein. When the school district asked the city either to relax its zoning restrictions or to de-annex the site for the new facilities, the city refused and threatened sanctions if the school district proceeded with the proposed construction.[41] In light of these threats, the school district sued for declaratory and injunctive relief, which the trial court granted. The court of civil appeals reversed that judgment, and the school district sought relief from the Texas Supreme Court.[42]

Before resolving the issue confronting it, the court prefaced its discussion with two points of significance. First, the court noted that the trial court specifically found that the school district acted reasonably in selecting the site for the new facilities, and this finding was not being challenged on appeal.[43] Second, and equally important, the court observed that the city had made no assertion that the proposed facilities constituted a nuisance.[44] Therefore, with these issues off the table, the court focused its attention on the central question of whether

38. *Id.* at 365.
39. *Id.*
40. *See* Austin Ind. Sch. Dist. v. City of Sunset Valley, 502 S.W.2d 670 (Tex. 1973).
41. *See id.* at 671.
42. *See id.* at 672.
43. *Id.*
44. *Id.*

"the City may utilize its zoning powers to wholly exclude from within its boundaries school facilities reasonably located."[45]

Reviewing decisions from other states, as well as its own precedent, the court answered that question negatively. Citing cases from Missouri and Pennsylvania, the court conceded that other jurisdictions had subjected local school districts to certain municipal regulations. The Missouri court, for example, had "correctly held" that a school district must pay fees assessed by a city for conducting mandatory safety inspections.[46] Similarly, the Pennsylvania court had properly upheld parking requirements designed to protect "safety, health and general welfare."[47] Moreover, the Texas court itself had previously indicated that a school district must comply with municipal building regulations.[48] But the court pointed out that none of these cases concerned the *location* of school facilities; rather, they all dealt with compliance of health and safety requirements.[49]

When one considered the question of site selection, the court suggested, the cases painted a much different picture. Again, the court found Missouri law to be instructive. Although the Missouri court had previously subjected a school district to local health and safety regulations, it distinguished zoning regulations that interfered with a school district's selection of school sites.[50] Noting that at least one other jurisdiction explicitly made the same distinction,[51] the court intimated that Texas, also, had done so implicitly. The Texas Education Code, for example, like those of other states, gave school districts the power to acquire and hold real property, including acquisition via eminent domain, for the purpose of constructing school buildings or for any other purpose deemed necessary by the district.[52] The court explained that, to properly construe these statutes, "one must read into [them] the power to 'select' sites for school buildings."[53] For that reason, the city could not prohibit the school district from locating its facilities in a residential zone.

Having answered the question put to it, the court in conclusion offered some useful *dicta* concerning the questions not at issue—i.e., whether the school district had acted reasonably or imposed a nui-

45. *Id.*

46. *Id.* at 674 (citing Kan. City Sch. Dist. v. Kan. City, 201 S.W.2d 930 (Mo. 1947)).

47. *Id.* at 672–73 (citing Sch. Dist. of Phila. v. Zoning Bd. of Adjustment, 207 A.2d 864 (Pa. 1965)).

48. *Id.* at 673 (citing Port Arthur Ind. Sch. Dist. v. City of Groves, 376 S.W.2d 330 (Tex. 1964)).

49. *See id.*; *see also id.* at 674.

50. *See id.* at 674 (citing State *ex rel.* St. Louis Union Trust Co. v. Ferriss, 304 S.W.2d 896 (Mo. 1957)).

51. *See id.* at 674 n.1 (citing City of Bloomfield v. Davis County Cmty. Sch. Dist., 119 N.W.2d 909 (Iowa 1963), Cedar Rapids Cmty. Sch. Dist. v. City of Cedar Rapids, 106 N.W.2d 655 (Iowa 1960)).

52. *See id.* at 673.

53. *Id.*

sance. "The determination flowing from the foregoing," the court said, "is not that the School District can act with impunity."[54] Once again, the court found decisions from other jurisdictions useful to its reasoning. Citing precedent from New Jersey and Delaware, the court stated that "immunity from city zoning laws is tempered by an inquiry into the reasonableness of the school authorities' actions."[55] Accordingly, the court strongly suggested that where the city could show that the school district exercised its authority unreasonably or arbitrarily, the result might well be different.[56]

2. *City of Lubbock v. Austin*

The Texas Supreme Court had occasion to revisit these issues a decade later in *City of Lubbock v. Austin*.[57] In that case, the City of Lubbock initiated a condemnation proceeding for portions of a residential lot in connection with improvements planned for a nearby intersection. The lot owners argued that the proposed condemnation was an unreasonable use of the city's eminent domain power because consummation of the project would render their lot out of compliance with the local zoning regulations. Specifically, the zoning ordinance required their lot to have a minimum 10-foot side yard, but after the condemnation, the side yard would only be a little over four feet. The jury issued special findings that the city had indeed abused its discretion, but the trial court disregarded these findings and held that the condemnation could go forward. The Amarillo Court of Civil Appeals reversed, and relief was sought from the Texas Supreme Court.[58]

The Texas Supreme Court framed the question as "whether a city is bound by its zoning ordinances when exercising its eminent domain power."[59] To answer that question, the court immediately turned to its prior decision in *Sunset Valley*. Noting that the court in that case had upheld the school district's decision about site selection despite the resulting violation of the city's zoning plan, the court here saw "no reason for a different rule when a city is seeking to avoid its own zoning ordinance."[60] Moreover, given the challenge being made by the lot owners, the court also endorsed *Sunset Valley*'s language about how a condemnor's site selection might be overcome. In short, the court announced as a rule what *Sunset Valley* had suggested in *dicta*:

54. *Id.* at 674.

55. *Id.* (citing City of Newark v. Univ. of Del., 304 A.2d 347 (Del. Ch. 1973); Rutgers, State Univ. v. Piluso, 286 A.2d 697 (N.J. 1971); Wash. Twp. v. Ridgewood Vill., 141 A.2d 308 (N.J. 1958)).

56. *See id.* Two justices concurred in the result, but would have placed the burden on the school district to prove the reasonableness of its claim to zoning immunity. *See id.* at 676 (Pope, J., concurring).

57. City of Lubbock v. Austin, 628 S.W.2d 49, 49 (Tex. 1982).

58. *See id.* 49–50.

59. *Id.* at 50.

60. *Id.*

"[A] city exercising its eminent domain power is not bound by its own zoning ordinance unless the objecting party can show that the condemnation is unreasonable or arbitrary."[61] And the jury's determination about that issue was irrelevant in the present context, because the city's use of eminent domain in a manner conflicting with its own zoning scheme was tantamount to an amendment of that scheme. In such cases, the court noted, the reasonableness of the amendment was a question of law to be decided by the court.[62] Because the lot owners had not demonstrated that the city's actions were unreasonable or arbitrary as a matter of law, the condemnation was valid notwithstanding its effect on the zoning compliance of the lot in question.[63]

II. *TEXAS MIDSTREAM*—ROADMAP FOR RESOLUTION

The foregoing discussion demonstrates some potential ambiguity in Texas law on the issue of whether a public utility possessing eminent domain powers must comply with a municipal zoning plan. Reflecting some of the differences among the state courts nationwide, Texas decisional authority can be cited in support of both an affirmative and negative answer. And, as mentioned at the outset of this article, this lack of clarity has become especially significant as gas drilling operations in the Barnett Shale encounter resistance from city governments and their constituents.[64] A recent federal court decision arising out of these operations, however, sheds light on the perceived ambiguities. Indeed, the federal court's reading of Texas law, while confirming some tension in the cases, suggests that a way of reconciliation nonetheless remains possible. Perhaps more significant, and as argued more fully below in Part III, this reading helps to provide an answer to the larger question concerning the proper interaction between municipal zoning and a utility's power of eminent domain.

The lawsuit resulting in the federal court's decision was filed by Texas Midstream Gas Services, LLC (Midstream), a natural gas pipeline company, to challenge a portion of the City of Grand Prairie's Unified Development Code. Midstream had previously acquired land inside the municipal limits of Grand Prairie on which it planned to construct a compressor station. After being notified of this plan, in July 2008, the city amended its Unified Development Code specifically to address the matter of compressor stations like that planned by Midstream.[65] In particular, the amended code subjected compressor stations to the following requirements: (1) a special use permit for stations located in certain zoning districts; (2) minimum setback and

61. *Id.*
62. *Id.*
63. *Id.*
64. *See supra* note 5 and accompanying text.
65. *See* Tex. Midstream Gas Servs., L.L.C. v. City of Grand Prairie, No. 3:08-CV-1724-D, 2008 WL 5000038, at *1 (N.D. Tex. Nov. 25, 2008).

yard requirements; (3) enclosure of the parcel by a security fence; (4) enclosure of the station equipment within a structure meeting certain specifications; (5) the restriction of noises to certain defined levels; and (6) certain landscaping specifications.[66] Midstream, whose parcel was located within a zone requiring a special use permit, sued to enjoin (both preliminarily and permanently) the enforcement of the July 2008 amendment.[67]

Included among the arguments advanced by Midstream in support of its preliminary injunction was that the amendment improperly interfered with its power of eminent domain under Texas law.[68] The city responded that Midstream's eminent domain power was irrelevant to the suit because it did not acquire the land in question through the exercise of that power, nor was it threatening to condemn any other parcels. Citing *White*, however, the court rejected the city's position on the ground that, "[u]nder Texas law, an entity with eminent domain power has the right not only to appropriate another's property but also to use its own property for a public purpose, even if it did not acquire the property through condemnation."[69] Thus, the issue was not the relevance or not of Midstream's condemnation power; that power clearly was relevant. The real issue, as framed by the court, was whether that power gave Midstream the right to build the compressor station without adhering to the July 2008 amendment.[70]

Answering that question required the court to review the five Texas decisions discussed in Part I of this article. According to the court, the decisions revealed an important dichotomy. The court noted that *Ammons*, *White*, *Sunset Valley*, and *Austin* all concerned ordinances that interfered with the would-be condemnor's decision about where to locate its facilities.[71] In this regard, *Porter* had to be viewed as something of an aberration, since it "subjected a utility with eminent domain power to a zoning ordinance that prohibited its intended public use in the desired location."[72] Even so, the court intimated, *Porter* was on to something when it suggested that a utility's eminent domain power is not in all respects superior to the zoning authority of a local government. This same point appeared in *Ammons*, the earliest of the Texas cases, which allowed the railroad to locate its track irrespective of the zones established by the city, but nonetheless subjected the construction of that track to the city's building regulations.[73] The court

66. *See* GRAND PRAIRIE, TEX., UNIFIED DEV. CODE art. 4, § 10 (2008), *available at* http://www.gptx.org/Modules/ShowDocument.aspx?documentid=397.

67. *See Texas Midstream*, 2008 WL 5000038, at *1.

68. Midstream also advanced arguments based on federal and state preemption, as well as a challenge based on violation of the dormant Commerce Clause. *See id.*

69. *Id.* at *14.

70. *Id.*

71. *Id.* at *16.

72. *Id.*

73. *Id.* at *15.

also pointed out that *Sunset Valley* "explicitly distinguished between regulation of site selection and construction, limiting its holding to the former."[74] Thus, the court saw a dominant theme running through the Texas cases: "While entities with eminent domain power have the right to select the location for their intended public use – even if such use is not permitted in the zoning district – they may still be subjected to other applicable zoning regulations."[75] Specifically, "zoning regulations that do not prohibit – i.e., 'zone out' – the intended public use are not necessarily superseded by the eminent domain power."[76]

Applying that standard to the July 2008 amendment yielded a conclusion that Midstream had not demonstrated the requisite likelihood of success to garner a preliminary injunction. According to the court, the amendment neither "zoned out" compressor stations altogether nor prohibited Midstream from building its proposed compressor station on the land it had selected. To the contrary, the court viewed the amendment as regulating nothing more than "the aesthetics and noise level of compressor stations."[77] So viewed, the amendment fit within the distinction made by the Texas cases and looked analogous to the building regulations to which the railroad was subjected in *Ammons*.[78] Moreover, the court noted *Porter*'s concern about allowing utilities to operate without any local oversight: "[I]f the City cannot regulate the aesthetics and noise level of compressor stations within its boundaries, these will be entirely within [Midstream's] discretion, which may be detrimental to the surrounding community."[79]

III. TEXAS'S ANSWER—UNDERSTANDING THE BALANCE

The federal court's reading of Texas case law reveals a constructive balance between the interests of the utility company and those of the local government. In short, this balance places the decision about where to locate utility infrastructure squarely within the utility company's discretion, so long as that discretion is not abused. Offsetting the utility's discretion about site selection, however, is the local government's authority to subject the utility company to its reasonable oversight concerning issues of health, safety, aesthetics, and similar community interests. The following discussion seeks to flesh out the reasons underlying this approach, as well as what remedies might be available in the event that either the utility company or the local government abuses its authority. Additionally, I offer some brief thoughts about why this approach might ultimately produce better results than an all-or-nothing system where either the utility can ignore

74. *Id.* at *16.
75. *Id.*
76. *Id.*
77. *Id.* at *17.
78. *Id.*
79. *Id.*

local regulations, or alternatively must comply with them, in their entirety.[80]

A. *Utility's Discretion Over Facility Siting*

1. Explaining the Need for Utility Discretion

As indicated by the federal court in *Texas Midstream*, a utility company possessing the power of eminent domain has extensive discretion under Texas law with regard to the location of its facilities.[81] The decision in *Ammons* made this point explicitly,[82] as have other decisions from the Texas courts,[83] and decisions from several other jurisdictions are in accord.[84] This discretion flows, in large part, from the nature of the eminent domain power itself. As explained in *Ammons*, "[e]minent domain is one of the inalienable rights of sovereignty"[85] and exists primarily for the promotion of the general welfare. Simply put, eminent domain enables the state to take private property, upon payment of just compensation, when that property is needed by the public at large to serve the greater good.[86] Perhaps the leading reason for allowing the state this ability to force an exchange of property is also suggested by *Ammons*—to thwart the efforts of private landowners to delay necessary public projects.[87] This rationale suggests that the state not only needs the power to take private property for public use but also needs discretion over the extent and location of the prop-

80. *Compare* Darlage v. E. Bartholomew Water Corp., 379 N.E.2d 1018, 1019–21 (Ind. Ct. App. 1978) (holding that public utility company is exempt from all local regulations, including those relating to construction as well as to location), *with* Ala. Power Co. v. Brewton Bd. of Zoning Adjustment, 339 So. 2d 1025, 1026–27 (Ala. 1976) (affirming denial of variance from local zoning regulations despite evidence that additional utility facilities were required and that proposed location was most desirable).

81. To the extent that *Porter* suggests otherwise, it is out of step with the weight of Texas authority and the reasoning that follows. *See* Porter v. Sw. Pub. Serv. Co., 489 S.W.2d 361 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.).

82. Fort Worth & D. C. Ry. Co. v. Ammons, 215 S.W.2d 407, 410 (Tex. Civ. App.—Amarillo 1948, writ ref'd n.r.e.) ("Our courts have held that in exercising the right of eminent domain the state delegates to the railway the discretion of selecting the sites upon which the road shall be located.").

83. *See, e.g.*, Valero Eastex Pipeline Co. v. Jarvis, 926 S.W.2d 789, 792 (Tex. App.—Tyler 1996, writ denied); Lohmann v. Natural Gas Pipeline Co. of Am., 434 S.W.2d 879, 881 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.); Tex. Elec. Serv. Co. v. Linebery, 327 S.W.2d 657, 664 (Tex. Civ. App.—El Paso 1959, writ dism'd); Cane Belt Ry. Co. v. Hughes, 31 Tex. Civ. App. 565, 565–66, 72 S.W. 1020, 1020 (Tex. Civ. App. 1903, no writ).

84. *See, e.g.*, Ala Elec. Co-op. v. Watson, 419 So. 2d 1351, 1356 (Ala. 1982); Gray v. Ouachita Creek Watershed Dist., 351 S.W.2d 142, 144 (Ark. 1961); La. Res. Co. v. Stream, 351 So. 2d 517, 518–19 (La. Ct. App. 1977); N. States Power Co. v. Effertz, 94 N.W.2d 288, 291 (N.D. 1959); Am. Tel. & Tel. Co. v. Proffitt, 903 S.W.2d 309, 311 (Tenn. Ct. App. 1995); Bridle Bit Ranch Co. v. Basin Elec. Power Co-op., 118 P.3d 996, 1015 (Wyo. 2005).

85. *Ammons*, 215 S.W.2d at 409.

86. *See id.*

87. *See id.* at 410.

erty to be taken. Indeed, eminent domain may be most necessary where a particular parcel or location is itself crucial to the project because, in such circumstances, the fulfillment of the public good may be held hostage by a single, recalcitrant landowner. In economic terms, such an owner "has monopoly power vis-à-vis the government, and may hold out for a price far in excess of [his] opportunity cost."[88] Eminent domain, therefore, keeps the landowner from thwarting the project, either outright or by seeking an exorbitant price, and allows the project to go forward without undue delay or burden to the taxpayers.[89]

This same rationale applies to public utility companies to whom the state has delegated its power of eminent domain. Again, *Ammons* proves instructive. As the court explained in that case, the state, "as a representative of the public, has a sovereign interest in railroads, the same as it does in highways or streets."[90] Railroads, like streets and highways, are essential means of transportation and commerce used by the public at large. Similarly situated are other utility services such as water, electricity, telephone, and natural gas. Each of these services is, in the words of the Texas Supreme Court, "affected with a public interest"[91]—that is, they are used by the public at large for the necessities of modern life.[92] Because these types of services are essential to the general welfare, the law imposes on the providers of such services a duty to furnish them to all potential customers on a nondiscriminatory basis.[93] This duty to serve the public carries with it a duty to construct and maintain adequate facilities sufficient to provide such service,[94] and the fulfillment of these duties underlies the delegation of eminent domain power to the utility provider.[95]

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88. DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 28 (2002).

89. *Id.* at 29.

90. *Ammons*, 215 S.W.2d at 411.

91. City of Texarkana v. Wiggins, 151 Tex. 100, 104, 246 S.W.2d 622, 624 (1952).

92. *Cf.* Potomac Edison Co. v. Jefferson County Planning & Zoning Comm'n, 512 S.E.2d 576, 583 (W. Va. 1998) (explaining that "electric power is necessary for the public health, safety and welfare").

93. *See* City of Lubbock v. Phillips Petroleum Co., 41 S.W.3d 149, 155, 157 (Tex. App.—Amarillo 2000, no pet.) (endorsing definition of "public utility" as "a privately owned and operated business whose services are so essential to the general public as to justify the grant of special franchises for the use of public property or of the right of eminent domain, in consideration of which the owners must serve all persons who apply, without discrimination" (quoting BLACK'S LAW DICTIONARY 1232 (5th ed. 1979))).

94. *Cf.* Consol. Edison Co. v. Vill. of Briarcliff Manor, 144 N.Y.S.2d 379, 384 (Sup. Ct. 1955) (stating that public utility company had duty to erect and maintain proposed facilities because state law mandated that it "furnish and provide such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable").

95. *See* McAmis v. Gulf, C. & S. F. Ry. Co., 184 S.W. 331, 332 (Tex. Civ. App.—Dallas 1916, writ ref'd) (indicating that delegation of eminent domain power is made "on the theory that such power [once delegated] will promote the general welfare"); Cane Belt Ry. Co., 31 Tex. Civ. App. at 565, 72 S.W. at 1020 (noting that "the public

Once delegated, the power to condemn carries with it discretion over the parcels subject to condemnation for the same reasons articulated above— i.e., to prevent any one landowner (or each landowner along a proposed utility route) from exercising monopoly power to obstruct a project necessary to serve the general public.[96] The same rationale also serves to limit judicial review of the condemnor's discretion, as explained by the Texas Court of Civil Appeals in 1903:

> If different courts and juries were allowed to pass on the necessity or advisability of condemning each tract out of the many which go to make up a right of way for a railway line, straight courses from point to point, with the consequent lessening of mileage, would in many, if not all, cases be impossible to secure. So in the case of depot grounds. One jury might hold, on competent evidence, that the land in question was not necessary to the purposes of the railroad. Another might render a like verdict as to any other tract sought to be subjected to its uses, and by such a course the company could be excluded altogether.[97]

Although this passage directly addresses the context of railroad condemnations, its logic has equal force in the context of other utility services.[98] It also helps explain why, in addition to individual landowners and courts, local governing authorities also should defer to a utility's discretion over site selection. Because these authorities are elected by and serve the interests of local residents, they naturally reflect many of the concerns and biases of those residents. Such reflection can produce both advantages and disadvantages. Inasmuch as the political units involved are generally small and localized, they have been viewed as more responsive to the needs of their constituents than governments at larger levels.[99] As explained by William A. Fischel's "homevoter hypothesis," local decision-making has greater influence on home values, resulting in greater participation by homeowners in local government, which in turn produces more efficient governmental action.[100] However, these same features can produce negative results, as well, especially when it comes to zoning.[101] The small and insular nature of local governments raises the potential that local prejudices may go unchecked for lack of a sufficiently strong

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have a large interest" in public utilities and common carriers "and for this reason the power of eminent domain is conferred").

96. *See* DANA & MERRILL, *supra* note 88, at 30.

97. *Hughes*, 31 Tex. Civ. App. at 565, 72 S.W. at 1020.

98. *See, e.g.*, Lohmann v. Natural Gas Pipeline Co. of Am., 434 S.W.2d 879, 881 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.) (applying *Hughes* rationale to condemnations by natural gas pipeline company).

99. *See, e.g.*, William A. Fischel, *The Political Economy of Public Use in* Poletown: *How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 930–31 (2004).

100. *See id.* at 931 (summarizing "homevoter hypothesis").

101. *See id.* at 930 ("Zoning serves the interests of a majority of local voters, most of whom are homeowners, and zoning's excesses must be laid at their doorstep.").

countervailing interest. In its worst form, these shared values can turn into a majoritarian tyranny of the sort famously warned against by James Madison, placing self-interest ahead of the public well-being.[102]

In the context of public utility services, this means that local governments can be just as obstructive to the general welfare as any individual landowner or jury. Although a local government may understand the need to allow facilities that are directly essential for delivering services to its own residents, it may become more myopic with regard to facilities lacking such an obvious local connection. In the words of one commentator, "left to their own devices, municipalities have often been incapable of making local land use decisions that are sensitive to regional and statewide needs."[103] Thus, there is a real danger that facilities designed to generate, store, process, or transport services on a state or regional basis might run afoul of local prejudices, jeopardizing a number of interests wider than those represented in the local political landscape.[104] As explained by one court: "If each county were to pronounce its own regulation and control over electric wires, pipe lines and oil lines, the conveyors of power and fuel could become so twisted and knotted as to affect adversely the welfare of the entire state."[105] Vesting the utility company with discretion over siting minimizes these risks. In short, "[w]hile local authorities and neighbors may not want an electric substation or oil pipeline in a residential area, the desire for efficient provision of service may compel insulating the utility from local law."[106]

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102. *See* THE FEDERALIST No. 10, at 45–46 (James Madison) (George W. Carey & James McClellan ed., 1990) ("When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens."); *see also id.* at 48 ("[T]he smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression."). Numerous scholars have noted the connections between Madison's arguments in *The Federalist No. 10* and local land use regulation. *See, e.g.*, Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L. J. 385, 405–07 (1977); Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1499 (2008); John M. Payne, *Politics, Exclusionary Zoning and Robert Wilentz*, 49 RUTGERS L. REV. 689, 706 (1997); Stewart E. Sterk, *The Inevitable Failure of Nuisance-Based Theories of the Takings Clause: A Reply to Professor Claeys*, 99 NW. U. L. REV. 231, 241 (2004).

103. Sager A. Williams, Jr., Comment, *Limiting Local Zoning Regulation of Electric Utilities: A Balanced Approach in the Public Interest*, 23 U. BALT. L. REV. 565, 608 (1994).

104. A related danger might be that, once the local government realizes that the facilities must be located somewhere, it zones such facilities in areas that are least likely to have the political capital to put up an effective fight—e.g., those areas populated predominately by poorer and minority residents. *See* Vicki Been, *What's Fairness Got to Do With It?: Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1009–15 (1993) (discussing discriminatory siting of locally undesirable land uses).

105. Chester County v. Phila. Elec. Co., 218 A.2d 331, 332–33 (Pa. 1966).

106. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 113–14 (2003).

At the end of the day, the law views the public utility company as a sort of agent for the general welfare.[107] This view is implicit in the Texas cases, and once again, *Ammons* provides a useful illustration. The logic of that opinion can be traced as follows: (1) the state has a sovereign interest in railroads; (2) to promote this interest, the state delegated its power of eminent domain to the railroad company; and (3) absent an abuse of that delegated authority, the railroad's decision to promote the statewide interest necessarily takes precedence over the municipality's parochial concerns with regard to placement of the facilities.[108] Similar logic can be found in *Sunset Valley*, where the court characterized the city's exercise of its zoning authority as a wholesale exclusion of school facilities from the municipal limits.[109] Implicit in this characterization is the notion that the city, in dumping the burden of school facilities off on other communities while nonetheless utilizing the services provided by the school district, was promoting its own self-interest at the expense of the school district as a whole.[110] Applying this logic to the wider context of public utilities generally, the question ultimately seems to focus on which entity, the utility or the local government, can be trusted to employ its powers most in conformity with the general welfare at all levels—local, regional, state, and (perhaps) national. Because the utility's service obligations most likely expand to a larger area than that of any local government, it makes sense as a general matter to vest siting discretion with the utility.

2. Challenging Abuses of Utility Discretion

As the Texas cases suggest, however, this discretion is not completely unfettered. Just as an agent might exceed the authority actually bestowed by its principal, so, too, might a utility company abuse its discretion concerning the exercise of eminent domain. The Texas Supreme Court acknowledged this potential for abuse in both *Sunset Valley* and *Austin*. In the former decision, after holding that the school district generally was exempt from the city's zoning regulations regarding the placement of facilities, the court nonetheless opined in *dictum* that the school district's discretion could not be exercised un-

107. *See* Ga. Pub. Serv. Comm'n v. Turnage, 669 S.E.2d 138, 139 (Ga. 2008) ("Public utilities are generally granted a protected status with respect to zoning restrictions because of the greater public welfare which utilities serve . . . .").

108. *See* Fort Worth & D. C. Ry. Co. v. Ammons, 215 S.W.2d 407, 410–11 (Tex. Civ. App.—Amarillo 1948, writ ref'd n.r.e.).

109. *See* Austin Ind. Sch. Dist. v. City of Sunset Valley, 502 S.W.2d 670, 672 (Tex. 1973).

110. *Cf.* Consol. Edison Co. v. Vill. of Briarcliff Manor, 144 N.Y.S.2d 379, 385 (Sup. Ct. 1955) ("One municipality, especially where it uses particular public utility services, may not, so to speak, dump the undesirable facilities necessary to furnish such services upon the lap of an adjoining municipality.").

reasonably.[111] In *Austin*, as noted above, the court adopted this *dictum* as a rule of decision: "[A] city exercising its eminent domain power is not bound by its own zoning authority *unless the objecting party can show that the condemnation is unreasonable or arbitrary*."[112] Applying this rule to the public utility context suggests that a city (or its residents) may seek to overcome the utility company's discretion over site selection in the narrow class of cases where it can show that the utility abused that discretion.

Other decisions, both from Texas and elsewhere, provide additional guidance for how the rule normally should apply. As an initial matter, regardless of whether it actually acquired the parcel in question through eminent domain or not,[113] the utility company must establish that the facilities to be constructed thereon are necessary for advancing some public use or purpose.[114] These issues generally are questions of law for judicial determination, but here, too, some amount of deference is given to the decision of the condemning body.[115] For example, great weight is usually afforded legislative declarations that a particular use is public, and this is true with regard to legislative delegations of the eminent domain power as well.[116] As for necessity, a condemnor normally need only show that its governing board made a determination that the taking was necessary.[117] Importantly, there is no requirement that the board specifically declare the necessity of the particular tract of land in question.[118]

Once public use and necessity are established, the burden then shifts to the party challenging the utility's decision to show that the company "acted in bad faith, or has acted arbitrarily, capriciously, or fraudulently, in selecting the particular land for its purpose."[119] Where a question of fact exists as to these issues, they may be submitted to a jury for resolution.[120] Mounting a successful challenge to the utility's site selection, however, presents a high hurdle, as demon-

111. *See Sunset Valley*, 502 S.W.2d at 674.

112. City of Lubbock v. Austin, 628 S.W.2d 49, 50 (Tex. 1982) (emphasis added).

113. *Cf.* Gulf, C. & S. F. Ry. Co. v. White, 281 S.W.2d 441, 449 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.) (noting that it is irrelevant whether the utility actually exercises its eminent domain power so long as it could do so).

114. *See generally* Whittington v. City of Austin, 174 S.W.3d 889, 896–98 (Tex. App.—Austin 2005, pet. denied) (discussing public use and necessity requirements); *see also id.* at 906 n.15 (mentioning condemnor's "initial burden to establish public use and necessity").

115. *See id.* at 897–98.

116. Anderson v. Teco Pipeline Co., 985 S.W.2d 559, 565 (Tex. App.—San Antonio 1998, pet. denied).

117. *Id.*

118. *Id.* at 566.

119. Tex. Elec. Serv. Co. v. Linebery, 327 S.W.2d 657, 664 (Tex. Civ. App.—El Paso 1959, writ dism'd); *accord* Valero Eastex Pipeline Co. v. Jarvis, 926 S.W.2d 789, 792 (Tex. App.—Tyler 1996, writ denied); *accord* Lohmann v. Natural Gas Pipeline Co. of Am., 434 S.W.2d 879, 881 (Tex. Civ. App.—Beaumont 1968, writ ref'd n.r.e.).

120. *Anderson*, 985 S.W.2d at 566.

strated by the judicial statements used to define the characteristics that must be proved. "Bad faith," for example, has been distinguished from mere negligence or poor judgment and instead has been equated with conscious wrongdoing motivated by improper interest, ill will, or dishonest intent.[121] "Fraud" has been defined as "any act, omission or concealment, which involved a breach of legal duty, trust or confidence, justly reposed and is injurious to another, or by which an undue and unconscientious advantage is taken of another."[122] Finally, the courts have defined "arbitrary and capricious" to "mean willful and unreasoning action, action without consideration and in disregard of the facts and circumstances exist[ing] at the time condemnation was decided upon, or within the foreseeable future."[123] Thus, to demonstrate that the utility company acted arbitrarily or capriciously, the challenger must produce evidence that the decision was "freakish, whimsical, fickle, changeable, unsteady" or "fixed or done . . . at pleasure; not founded in the nature of things; non-rational; not done or acting according to reason or judgment; depending on the will alone; tyrannical; despotic."[124] A mere difference of opinion about the location of the facilities will not suffice,[125] nor will evidence that another location was equally or better suited to the project.[126] Rather, the challenger has to come forward with evidence negating "any reasonable basis for determining what and how much land to condemn."[127] If the challenger is unable to meet this burden, then it must concede the utility's choice of location irrespective of the parcel's local zoning designation.[128]

121. City of Atlanta v. First Nat'l Bank of Atlanta, 271 S.E.2d 821, 822 (Ga. 1980); City of Freeman v. Salis, 2001 SD 84, ¶ 11, 630 N.W.2d 699, 703 (2001).

122. Wagoner v. City of Arlington, 345 S.W.2d 759, 763 (Tex. Civ. App.—Fort Worth 1961, writ ref'd n.r.e.).

123. *Id.*

124. Webb v. Dameron, 219 S.W.2d 581, 584 (Tex. Civ. App.—Amarillo 1949, writ ref'd n.r.e.).

125. *See id.* ("Action is not arbitrary or capricious when exercised honestly and upon due consideration, where there is room for two opinions, however much it may be believed that an erroneous conclusion was reached.").

126. *See, e.g.*, Malcolmson Rd. Util. Dist. v. Newsom, 171 S.W.3d 257, 269 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) ("[A] showing that alternate plans are feasible or better does not make the condemnation determination arbitrary or capricious.").

127. *Id.* at 269.

128. *See* City of Jacksonville v. Griffin, 346 So. 2d 988, 990 (Fla. 1977) (stating that, once necessity is shown, "the landowner must then either concede the existence of a necessity or be prepared to show bad faith or abuse of discretion as an affirmative defense"); *see also Newsom*, 171 S.W.3d at 268 (explaining that issue of necessity includes "condemnor's discretion to determine what and how much land to condemn for its purposes").

B. *Local Government's Authority to Regulate Non-Siting Issues*

1. Explaining the Need for Local Oversight

Balanced against the utility's general discretion over siting is the authority of the local government to regulate non-siting issues that affect health, safety, aesthetics, and similar community interests.[129] Just as the siting discretion afforded the utility flows from the nature of the eminent domain power, the justification for the local government's oversight of non-siting matters starts with the nature and purposes of the zoning power. A city's authority to regulate land use, as long explained by the Texas courts, exists to promote and safeguard its residents' interests in public health, morals, safety, comfort, good government, peace, tranquility, order, and the general welfare.[130] Because the zoning power is administered on the local level, of necessity, the interests it seeks to encourage and protect are predominately local in nature. As explained above, local governments generally understand and efficiently respond to matters of concern to their residents, at least as compared to larger units of government. This normally holds true with regard to zoning as well as to other municipal functions. While this quality can produce problems with regard to siting utility infrastructure, it can prove beneficial when applied to other matters.

Examples of such locally beneficial regulations might include permitting requirements, certain environmental standards, noise and light abatement, certain structural and building configurations, setback and yard requirements, landscaping standards, and bonding and insurance requirements. These types of regulations would normally serve to minimize any negative externalities imposed by the utility facility on interests that are uniquely local and not otherwise represented. Permitting, for example, ensures some local oversight so that the utility, probably an outsider, does not have *carte blanche* to ignore community interests that it may not share or of which it may not be cognizant. Building regulations, environmental mitigation, landscaping requirements, and other similar standards seek to foster substantive protection for these community interests. Requirements that the utility company be bonded and have sufficient insurance helps ensure that the community and its residents have some remedy against injuries caused by the utility company.

In addition to issues such as physical health and safety, a primary concern is protecting those intangible attributes of the local area that may be particularly vulnerable once the utility's siting decision has

129. *See, e.g.*, Fort Worth & D. C. Ry. Co. v. Ammons, 215 S.W.2d 407, 411 (Tex. Civ. App.—Amarillo 1948, writ ref'd n.r.e.) (subjecting railroad to municipal building regulations).

130. *See, e.g.*, Ellis v. City of W. Univ. Place, 141 Tex. 608, 609, 175 S.W.2d 396, 397 (1943); *Ammons*, 215 S.W.2d at 409; Klepak v. Humble Oil & Ref. Co., 177 S.W.2d 215, 218 (Tex. Civ. App.—Galveston 1944, writ ref'd w.o.m.).

been made. Put differently, a primary aim of local regulation is to minimize further injury to the "character" of the area in which the facility is located. As Bradley C. Karkkainen has explained, zoning not only protects adverse impacts on residential market values but also protects a homeowner's consumer surplus that goes above and beyond market calculations.[131] Stated simply, this consumer surplus includes subjective qualities that are difficult (if not impossible) to measure on an objective basis.[132] Professor Karkkainen asserts that these subjective qualities produce not only a surplus value in the property owner's particular home or parcel but also in the character of the surrounding area or neighborhood—what he terms "neighborhood commons."[133] In addition to amenities such as parks, schools, houses of worship, and similar area establishments, these commons "include other intangible qualities such as neighborhood ambiance, aesthetics, the physical environment (including air quality and noise), and relative degrees of anonymity or neighborliness."[134] Together, these qualities make up the "feel" or "character" of the neighborhood, and this "character" in part motivates a property owner's decision about where to locate and establish ties.[135] Because different people place different values on different neighborhood characteristics, "character" usually is not sufficiently reflected in the market value of any particular parcel.[136] Zoning, therefore, "is not merely a system for protecting the market values of individual properties, but rather is a device to protect neighborhood residents' interests in their entirety, including consumer surplus in their homes, as well as their interests in . . . the neighborhood commons."[137]

As with zoning generally, subjecting a utility company to non-siting regulations seeks to defend from further negative effects the "character" of the area in which the facility is sited. By way of example, building regulations and landscaping requirements can minimize aesthetic harm caused by the facility, whereas standards for noise and light abatement can help preserve the neighborhood's environment and atmosphere. Without some local oversight, these "character" interests may be disrupted by the utility, leaving neighborhood residents with the choice of expending their own resources to alleviate the disruption or moving out of the neighborhood altogether.[138] In either

131. Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45, 65 (1994).

132. *See* Frank I. Michelman, *Property as Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1112 (1981) ("[W]e can easily see that property may represent more than money because it may represent things that money itself can't buy—place, position, relationship, roots, community, solidarity, status" and "security").

133. Karkkainen, *supra* note 131, at 68–69.

134. *Id.* at 69.

135. *Id.* at 69–70.

136. *Id.* at 70.

137. *Id.* at 66–67.

138. *Cf. id.* at 66.

case, there is a danger that the utility will impose negative externalities on the neighborhood. Although the externalities are easier to see where residents are making out-of-pocket expenditures as a result of the utility's presence, externalities may result where residents exit the neighborhood as well. If the "character" of the locale includes a strong sense of community—that is, robust interpersonal relationships that have developed based on proximity, shared interests, and the passage of time—then the exit of certain members of the community may impose social costs on those who remain.[139] Whether in the form of money or lost relationships, to the extent that utility infrastructure imposes such externalities, then the community, acting through its elected officials, should have the ability to regulate in ways that force the utility company to internalize at least some of these costs.[140]

In sum, just as local governments do not always account for regional or state concerns, it is equally true that "utilities . . . do not always make decisions that sufficiently consider and protect vital local interests."[141] Exempting utilities wholesale from local regulation, therefore, may accomplish little more than replacing the local government's shortsightedness with that of the utility company. As explained by *Porter*, some local oversight is desirable so that the utility is not left free to build infrastructure completely "inconsiderate of the city's peculiar problems of health, safety and welfare."[142]

2. Challenging Abuses of Local Oversight

Nonetheless, the local government may not promote local health, safety, and welfare to the detriment of the wider concerns discussed above—that is, in a manner that imposes inordinate costs that bear no real relationship to the utility's effects on the neighborhood so as to impede the company's ability to meet its service obligations. Accordingly, as with the utility's siting determination, the regulations imposed by the local government are subject to judicial review. Successfully contesting such regulations, however, presents a high bar similar to that confronting a challenge to the utility's discretion over siting. As have courts in other states,[143] the Texas courts have made

139. *See* Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75, 114 (2004) (noting externalities problem in context of community because "each resident in a community has a stake in the continued presence of other members and simultaneously bestows a benefit on others by his own presence").

140. This point seems implicit in the distinction between siting and safety regulations made by the court in *Sunset Valley*, as well as in the court's mentioning that the school district facilities at issue in that case were not alleged to impose a nuisance. *See* Austin Ind. Sch. Dist. v. City of Sunset Valley, 502 S.W.2d 670, 672 (Tex. 1973).

141. Williams, *supra* note 103, at 609.

142. Porter v. Sw. Pub. Serv. Co., 489 S.W.2d 361, 365 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.).

143. *See, e.g.*, Save Sunset Beach Coal. v. City & County of Honolulu, 78 P.3d 1, 10 (Haw. 2003); Four States Realty Co. v. City of Baton Rouge, 309 So. 2d 659, 672 (La.

clear that zoning is a legislative function entitled to a presumption of validity.[144] As such, the party seeking to prevent enforcement of a zoning ordinance bears the "extraordinary burden"[145] of showing that it is arbitrary or unreasonable because it lacks a substantial relationship to public health, safety, welfare, or morals.[146] Ultimately, the reasonableness of the local government's regulations is a question of law for determination by the court, although disputes about the facts on which that determination depends are to be handled like any other factual dispute, including resolution by jury where appropriate.[147] To succeed, the challenger must demonstrate "a clear abuse of municipal discretion" or come forward with "conclusive evidence that a zoning ordinance is arbitrary either generally or as to particular property."[148] If reasonable minds can differ on these questions, then the regulations must be upheld.[149]

Applying these standards to a local government's non-siting regulations of utility infrastructure yields the conclusion that most of these regulations should be upheld against legal challenge. However, in determining whether local regulations are reasonable, courts must be mindful of the reasons that the utility is vested with discretion over site selection. Of particular concern is ensuring that the local government does not utilize its authority to regulate non-siting issues as a mere pretext for undoing the utility's siting discretion, bestowed in the first instance due to the danger of parochial concerns at the local level that might place larger interests in jeopardy. Inasmuch as zoning exists to promote the general welfare, local regulations (even over non-siting issues) that "stand in the way of necessary public utility development" are invalid as "contrary to rather than in the interest of general welfare."[150] Thus, local regulations that unduly hinder the ability to

1975); Childs v. Hancock County Bd. of Supervisors, 2006-CT-00608-SCT (¶ 12), 1 So. 3d 855, 859 (Miss. 2009); Town of Rhine v. Bizzell, 2008 WI 76, ¶ 26, 751 N.W.2d 780, 790 (2008); *cf.* JUERGENSMEYER & ROBERTS, *supra* note 106, at 170 ("Most states treat all zoning changes, whether general or site-specific, as legislative acts and accord them a presumption of validity.").

144. *See, e.g.*, City of Pharr v. Tippitt, 616 S.W.2d 173, 175–76 (Tex. 1981); City of San Antonio v. Arden Encino Partners, 103 S.W.3d 627, 630 (Tex. App.—San Antonio 2003, no pet.).

145. *Arden*, 103 S.W.3d at 630.

146. *Tippitt*, 616 S.W.2d at 176.

147. *Arden*, 103 S.W.3d at 630; *accord* Houston & T. C. Ry. Co. v. City of Dallas, 98 Tex. 396, 417–18, 84 S.W. 648, 654–55 (1905).

148. *Arden*, 103 S.W.3d at 630 (quoting City of Univ. Park v. Benners, 485 S.W.2d 773, 779 (Tex. 1972)).

149. *Tippitt*, 616 S.W.2d at 176.

150. Consol. Edison Co. v. Vill. of Briarcliff Manor, 144 N.Y.S.2d 379, 384 (Sup. Ct. 1955); *see also Houston*, 98 Tex. at 415, 84 S.W. at 653 (explaining that power to regulate land use is "commensurate with, but does not exceed, the duty to provide for the real needs of the people in their health, safety, comfort, and convenience as consistently as may be with private property rights" and "a privation by force of the police power fulfills this requirement only when the power is exercised for the pur-

satisfy the utility's duty to serve are unreasonable and qualify as an abuse of the government's zoning authority.[151]

C. *Increased Bargaining as One Benefit of the Balance*

Having explained the justifications for and limits of the authority that Texas law gives to the utility company and the local government, it remains to discuss why this approach provides a desirable model for other jurisdictions. Although an exhaustive discussion on this point is beyond the scope of this article, I will offer one likely benefit of this balanced approach beyond what has already been said. Ideally, the balanced approach described here should provide incentive for increased negotiation between the local community and the utility company over the placement and construction of utility infrastructure.

This benefit may best be considered by comparing it to the alternative systems. Where the utility company must comply with all local regulations, both siting-related and otherwise, one wonders how strong a motivation there is on the part of the community or its representatives to seriously engage the utility's concerns and commitments. Likewise, in a system where the utility company is completely exempted from local regulations, there might be little reason (apart from public relations, perhaps) for the utility to demonstrate genuine interest in purely local matters, especially those as subjective as concerns about neighborhood "character." Under the balanced approach, however, both the utility and the community have power and, concomitantly, each have something to gain and something to lose. While the utility more or less has the ability to locate its facilities where it legitimately deems best, it nonetheless will have to comply with whatever reasonable non-siting regulations the local government thinks necessary. Under this approach, the community knows from the outset that it will not be able to prevent the facility's construction in the area chosen by the utility, and the utility realizes that it will be subjected to local oversight concerning how that construction proceeds. Moreover, although both sides will be kept in check by the courts, each knows that it will be possible to undo the decisions made by the other only in the most egregious of circumstances. Accordingly, it would seem to be in everyone's best interest for the utility representatives, the local officials, and the community leaders to come to some sort of mutually amicable arrangement before a siting decision has been finalized and regulatory enforcement has been commenced.

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pose of accomplishing, and in a manner appropriate to the accomplishment of, the purposes for which it exists").

151. *See* Potomac Edison Co. v. Jefferson County Planning & Zoning Comm'n, 512 S.E.2d 576, 583 (W. Va. 1998) ("Local governments may, in the public interest, provide reasonable parameters for land use; but local governments cannot effectively prohibit a utility from conducting its necessary activities, and thereby 'dump' the construction of utility facilities on other jurisdictions.").

At least two objections may be raised to the assertion that increased bargaining between the utility and the community actually qualifies as a resulting benefit of the balanced approach. First, it might be argued that any bargains that emerge from such an approach would constitute illegal contract zoning and, therefore, would be unenforceable. Second, as with any bargaining process, there is a risk that the resulting arrangements could lead to abuse or inequities because of power imbalances, inefficient information, or outright corruption. While these objections raise important issues, the dangers they predict seem to be overstated in the context under consideration.

As an initial matter, what exactly amounts to illegal contract zoning is a question lacking a clear answer.[152] Indeed, the term "contract zoning" itself seems to suggest more about a court's normative conclusions regarding the validity of a particular bargain than it does about the fact that bargaining may have occurred.[153] Many decisions seem to employ the label "contract zoning" to describe bargaining arrangements perceived as illicit, whereas those arrangements recognized as legitimate are termed "conditional zoning," without much explanation of any analytical differences between the two categories.[154] Other decisions attempt to distinguish permissible and impermissible bargains by focusing on whether the bargain involves only a unilateral promise from the landowner or a bilateral agreement involving reciprocal promises between both the landowner and the government.[155] But determining exactly what constitutes a unilateral or bilateral arrangement is difficult because "even unilateral agreements can serve as an incentive to government action."[156] Thus, whatever labels are at-

152. According to the Texas Supreme Court, "'[c]ontract zoning' occurs when a governmental entity, such as a city, enters into a binding contract in which it promises to zone land in a certain way in exchange for a landowner's promise to use the land in a particular manner." City of White Settlement v. Super Wash, Inc., 198 S.W.3d 770, 772 n.2 (Tex. 2006). This definition is by no means uniform among courts that have considered the question. *See* Durand v. IDC Bellingham, LLC, 793 N.E.2d 359, 366 n.17 (Mass. 2003) (discussing differing definitions of "contract zoning"). It should be noted that the Texas Supreme Court has not yet addressed the legal validity of contract zoning. *See Super Wash*, 198 S.W.3d at 772 n.2.

153. *See* Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 979–80 (1987) (examining cases and concluding that labels used by courts often are "adopted for purposes of describing the ultimate disposition of the case" rather than "for purposes of defining the applicable theoretical framework").

154. *See id.* (noting that "contract zoning" often operates as "a convenient epithet" while courts "deliberately cho[o]se the 'conditional zoning' terminology . . . as a means of describing rezoning arrangements perceived as legitimate"). For an example of a court recognizing this tendency, but falling into the same trap itself, *see* Cross v. Hall County, 235 S.E.2d 379, 382–83 (Ga. 1977).

155. *See, e.g.*, Chrismon v. Guilford County, 370 S.E.2d 579, 594 (N.C. 1988).

156. Wegner, *supra* note 153, at 979 n.122; *see also Cross*, 235 S.E.2d at 382 (upholding unilateral promise by developer even though it seemingly provided substantial motivation for county's ultimate zoning decision).

tached to any particular bargaining process, it seems that the mere existence of bargaining, without more, is rarely sufficient to undo a zoning determination.[157]

What more is needed to push a negotiated result into the category of illegality is not entirely clear, although several opinions suggest that the determining factors are the same as with any other zoning question—i.e., the openness of the process and the reasonableness of the final decision.[158] Under this standard, any negotiations between the utility company, local government officials, and community leaders would be valid so long as: (1) no commitments are made before a fair and open hearing held in accordance with applicable law; (2) all parties have an opportunity to voice their concerns and interests in such a hearing; and (3) the substance of any final decision concerning the placement and construction of utility infrastructure substantially promotes the public interest and general welfare.

Moreover, the satisfaction of these requirements should go a long way in minimizing any concerns about power imbalances, lack of information, or corruption. As explained above, the balanced approach gives significant power both to the utility company (over siting issues) and to the local government (over non-siting issues). Increased participation by citizens on the local level provides a political incentive for the elected officials, especially those representing the affected area or neighborhood, to assure that the community's interests are adequately promoted.[159] And it is assumed that community leaders—e.g., representatives of homeowners associations, the chamber of commerce, and other community interest groups—will be involved in the pre-hearing discussions alongside the utility and local officials. Finally, the bargaining process itself, coupled with an open public hearing and the prospect of judicial review, should open channels for the transfer of information[160] and decrease opportunities for graft and other abuses.

157. *See* McLean Hosp. Corp. v. Town of Belmont, 778 N.E.2d 1016, 1020 (Mass. App. Ct. 2002) ("The existence of an agreement per se does not invalidate related zoning actions . . . ."); *cf.* PETER W. SALSICH, JR. & TIMOTHY J. TRYNIECKI, LAND USE REGULATION 193 (2003) ("If anything is apparent . . . in day-to-day land use practice before zoning officials, it is that modern zoning, in the general sense, is a negotiation, not simply an application and response.").

158. *See, e.g.*, Durand v. IDC Bellingham, LLC, 793 N.E.2d 359, 369 (Mass. 2003) (indicating that "proper focus" of review "is whether [the bargained-for decision] violates State law or constitutional provisions, is arbitrary or unreasonable, or is substantially unrelated to the public health, safety, or general welfare"); Old Canton Hills Homeowners Ass'n v. Mayor of City of Jackson, 1998-CA-01514-SCT (¶ 12), 749 So. 2d 54, 59 (Miss. 1999) (upholding decision where "all parties were given opportunity to speak" and council made determination based on "genuine belief that the rezoning was in the best interests of the City"); Dacy v. Vill. of Ruidoso, 845 P.2d 793, 797–98 (N.M. 1992) (bargaining valid where "the municipality does not commit itself to any specified action before the zoning hearing" and "does not circumvent statutory procedures or compromise the rights of affected persons").

159. *See* Karkkainen, *supra* note 131, at 84.

160. *See id.*

In sum, the balanced approach, whereby the utility company is vested with discretion over siting and the local government is vested with authority to regulate non-siting matters, provides incentives for the interested parties to work out mutually beneficial arrangements regarding the location and construction of utility infrastructure. Moreover, where such arrangements are negotiated on an inclusive basis, subject to open and fair procedures, and represent acceptable standards both for the utility's service obligations and the community's concerns, they should not run afoul of the aforementioned objections. To be sure, by empowering both the utility and the community, this approach reduces legal certainty. But that very feature encourages both sides to look for common ground, with the tradeoff hopefully being greater flexibility, healthier discourse, enhanced efficiency, and improved decision-making.[161]

CONCLUSION

Despite the tension that exists among some of the Texas decisions on the issue, a close evaluation of the case law reveals that Texas follows a balanced approach when considering the proper interaction between a utility's power of eminent domain and a local government's zoning authority. On one side, the utility provider is vested with discretion over the location of utility infrastructure to ensure its ability to meet its service obligations, which might be hindered by purely local concerns that do not adequately consider interests at larger levels. On the other side, the local government is vested with authority to subject the utility to reasonable non-siting regulations to force internalization of some of the costs the facilities may impose on local interests, especially the "character" of the neighborhood in which the facilities are located. This balance thus recognizes the multiple interests involved in the placement and construction of utility infrastructure and divides power so as to better ensure that those interests receive proper consideration and protection.

One likely advantage of this balanced approach is increased negotiation between the utility company, local officials, and community leaders, resulting in mutually beneficial arrangements over the siting and building of utility facilities. By empowering both the utility and the local government, this approach provides an incentive for each to bargain with the other. And where such bargaining includes all

161. *See* Daniel R. Mandelker, *Planning and the Law*, 20 VT. L. REV. 657, 660–61 (1996) ("A healthy political process contemplates and encourages negotiation in decision-making that makes outcomes uncertain. . . . Political bargains change over time, but the essential prerequisite to healthy bargaining is the presence of interest groups that have comparable weight in the process that produces these bargains."); Wegner, *supra* note 153, at 960 ("[T]he bargaining process may be more efficient because it facilitates cost-efficient outcomes and substitutes a potentially cheaper decisionmaking process that fosters prompt and amicable compromises while avoiding the costs attendant to protracted administrative and judicial appeals.").

voices, a fair and open process, and produces decisions that advance both the utility's service obligations and the concerns of the community, these negotiations should produce more informed and effective decisions over where and how utility infrastructure is built.