IN THE COURT OF APPEALS FOR

THE FIRST DISTRICT OF TEXAS

AT HOUSTON

No. 01-07-00698-CV

THE FREEPORT ECONOMIC
DEVELOPMENT CORPORATION,
Appellant,

v.

WESTERN SHELLFISH
CORPORATION,
Appellee.

On Appeal from the County Court
at Law No. 2 of Brazoria County, Texas
Case No. CI032662
Honorable Mark Holder, Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE WESTERN SHELLFISH CORPORATION

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Texas Rule of Appellate Procedure 11, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

DATED: December 3, 2007.

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KATHLEEN CASSIDY GOODMAN

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Texas Rule of Appellate Procedure 11, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the appellee, Western Shellfish Company.

Pacific Legal Foundation (PLF) was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys have represented property owners and participated as amicus curiae in such important eminent domain cases as *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006); *Kelo v. City of New London, Connecticut*, 545 U.S. 469 (2005); *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004); and *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984). PLF also appeared as amicus in support of Western Seafood Company in *Western Seafood Co. v. United States*, 202 F.App'x 670 (5th Cir. 2006).

PLF attorneys have written extensively on eminent domain and other important property rights issues. *See, e.g.*, Timothy Sandefur, *Don't Mess With Property Rights in Texas: How the State Constitution Protects Property Owners in the*

Wake of Kelo, 41 Real Prop. Prob. & Tr. J. 227 (2006); James Burling, *Do Economic Results of a Transfer to a Private Developer Constitute "Public Use?"*, SL049 ALI-ABA 679 (2006). Because of its history and experience with regard to the power of eminent domain, PLF believes its perspective will aid this Court in considering this case.

INTRODUCTION

This appeal arises from the trial court's dismissal of the Freeport Economic Development Corporation's (Freeport) attempt to condemn property, including a private marina owned by Western Shellfish, for the purpose of transferring that property to a would-be developer of a larger marina. On appeal, this Court must affirm the dismissal if any legal theory evident in the record supports that result. *Nichols v. Sedalco Constr. Servs.*, 228 S.W.3d 341, 342-43 (Tex. App. 2007). Freeport must therefore "negate all possible grounds for dismissal" of its condemnation action. *Manning v. North*, 82 S.W.3d 706, 713 (Tex. App. 2002). This it cannot do, because in addition to the arguments offered in Western Shellfish's brief, the Texas Constitution forbids the agency's condemnation of Western Shellfish's property for transfer to a private developer.

Unlike the Public Use Clause in the Federal Constitution, the public use clause of the Texas Constitution has never been held to authorize the taking of a person's productive property and business for greater "economic development." Indeed, the text, history, purpose, and judicial application of the state's public use clause stand in manifest opposition to such an endeavor. As one example, the Texas Supreme Court specifically rejected a broad interpretation of "public use" as "mean[ing] nothing more than public welfare or good and under which almost any kind of business which promotes the prosperity or comfort of the community might be aided by the power of eminent domain," in *Coastal States Gas Producing Co. v. Pate*, 309 S.W.2d 828, 833 (Tex. 1958). Instead, the public must acquire "some definite right or use in the business or undertaking to which the [condemned] property is devoted" to satisfy the state constitution's "public use" limitation. *Id.*

The Texas Supreme Court has never repudiated this understanding. Although it suggested in *Hous. Auth. of City of Dallas v. Higginbotham*, 143 S.W.2d 79, 84 (Tex. 1940), and *Davis v. City of Lubbock*, 326 S.W.2d 699, 706 (Tex. 1959), that the term "public use" should be construed liberally in the context of blight elimination, neither of those cases held that economic benefits alone satisfy the Public Use

requirement. Rather, they merely held that eradicating dangerous, slum property is a proper governmental function—a proposition which does not apply to this case. There is, then, nothing in Texas case law, and certainly nothing in the original intent of the framers of the Texas Constitution, allowing seizure of non-slum, commercially viable property like that belonging to Western Shellfish, so that the government can transfer it to a different private owner in the hope of increased productivity.

ARGUMENT

I

CONDEMNING PRIVATE PROPERTY TO TRANSFER IT TO ANOTHER OWNER WHO PROMISES MORE ECONOMIC PRODUCTIVITY VIOLATES THE TEXAS CONSTITUTION'S PUBLIC USE CLAUSE

A. The State Constitution's Public Use Clause Limits Eminent Domain to a Greater Extent Than the Federal Public Use Clause

As the United States Supreme Court recognized in *Kelo*, state constitutions can provide greater protections for property owners than the Federal Constitution. *See Kelo*, 545 U.S. at 489. And indeed, many state supreme courts have interpreted state "public use" clauses as requiring something more than that a condemnation merely benefit the public in some attenuated sense. *See, e.g.*, *Hathcock*, 684 N.W.2d at 786

("[I]f one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore,' or the like."); *accord*, *Norwood*, 853 N.E.2d at 1141 (quoting *Hathcock*).

The Texas Constitution likewise forbids the abuse of eminent domain for private development.[1] As the Fifth Circuit Court of Appeals has noted, Texas courts have "adopted a narrower view" of the public use requirement than the federal courts have. *City of Arlington, Texas v. Golddust Twins Realty Corp.*, 41 F.3d 960, 965 (5th Cir. 1994); *cf. Western Seafood*, 202 F.App'x at 677. Thus, while the Texas Constitution's public use provision allows eradication of slums, *see Higginbotham*, 143 S.W.2d at 85; *Davis*, 326 S.W.2d

[1] Western Shellfish's state constitutional issues were raised before the Fifth Circuit Court of Appeals, which remanded the case to the district court for further consideration. *Western Seafood*, 202 F.App'x at 676-77. The district court then returned the case to state court. *Western Seafood Co. v. United States*, No. G-03-811, 2007 WL 2351198, at *1-2 (S.D. Tex. Aug. 15, 2007). Thus the constitutional issue was raised sufficiently for consideration by this Court. Moreover, even if it was not, this constitutional issue may be raised for the first time on appeal because it challenges the subject matter jurisdiction of the court, and the public interest is "directly and adversely affected" by an expansive interpretation of "public use" in the state constitution. *Kaye v. Harris County Mun. Util. Dist. No. 9*, 866 S.W.2d 791, 795 (Tex. App. 1993).

at 709, it does not allow condemnations which simply " 'encourage industry, or promote the general public welfare.'" *Golddust Twins*, 41 F.3d at 965 (quoting Daniel B. Benbow, *Public Use as a Limitation on the Power of Eminent Domain in Texas*, 44 Tex. L. Rev. 1499, 1500 n.8 (1966)). In fact, in interpreting the state's constitution, the Texas Supreme Court has "refused to accept the definition adopted by some authorities which makes the phrase ['public use'] mean nothing more than public welfare or good and under which almost any kind of business which promotes the prosperity or comfort of the community might be aided by the power of eminent domain." *Pate*, 309 S.W.2d at 833.[2] Consequently, this state's test for determining whether a taking satisfies the public use clause "is to see if there results to the

[2] A state's constitutional history can reveal that state constitutional provisions provide greater protections than federal clauses even when they are similarly or identically worded. Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. Rev. 199, 203 (1998); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 817 (1992). *See further Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 808 (Cal. 1997) ("[E]ven when the terms of the California Constitution are textually identical to those of the federal Constitution, the proper interpretation of the state constitutional provision is not invariably identical . . . ."); *State v. Gunwall*, 720 P.2d 808, 812-13 (Wash. 1986) (setting forth six criteria for determining when state constitution offers greater protection than Federal Constitution).

public some definite right or use in the business or undertaking to which the property is devoted." *Tenngasco Gas Gathering Co. v. Fischer*, 653 S.W.2d 469, 475 (Tex. App. 1983). That test cannot be met where, as here, a taking is purely designed to allow a private party to generate additional income from the property. As shown below, this view is so firmly grounded in the history of the Texas Constitution and state case law that it cannnot be abandoned now.

B. Both the 1845 and 1875 Versions of the Texas Constitution Adopted an "Actual Use" Theory of "Public Use"

The Texas Constitution should be interpreted "in accordance with the obvious intent of those who enacted [it]." *Bell v. Indian Live-Stock Co.*, 11 S.W. 344, 345 (Tex. 1889). The debates and circumstances surrounding the adoption of the 1845 and 1875 Texas Constitutions reveal that, at both points, the "public use" limitation on takings was meant to allow takings for direct public use.

1. The 1845 Constitution

The Texas Constitution's "public use" clause originated in 1845. *See* John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 Tex. Tech L. Rev. 1089, 1127 (1995). At the state's first Constitutional

Convention, in 1845, a committee appointed to draft a bill of rights proposed that the clause read "nor [may] vested rights be divested, unless for purposes of public utility, and for adequate compensation previously made." William F. Weeks, *Debates of the Texas Convention* 22 (1846).[3] But Delegate Armstrong of Jefferson County—an attorney who had served in the legislature of the Republic of Texas and would later serve at the Constitutional Convention of 1868 moved to amend this proposal to read, "and no person's property shall be taken or applied to public use, without adequate compensation being made, unless by the consent of such person." *Id.* at 95. Armstrong explained that "he thought the necessity apparent of changing the phraseology, if not of striking out: so as not to leave points undetermined which it is intended to establish. The terms in the report were liable to dispute at the best." *Id.* Armstrong's motion was agreed to, *id.* at 96, and his wording was adopted. Thus the Texas framers explicitly chose to avoid a relaxed standard of "public utility," and to adopt instead a strict standard of "public use," so as to avoid leaving anything "undetermined."

[3] *Available at* http://tarlton.law.utexas.edu/constitutions/pdf/pdf1845debates/00000008.pdf (last visited Nov. 12, 2007).

That Armstrong's measure was understood as requiring a strict standard of "public use" is confirmed by the comments of Delegate John Hemphill, the Chief Justice of the Texas Supreme Court at the time that he served as a delegate to the 1845 Convention, and remembered today as "the John Marshall of Texas." Texas State Historical Association, *The Handbook of Texas Online* (last updated June 6, 2001).[4] Hemphill explained the scope of eminent domain in these terms: "All persons . . . acquainted with military operations . . . well know the necessity that frequently exists of making use of private property, cattle, horses, powder and lead, and any other articles necessary to the success of the forces in the field." Weeks, *supra*, at 95–96. This military example demonstrates that delegate Hemphill regarded the power of eminent domain as limited to such traditional public uses as military installations or supplies. Military necessity was originally understood as the definitive "public use." *See* Sandefur, *supra*, at 236–37. Neither Hemphill nor any other 1845 delegate referred to the "public use" limitation as allowing takings for economic development or other semi-private or private uses.

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[4] *Available at* http://www.tsha.utexas.edu/handbook/online/articles/HH/fhe13.html (last visited Nov. 12, 2007)

Given his role as Chief Justice, Hemphill's views on the meaning of the "public use" portion of the 1845 Constitution was undoubtedly informed by the controlling case—law of the period. In 1845, "public use" was judicially understood to prohibit the transfer of property to private parties. *See Varick v. Smith*, 5 Paige Ch. 137 (N.Y. Ch. 1835); *Bloodgood v. Mohawk & Hudson R.R. Co.*, Lock. Rev. Cas. 118 (N.Y. 1837); *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 658 (1829) ("[W]e know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union."). Indeed, in 1857, Hemphill himself held in *Hearn v. Camp*, 18 Tex. 545, 1857 WL 5003, at *4 (Tex. 1857), that "[t]he lands of an individual cannot be taken for public use without compensation, much less can they be wrested from one man and given to another; neither directly, nor indirectly."

There were two instances in which condemnations benefitting private parties *were* allowed under the case law of other states in 1845: the Mill Act cases and the railroad cases. Sandefur, *supra*, at 232–34. These cases, which allowed private investors to seize neighboring land to construct railroads or flood neighboring lands to create watermills, were highly contentious, and courts that allowed

these takings did so only because mills and railroads were regulated public utilities, and not wholly private corporations. *See, e.g., Boston & Roxbury Mill Corp. v. Newman*, 29 Mass. (12 Pick.) 467, 477 (Mass. 1832); *Swan v. Williams*, 2 Mich. 427, 1852 WL 3103 (Mich. 1852). "[S]trictly *private* corporations" for which "the *private interest* of the corporators is the primary object," could *not* employ the power of eminent domain, 1852 WL 3103 at *5, but railroads were semi-public agencies, which, while they did lead to "private emolument on the part of the corporators," were really created for "public utility, and [the] private benefit, instead of being the occasion of the grant [of the charter of corporation], is but the reward springing from the [public] service." *Id.* at *7. Thus railroads could condemn land, but only because they were regulated public utilities. *Beekman v. Saratoga & Schenectady R.R. Co.*, 3 Paige Ch. 45 (N.Y. Ch. 1831) ("[T]he owners may be prosecuted . . . if they should refuse to transport an individual, or his property, without any reasonable excuse, upon being paid the usual rate of fare," and legislature could "regulate the use of the franchise and limit the amount of toll which it shall be lawful to take, in the same manner as they may regulate the

amount of tolls to be taken at a ferry, or for grinding at a mill.").

The theory that "public use" referred to the social benefits incidental to a private corporation's improved business was not part of the law in 1845. Instead, the government could take property for semi-private industrial pursuits only when the government regulated those pursuits as common carriers or public utilities. But if a taking enriched private individuals, the condemnation was invalid under the public use clause. *See, e.g., Varick*, 5 Paige Ch. 137 (legislature could create canal system and mills for public use, but is forbidden from "taking the property of one citizen and selling it to another").

2. The 1875 Constitutional Convention Also Did Not Regard Business Subsidies as Public Uses

The 1845 public use clause remained unchanged until 1876, when it was changed slightly so as to provide more protective methods of compensation. *See Debates in the Texas Constitutional Convention of 1875* at 237-38 (Seth Shepard McKay ed., 1930). Although the Convention did not debate the meaning of "public use" directly, the delegates who discussed the compensation alterations referred only to the use of

eminent domain for "making roads," *id.* at 238, a traditional, actual public use.

Moreover, as in 1845, the constitution of 1875 was adopted in a legal culture in which the term "public use" only permitted condemnation of private land for government buildings, public highways, public utilities, or regulated common carriers. *See, e.g., Smith v. Taylor*, 34 Tex. 589, 1871 WL 7451, at *11 (Tex. 1870) (land may be "condemned for the use of government"); *Jones v. Keith*, 37 Tex. 394, 1873 WL 7279, at *4 (Tex. 1872) (eminent domain may be used for ferries and highways); *City of Paris v. Mason*, 37 Tex. 447, 1873 WL 7299, at *3 (Tex. 1872) (eminent domain may be used to construct streets). *Cf. Miller v. Burch*, 32 Tex. 208, 1869 WL 4801, at *2 (Tex. 1869) (city exceeded its authority by condemning property which had become delapidated; "If the common council may make such an ordinance in respect to the comparatively valueless stable of the plaintiff, why not a like one to be executed on the most elegant and costly edifice . . . ?"). Conversely, when the 1875 constitution was enacted, no case indicated that eminent domain could be used to transfer private property from one owner to another for purposes of economic development. The logical conclusion is that the 1875 "public use" clause was intended to limit

takings to property that would be publicly accessible or owned.[5]

C. Early Texas Court Decisions Construed Texas' Public Use Clause to Require More than an Incidental Public Benefit

As the delegates to the 1875 Convention were likely aware, condemnations of private property for railroad construction by private corporations had long been upheld as a "public use." *See, e.g., Buffalo Bayou, Brazos & Colorado R.R. Co. v. Ferris*, 26 Tex. 588, 1863 WL 2747, at *8 (Tex. 1863). But such railroad cases did not establish that the Texas "public use" clause is satisfied when a condemnation merely benefits the public in some general way; to the contrary, they confirm that this is insufficient.

In *Mangan v. Tex. Transp. Co.*, 44 S.W. 998 (Tex. Civ. App. 1898), the court of civil appeals upheld a condemnation to construct a railroad which would be used by brewery companies in shipping their wares. The court found that this satisfied the public use requirement because "the public has

[5] Moreover, the debates reveal that, more generally, the delegates did not view it as a proper governmental function to transfer property to private parties for their economic benefit. The Convention enacted a provision prohibiting the legislature from granting any of the lands of the state to any railway company except on certain conditions, and allowed the legislature only to enact "general laws" for such purposes—prohibiting real property transfers to particular businesses. Sandefur, *supra*, at 239–41.

an equal right with the two breweries mentioned in the petition to enjoy the benefits of appellee's proposed road and command its services." *Id.* at 1001. Although condemnations for railroads would benefit private companies, "such statutes have been upheld, upon the ground that the roads, when constructed, were charged with the duties of common carriers . . . and were, therefore, *public highways*." *Id.* (citing cases; emphasis added).

In *Kyle v. Texas & New Orleans Ry. Co.*, 3 Willson 518, 1889 WL 1464 (Tex. App. 1889), the court held that a condemnation to construct a private spur line to a railroad violated the public use clause. Railroads could use eminent domain, explained the court, but "only . . . where the [taken] property is required for the purposes of the incorporation or the transaction of its business," and not "for the construction of an independent branch road to subserve only mere private interests." 1889 WL 1464 at *4 (citation omitted). Unlike the brewery road allowed in *Mangan*, the private spur line in *Kyle* was not accessible by the public, and was "exclusively in the interest of and for the private benefit of private parties and of the corporation." 1889 WL 1464 at *5. *Cf. Barrett v. Metcalfe*, 33 S.W. 758, 759 (Tex. Civ. App. 1896) (law allowing riparian owner to divert

upstream water for private irrigation was unconstitutional taking of downriver owners' property for private use).

Again, the rule in *Mangan* was the basis of the decision in *Borden v. Trespalacios Rice & Irrigation Co.*, 86 S.W. 11 (Tex. 1905), *aff'd per curiam*, 204 U.S. 667 (1907). There, the challenged law allowed irrigation companies to construct canals across private land via eminent domain. The court held that the state constitution forbids "purely private corporations and associations of persons for the carrying on of businesses wholly private" from "tak[ing] private property for use in such businesses, without being required to assume any duty to, or to respect any right in, the public." *Id.* at 14. The *Borden* court specifically rejected

> that liberal definition of the phrase "public use" adopted by some authorities, which makes it mean no more than the public welfare or good, and under which almost any kind of extensive business which promotes the prosperity and comfort of the country might be aided by the power of eminent domain.

Id. Instead, the public use clause only allowed the use of eminent domain "when there results to the public some definite right or use in the business or undertaking to which the property is devoted." *Id. See also Dallas Cotton Mills v. Indus. Co.*, 296 S.W. 503, 505 (Tex. Comm'n App. 1927) ("A sine qua non of lawful taking . . . is that the professed use be a public one in truth. Mere fiat . . . pronounced by the

Legislature . . . does not make that a public use which is not such in fact.").

The lesson to be taken from these decisions is that the state courts accepted and enshrined the narrow construction of "public use" intended by the 1845 and 1875 Constitutional Conventions, despite making a necessary concession for use of eminent domain for private railroad construction.

D. Modern Cases Did Not Loosen the "Public Use" Requirement to Justify Economic Development Condemnations

The Texas courts' refusal to adopt a liberal interpretation of "public use" continued until 1940, when, in an abrupt reversal, the state supreme court declared that "cases from our jurisdiction demonstrate[] that this court has adopted a liberal view concerning what is or is not a public use." *Higginbotham*, 143 S.W.2d at 84. Remarkably, the *Higginbotham* Court went on to quote the language from *Borden* which explicitly *rejected* such a holding, and then asserted that "[t]he public use [in *Borden*] arose out of the general benefit to the state through the reclamation of arid lands for agriculture by irrigation, which would otherwise be lost to the state." *Id.* at 85. But this was not true. *Borden*, like *Kyle* and *Mangan*, adopted a moderate "actual use" standard whereby a condemnation satisfied the public use clause only

where the condemning party was subject to the sorts of regulations that would guarantee "to the public some definite right or use in the business or undertaking to which the property is devoted." *Borden*, 86 S.W. at 14. *See also West v. Whitehead*, 238 S.W. 976, 978 (Tex. Civ. App. 1922) (railroads are public uses only because they are "a highway, or a common carrier, and open to the promiscuous and uniform use of the public").[6]

Higginbotham's weaknesses aside, the case did not establish a warrant for condemnations for general economic development. Even after *Higginbotham*, the Texas Supreme Court reiterated that it "refused to accept the definition adopted by some authorities which makes the phrase mean nothing more than public welfare or good and under which almost any kind of business which promotes the prosperity or comfort of the

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[6] The *Higginbotham* court misconstrued over a half century of Texas law in another important way. It relied heavily and wrongly on cases involving the expenditure of tax funds: *Goodnight v. City of Wellington*, 13 S.W.2d 353 (Tex. Comm'n App. 1929), and *Davis v. City of Taylor*, 67 S.W.2d 1033 (Tex. 1934). In this respect, *Higginbotham* parallels the Michigan Supreme Court's infamous *Poletown* decision, which also confused cases involving the expenditure of tax funds with cases involving the use of eminent domain. *See Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455, 457–59 (Mich. 1981), overruled by *Hathcock*, 684 N.W.2d at 787; *cf.* 304 N.W.2d at 472–75 (Ryan, J., dissenting) (pointing out difference between public purpose in tax cases and public use in eminent domain cases).

community might be aided by the power of eminent domain." *Pate*, 309 S.W.2d at 833. The court cited *Higginbotham* in this paragraph. Notwithstanding that case, however, "property is taken for public use only when there results to the public some definite right or use in the business or undertaking to which the property is devoted." *Pate*, 309 S.W.2d at 833.

Higginbotham was therefore specifically limited to the eradication of slum property, which is different from the use of eminent domain for generalized economic benefits. In the case of slum eradication, as the Michigan Supreme Court recently put it, "the selection of the land to be condemned is itself based on public concern . . . . meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land . . . satisfy the Constitution's public use requirement." *Hathcock*, 684 N.W.2d at 782–83. But in the case of economic development condemnations, the transfer is said to be a public use because it will "allow [the new owner] to grow and prosper and contribute to positive economic growth in the region." *Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 768 N.E.2d 1, 9 (Ill. 2002). The problem with the latter rationale is that " 'incidentally, every lawful business does this,' " *id.* (quoting *Gaylord v. Sanitary Dist. of Chicago*, 68 N.E. 522,

525 (Ill. 1903)), meaning that it would justify a condemnation of virtually any property for virtually any reason. *See also Norwood*, 853 N.E.2d at 1141 (if a "generalized economic benefit in the transfer of private property to a private entity [is] sufficient to satisfy the public-use requirement," even unjustified condemnations would survive scrutiny.). Texas courts have never gone so far, not even in *Higginbotham*.

The Texas Supreme Court again upheld the condemnation of slum property in *Davis*, 326 S.W.2d 699. There, the court found that the original intent of the 1875 public use clause was to allow condemnations of property "for resale to private individuals." *Id.* at 704. To support this assertion, the *Davis* court cited *Smith*, 34 Tex. 589, 1871 WL 7451. But in *Smith*, the land was condemned to construct a state capitol building, and, fifteen years later, excess land which had not been used for that purpose was later sold at a public auction. *See Smith*, 34 Tex. 589, 1871 WL 7451, at *11. The case contains no suggestion that the government could legitimately seize land from a private party and transfer it to another for economic development.

Whatever its flaws, the *Davis* decision also did not hold that economic development improvement alone could satisfy the public use requirement in eminent domain cases. Like

Higginbotham, that case involved "slum and blighted areas which constitute a serious and growing menace" to society by "contribut[ing] substantially and increasingly to the spread of crime, disease and juvenile delinquency." *Davis*, 326 S.W.2d at 703.

By contrast, in *Maher v. Lasater*, 354 S.W.2d 923 (Tex. 1962), the Texas Supreme Court cited *Davis* while holding that a city could not condemn property to establish a road which would serve only to allow a landowner easier access to the marketplace. *See Maher*, 354 S.W.2d at 926 ("The only possible public purpose conceivable which the road in this case can serve is that of putting the products of the soil and the range of Section 331 into the economy of the community."). Even under the rule announced in *Davis*, a city could not "condemn a highway across [one person's] ranch in order to enable [another person] to establish a fishing camp or other commercial enterprise on his land. To do so would be taking private property for a private purpose." *Maher*, 354 S.W.2d at 926 (quoting *Phillips v. Naumann*, 275 S.W.2d 464, 468 (Tex. 1955)). **In fact, the Texas Supreme Court has never declared economic improvement to be sufficient to satisfy the public use clause of the state constitution.**

In sum, the "public use" clause of the Texas Constitution is more protective of private parties than the Federal Constitution, allowing takings only when the public acquires a concrete and immediate use of the condemned property. The Texas courts have accordingly rejected a "public benefits" view under which a taking is acceptable as a public use if the public—through the government—stands to gain some indirect economic benefit. The taking in this case is not for a public use, it is designed to transfer one person's private and productive business to another in the hope that this will ultimately lead to more economic output. This simply does not pass Texas constitutional muster, indeed, it violates both the original meaning of that clause and judicial interpretations of it.

CONCLUSION

Direct transfers of property between private parties for private profit, such as the one at issue in this case, violate the public use clause of the Texas State Constitution. The decision below should be affirmed.

DATED: December 3, 2007.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 52.10(a), I certify that I have notified or made a diligent effort to notify all parties by expedited means (such as by telephone or fax) that this document has been or will be filed.

DATED: December 3, 2007.

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CERTIFICATE OF SERVICE

As required by Texas Rule of Appellate Procedure 6.3 and 9.5(b), (d), (e), I certify that I have served this document on all other parties—which are listed below—on December 3, 2007, as follows:

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