

IN THE SUPREME COURT OF TEXAS

No. 13-0303

HARRIS COUNTY FLOOD CONTROL DISTRICT AND
HARRIS COUNTY, TEXAS, PETITIONERS,

v.

EDWARD A. AND NORMA KERR, ET AL., RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

JUSTICE LEHRMANN, concurring.

“[A]ware of the tendency of power to degenerate into abuse,” Thomas Jefferson said that “our own country [has] secured its independence by the establishment of a constitution and form of government for our nation, calculated to prevent as well as to correct abuse.” 8 THOMAS JEFFERSON, *To the Tammany Society of Columbian Order of the City of Washington (March 2, 1809)*, in THE WRITINGS OF THOMAS JEFFERSON 156, 156–57 (1854). Recognizing the same need to set in stone the limits on government’s capacity to invade certain essential rights, “Texans have adopted state constitutions to restrict governmental power.” *Vinson v. Burgess*, 773 S.W.2d 263, 267 (Tex. 1989). In that sense, the constitutional bedrock underlying and supporting Texas’s legal system assumes both the possibility that the government will abuse its authority and the wisdom of curtailing that abuse from the outset.

To that end, Article I, section 17 of the Texas Constitution contains an important limitation on the government’s authority to invade Texans’ property rights, providing that “[n]o person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made.” In this case, the plaintiffs contend that the government took their property without compensation by approving private development that resulted in the flooding of their homes. I agree with the Court that the circumstances of this case do not give rise to a cognizable takings claim and join the Court’s opinion in full. I write separately to call attention to the Court’s recognition that “if a taking for public use is compensable, then surely a taking for private use would also be compensable.” *Ante* at ___ n.41. While not crucial to the dispute at hand, this point warrants further discussion.

In compliance with Article I, section 17’s restrictive mandate, we have consistently held that the State must justify its exercise of eminent domain by establishing the taking is for public use. *See, e.g., City of Austin v. Whittington*, 384 S.W.3d 766, 772 (Tex. 2012); *Davis v. City of Lubbock*, 326 S.W.2d 699, 702–03 (Tex. 1959). And quoting that same constitutional language—perhaps carelessly—we have also stated that an aggrieved property owner’s claim for inverse condemnation is predicated on a showing that the government “intentionally took or damaged [private] property for public use, or was substantially certain that would be the result.” *City of Keller v. Wilson*, 168 S.W.3d 802, 808 (Tex. 2005); *see also State v. Hale*, 146 S.W.2d 731, 736 (Tex. 1941); *Gulf, C. & S.F. Ry. Co. v. Donahoo*, 59 Tex. 128, 133 (1883). But we have never held that a taking that fails to satisfy the public-use element is not compensable. To the contrary, we have broadly held that when “the government takes private property without first paying for it, the owner may recover

damages for inverse condemnation.” *Tarrant Reg’l Water Dist. v. Gragg*, 151 S.W.3d 546, 554 (Tex. 2004). Our inclusion of “public use” as an element of an inverse-condemnation claim—stated with no analysis in cases in which public use was not even at issue—should not be read to imply that an inverse-condemnation claimant would not be entitled to compensation if property were taken for private use or the public-use requirement were not satisfied. *See, e.g., City of Keller*, 168 S.W.3d at 808.

Moreover, the Court has explicitly addressed the propriety (or rather, the impropriety) of a private-use taking within other contexts. We did so with greatest clarity in *Maher v. Lasater*, 354 S.W.2d 923 (Tex. 1962). In that case, a property owner challenged the constitutionality of a commissioners court’s order declaring a private road to be a public highway. *Id.* at 924. The order was issued pursuant to a statute that permitted such a declaration if a road was deemed “of sufficient public importance.” *Id.* at 925. The road at issue traversed the plaintiff’s property from a public road and terminated at the boundary of his neighbor’s land, which was used for grazing and pasturing. *Id.* at 924. As the road allowed access solely to the neighbor’s land, the only public purpose served was “putting the products of the soil and the range of [the neighboring property] into the economy of the community.” *Id.* at 926. As such, we held that the commissioners court’s declaration violated the public-use requirement of the Texas Constitution’s Takings Clause, and that the taking was void because it was not of sufficient public importance.¹ *Id.* Implicit in this holding is a recognition that a taking for a private purpose would also be void.

¹ This decision fits squarely with the U.S. Supreme Court’s view. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (“A purely private taking could not withstand the scrutiny of the public[-]use requirement; it would serve no legitimate purpose of government and would thus be void.”).

But this precedent does not clearly address whether an inverse-condemnation plaintiff is entitled to compensation for a private taking. Unlike *Maier*, in which the government’s declaration that the plaintiff’s property was no longer private was declared void, in this case the County cannot undo the water damage to the plaintiffs’ homes. The proverbial bell has been rung. *Maier* addresses what Texas courts should do when title to property is taken outright for private use, but it fails to suggest a solution when a taking for private use damages property and reduces its value.

The need for this Court to address the compensability of a private taking is particularly important in Texas because such a taking is a real possibility. See *Osburn v. Denton Cty.*, 124 S.W.3d 289, 293 (Tex. App.—Fort Worth 2003, pet. denied) (holding that a private-use taking did not warrant compensation). By contrast, private takings are ostensibly a non-issue under the federal Constitution. The Sixth Circuit has stated that “[e]xamples of a taking for a private use tend to be esoteric . . . because all that is required for the taking to be considered for public use is a rational relationship to some conceivable public purpose.” *Montgomery v. Carter Cty., Tenn.*, 226 F.3d 758, 765 (6th Cir. 2000). As such, “[v]ery few takings will fail to satisfy that standard.” *Id.* at 765–66. The Seventh Circuit has similarly characterized the burden of establishing a public use as “remarkably light.” *Daniels v. Area Plan Comm’n of Allen Cty.*, 306 F.3d 445, 460 (7th Cir. 2002).² That low bar was confirmed by the U.S. Supreme Court’s ruling in *Kelo v. City of New London* that a taking “for public use” need only serve a public purpose. 545 U.S. 469, 480 (2005). As a result,

² However, the burden is not insurmountable. Federal courts on occasion have enjoined condemnation proceedings on federal constitutional grounds because the purported reason for the proposed taking did not satisfy the public-use requirement. See, e.g., *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1130–31 (C.D. Cal. 2001).

the Court held that taking private property for the purpose of turning it over to private developers pursuant to a “carefully formulated . . . economic development plan” satisfied the public-use requirement of the U.S. Constitution’s Takings Clause. *Id.* at 483.

In what has widely been viewed as a response to *Kelo*, the Texas Legislature passed the Limitations on Use of Eminent Domain Act during a 2005 special session. Act of Aug. 16, 2005, 79th Leg., 2d C.S., ch. 1, § 1, 2005 Tex. Gen. Laws 1, 1–2; *see also W. Seafood Co. v. United States*, 202 F. App’x 670, 677 (5th Cir. 2006) (noting that the Act was passed in response to the *Kelo* decision). Codified as Texas Government Code section 2206.001, the Act precludes a government taking that (1) would confer “a private benefit on a particular private party through the use of the property,” (2) was “merely a pretext to confer a private benefit,” or (3) served purely “economic development purposes.” The Act was amended in 2011 to make clear that the government may not condemn property if it “is not for a public use.” Act of May 6, 2011, 82d Leg., R.S., ch. 81, § 2, sec. 2206.001, 2011 Tex. Gen. Laws 354, 354.

These provisions are aimed squarely at the federal courts’ deferential approach to the public-use requirement. The Legislature has clearly exercised its prerogative to protect Texans’ property rights by narrowly defining public use. As a result, government actions that satisfy the federal public-use requirements could very well fail to satisfy such requirements in Texas. Because the Texas Legislature has opted to give greater protection to individual property rights, any suggestion that a private-use taking might bar a property owner’s right to recovery is misplaced. The Constitution limits government power; it does not limit Texans’ rights to obtain appropriate relief when that power is exceeded.

Although a few cases from other jurisdictions addressing those states' constitutions have held that a taking for private use is not compensable, I find the reasoning in these cases unpersuasive. *E.g.*, *Clark v. Asheville Contracting Co.*, 342 S.E.2d 832, 839 (N.C. 1986); *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 45 P.2d 972, 990 (Cal. 1935). Such a holding improperly infers from the constitutionally placed burden on the government a reciprocal burden on property owners. Just as crucially, however, it ignores the Texas Constitution's goal of anticipating and preventing potentially abusive government action. Declaring that a private-use taking is not compensable would create a perverse set of incentives for State actors by encouraging takings that do not serve a public use. In turn, a public shield against improper government action would be converted into a sword to enable that same improper action. Put simply, it makes no sense to say that a property owner is entitled to compensation if the government does the right thing but not if it does the wrong thing.³

With these additional thoughts, I join the Court's opinion and judgment.

Debra H. Lehrmann
Justice

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³ Such a conclusion would leave property owners injured by a private taking with little recourse, as sovereign immunity would bar alternative tort claims against the government. While *ultra vires* actions against a government official who acts without legal authority allow prospective relief, they offer little solace to a property owner faced with repairing damage that has already occurred. *See City of El Paso v. Heinrich*, 284 S.W.3d 366, 373–77 (Tex. 2009) (discussing the strictly prospective nature of the relief in an *ultra vires* action).