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## Texas Statute Authorizes a Relocation Assistance Program to Compensate Owners When Moving From Property Taken in the Acquisition of Right of Way for Highways.

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## STATUTORY NOTE

**EMINENT DOMAIN—TEXAS STATUTE AUTHORIZES A RELOCATION ASSISTANCE PROGRAM TO COMPENSATE OWNERS WHEN MOVING FROM PROPERTY TAKEN IN THE ACQUISITION OF RIGHT OF WAY FOR HIGHWAYS. TEX. REV. STAT. ANN. art. 6674n-4 (Supp. 1969).**

Article 6674n-4<sup>1</sup> was enacted by the 61st Texas Legislature in 1969 and became effective April 2, 1969. This statute authorizes displaced persons' moving expenses, relocation payments, financial assistance to acquire replacement housing, rental supplements and compensation for expenses incidental to the transfer of property to the state.<sup>2</sup> The Statute also provides that the State Highway Commission shall formulate rules and regulations to carry out the provisions stated in the Statute and that the Commission shall establish a relocation advisory service.<sup>3</sup>

The article was a necessary and immediate measure to comply with Federal regulations.<sup>4</sup> The Federal-Aid Highway Act of 1968 designates, as a part of the cost of construction of a project under any Federal-Aid Highway program, that the state governments administering such programs must provide relocation assistance as a condition for receipt of Federal funds. The sanction for failing to comply with the provisions of the Act before July 1, 1970, is the withholding of all Federal highway assistance from the state after that date.<sup>5</sup>

The authority for such a statute is derived from the Constitution and from statutory law. The fifth amendment of the United States Constitution guarantees the payment of "just compensation" when private property is taken for public use.<sup>6</sup> The Constitution does not define the term "just compensation;" consequently, it has been left to the courts to establish the definition.<sup>7</sup> The Supreme Court of the United States has held that the fifth amendment requires payment only for property that is taken and that the compensation is for the property taken, not for the owner.<sup>8</sup> Thus, historically, the courts have denied payment for incidental losses or expenses incurred by property owners

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<sup>1</sup> TEX. REV. CIV. STAT. ANN. art. 6674n-4 (Supp. 1969).

<sup>2</sup> *Id.* § 1.

<sup>3</sup> *Id.* § 2.

<sup>4</sup> 23 U.S.C.A. §§ 502-511 (Supp. 1969).

<sup>5</sup> *Id.* § 502.

<sup>6</sup> U.S. CONST. amend. V: ". . . nor shall any person be deprived of property, without due process of law, . . . nor shall property be taken for public use, without just compensation."

<sup>7</sup> *Mitchell v. United States*, 267 U.S. 341, 45 S. Ct. 293, 69 L. Ed. 644 (1925); *United States ex. rel. T.V.A. v. Powelson*, 319 U.S. 266, 63 S. Ct. 1047, 87 L. Ed. 1390 (1943); TEX. REV. CIV. STAT. ANN. art. 3265 § 2 (1962); *Reeves v. City of Dallas*, 195 S.W.2d 575 (Tex. Civ. App.—Dallas 1946, writ ref'd n.r.e.).

<sup>8</sup> *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 13 S. Ct. 622, 37 L. Ed. 463 (1893).

or tenants as a result of the taking of real property.<sup>9</sup> The Supreme Court has also stated that compensation for such losses could not be implied from a constitutional provision.<sup>10</sup> The Court, however, from an early date made it clear that Congress has the authority to authorize the payment of compensation in addition to the "just compensation" required.<sup>11</sup> Such authority was held to be found in the constitutional power of Congress to determine if claims upon the Public Treasury are founded on moral obligations or principles of right and justice.<sup>12</sup> In addition to the clause of the United States Constitution concerning "just compensation," all state constitutions<sup>13</sup> have a similar guarantee except New Hampshire and North Carolina, whose courts have implied the requirement.<sup>14</sup> There seems to be no barrier to excessive compensation under state constitutions, if legislatively authorized.<sup>15</sup>

Numerous states have, in the past, had statutes authorizing partial moving expenses or programs of assistance.<sup>16</sup> The Federal-Aid Highway Act of 1962 required that state highway departments provide relocation advisory assistance, but authorized payments for moving expenses only to the extent authorized by state law, and these payments were not required.<sup>17</sup> Under the 1968 Federal-Aid Act, the provisions of Chapter 5 are mandatory upon the states.<sup>18</sup>

States have now amended or enacted statutes in various ways to achieve Federal compliance. Some states have passed new statutes that, in addition to their own provisions for procedures and costs, list specifically all the provisions of the Federal Act.<sup>19</sup> Other states have enacted general statutes that simply state that they assent to all the

<sup>9</sup> *United States v. Perry Motor Co.*, 227 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 729 (1946); *State v. Vaughn*, 319 S.W.2d 349 (Tex. Civ. App.—Austin 1958, no writ). There have been exceptions in partial taking: *United States v. General Motors Corp.*, 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311 (1945); *Hart Bros. v. Dallas County*, 279 S.W. 1111 (Tex. Comm'n App. 1926, jdgmt adopted).

<sup>10</sup> *Mitchell v. United States*, 267 U.S. 341, 45 S. Ct. 293, 69 L. Ed. 644 (1925).

<sup>11</sup> *Joslin Mfg. Co. v. Providence*, 262 U.S. 688, 43 S. Ct. 684, 67 L. Ed. 1167 (1923); *Mitchell v. United States*, 267 U.S. 341, 45 S. Ct. 293, 69 L. Ed. 644 (1925).

<sup>12</sup> *Id.*

<sup>13</sup> See TEXAS CONST. art. 1 § 17: "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made unless by consent of such person. . . ."

<sup>14</sup> NICHOLS, *Eminent Domain* §§ 14.1, 14.2 (1962). *Petition of Mount Washington Road Co.*, 35 N.H. 134 (1857); *Staton v. Norfolk & C.R.R.*, 16 S.E. 181 (N.C. 1892).

<sup>15</sup> STUDY OF COMPENSATION AND ASSISTANCE FOR PERSONS AFFECTED BY REAL PROPERTY ACQUISITION IN FEDERAL AND FEDERALLY ASSISTED PROGRAMS (Comm. Print. 1964): "It may be noted that no state decision has been found which had denied the right of a state legislature to authorize the payment of moving costs or related losses or expenses for persons displaced from private property by public improvement programs." (p. 90).

<sup>16</sup> N.D. CENT. CODE 32-15-22.1 (Supp. 1969); PA. STAT. ANN. tit. 26, § 1-616 (Supp. 1969); TENN. CODE ANN. 23-144 (Supp. 1969); WASH. REV. CODE ANN. § 8.25.040 (Supp. 1969); ANN. CODE OF MD. art. 33a, *Eminent Domain*, § 6A (1968 Cum. Supp.).

<sup>17</sup> 23 U.S.C.A. § 133(c) (1964).

<sup>18</sup> 23 U.S.C.A. § 502 (Supp. 1969).

<sup>19</sup> CAL. STS. & H. C. 156-159.6 (Supp. 1969); N.M. STAT. ANN. 55-12-(1)-(16) (Supp. 1969); I.M. 80-1-68 RELOCATION ASSISTANCE PAYMENTS—U.S. DEPT. OF TRANS. (Nov. 1968).

provisions of Chapter 5, Title 23 U.S.C.A., and establish a Relocation Assistance Program as defined in the 1968 Federal-Aid Act.<sup>20</sup>

The Texas statute<sup>21</sup> is written in general terms. It does not state specifically what relocation costs will be allowed, nor does it assent and adopt the provisions of the Federal Act. Instead, Texas has delegated the authority to formulate the rules and regulations to the State Highway Commission and only prescribes that such expenditures shall not be in excess of those authorized by the Federal Highway Relocation Assistance Program.<sup>22</sup> The Texas law provides that displaced persons *may* be paid<sup>23</sup> such compensation, whereas the Federal Act states *shall* be paid.<sup>24</sup> Thus, the Texas statute is unique in making the compensation permissive rather than compulsory, and it does not have the strength of the Federal regulations.

The Minute Order approved by the Texas Highway Commission to supplement the Statute does not strengthen the statute's wording, but similarly only states that the dislocated persons *may* be compensated.<sup>25</sup> The order does set out most of the provisions of the Federal regulations such as relocation payments, replacement housing, rental supplements, expenses incidental to transfer of property to the state and relocation advisory assistance.<sup>26</sup> Neither the statute nor the order contain certain provisions of the Federal Relocation Assistance Program.

Texas has not provided that displaced persons are entitled to storage cost for their personal property as authorized by the Federal regulations.<sup>27</sup> There are also no provisions in Texas for hardship cases, such as prepayment of moving expenses<sup>28</sup> or exceptions to the suitable housing rule.<sup>29</sup> The Federal Act also establishes that the replacement housing allowance shall not be paid if the displaced person does not purchase and occupy a dwelling within one year.<sup>30</sup> The Texas regulations do not

<sup>20</sup> N.D. CENT. CODE 24-01-41.1 (Supp. 1969); ORE. REV. STAT. 366.324 (Supp. 1969).

<sup>21</sup> TEX. REV. CIV. STAT. ANN. art. 6674n-4 (Supp. 1969).

<sup>22</sup> *Id.* § 1.

<sup>23</sup> *Id.*

<sup>24</sup> 23 U.S.C.A. § 502 (Supp. 1969): "The secretary shall not approve any project . . . which will cause displacement . . . unless he receives assurance from the state . . . that —1. Fair and reasonable relocation and other payments *shall* be afforded to displaced persons in accordance with §§ 505, 506, and 507 of this title; . . ." (emphasis added).

<sup>25</sup> Minute Order 62135, Texas Highway Dept. (Apr. 2, 1969).

<sup>26</sup> *Id.* The Minute Order provides in essence: 1. Relocation payments—(A) Actual expenses to 50 miles; (B) Optional payment from schedule plus \$100.00 dislocation allowance; (C) Optional payment to business, farm, ranch—average annual net earnings or \$5,000.00 whichever lesser. 2. (A) Replacement housing; supplement not over \$5,000.00 when added to acquisition payment equals average price of comparable dwelling; (B) One not qualifying under (A) or tenant may receive to \$1,500.00 for rent or down payment on house. 3. Expenses incidental to transfer—recording fees, prepayment penalty, taxes. 4. Relocation advisory service shall be established.

<sup>27</sup> I.M. 80-1-68. RELOCATION ASSISTANCE AND PAYMENTS INTERIM OPERATING PROCEDURES—U.S. DEPT. OF TRANS. (Nov. 15, 1968) p. 9.

<sup>28</sup> 23 U.S.C.A. § 510(2) (Supp. 1969).

<sup>29</sup> *Supra*, note 27.

<sup>30</sup> 23 U.S.C.A. 506a (Supp. 1969).

limit such payments. Although states have the power to offer their own additional assistance, article 6674n-4 provides that expenses cannot be in excess of those granted by the Federal Act. As a result, the Highway Commission may not have the authority to extend the payments beyond this one year period.

Neither article 6674n-4 nor the Minute Order specifically states what property may be compensated for under the category of moving expenses. Other states have attempted to be more definite by making specific exclusions or by establishing monetary limits for personal property from residences and businesses and providing greater compensation for the expense of moving machinery, equipment, or fixtures.<sup>31</sup> It is questionable whether the legislative intent concerning the Texas law can be ascertained from article 3265, an eminent domain statute subsequently passed providing moving expenses for other than highway condemnations. Article 3265 limits moving expenses to personal property other than machinery, equipment or fixtures.<sup>32</sup> If the intention is to limit moving costs to personal property under article 6674n-4, it is not in compliance with Federal regulations.<sup>33</sup> Important questions are left unanswered in both the Federal Act and the Texas Act governing assistance in moving "the business." Does "the business" include fixtures? Does "the business" include the building itself? These problems are left for the courts' interpretation.

The Texas Act does not state whether the compensation recovered under the Relocation Assistance Program is to be considered as a part of the damages in determination of "just compensation" in a condemnation proceeding or as an additional compensation above and separate from the proceedings.<sup>34</sup> In the past, moving cost, loss of profits and relocations expenses have not been admissible in a condemnation suit<sup>35</sup> with certain exceptions in cases of partial taking.<sup>36</sup> As a result, the Texas law leaves the lawyer in a dilemma as to the procedure to follow to obtain the additional compensation authorized. The Texas Reloca-

<sup>31</sup> MICH. STAT. ANN. 8.214 (Supp. 1969): "Moving pertains to personal property exclusive of trade fixtures." PA. STAT. ANN. tit. 26, 1-610 (Supp. 1969): "... to \$500.00 when personal property and to \$25,000.00 when personal property of business."

<sup>32</sup> TEX. REV. CIV. STAT. ANN. art. 3265, § 7 (Supp. 1969).

<sup>33</sup> 23 U.S.C.A. § 505a (Supp. 1969).

<sup>34</sup> Federal-Aid Highway Act of 1968, Public Law 90-495, § 32, 82 Stat. 815, 835. "Nothing contained in chapter 5 of title 23, United States Code, shall be construed as creating in any condemnation proceeding brought under the power of eminent domain, any element of damages not in existence on the date of enactment of such chapter 5." N.M. STAT. ANN. 55-12-13. "... not an element of damages in a condemnation proceeding."

<sup>35</sup> State v. Vaughn, 319 S.W.2d 349 (Tex. Civ. App.—Austin 1958, no writ); Reeves v. City of Dallas, 195 S.W.2d 575 (Tex. Civ. App.—Dallas 1946, writ ref'd n.r.e.); Herndon v. Housing Authority of City of Dallas, 261 S.W.2d 221 (Tex. Civ. App.—Dallas 1953, writ ref'd).

<sup>36</sup> City of Dallas v. Priolo, 150 Tex. 423, 242 S.W.2d 176 (1951); State v. Parkey, 295 S.W.2d 457 (Tex. Civ. App.—Waco 1956, writ ref'd n.r.e.).

tion Assistance Program does not establish procedural guidelines for the claimants. Because of the scope of this statute, clear statutory rules should be established for the payment of just claims. New Mexico provided in their original statute that the claimant can petition the Highway Department Engineer to review the Department's determination of the amount and then, if he is unsatisfied, he can bring suit in district court.<sup>37</sup>

By statute, Texas has given county courts special jurisdiction over eminent domain suits.<sup>38</sup> The district courts, however, have potential jurisdiction in some counties.<sup>39</sup> It is presently unclear whether a claimant must file with the Special Commissioners, or who is to review the claim before suit is brought in Texas. The Federal Act requires that a claimant may have his application reviewed by the head of the state agency making the determination, but neither the Texas statute nor the Minute Order designate such person.

There is no determination as to which court will have actual jurisdiction over claims under the Texas Relocation Assistance Program, nor is it stated whether the substantial evidence rule<sup>40</sup> will be applied to the Highway Commission's hearing or whether there will be a trial de novo. Because article 6674n-4 authorizes the Highway Commission to establish the necessary rules and regulations,<sup>41</sup> the statute may falter under constitutional scrutiny as an unlawful delegation of power in that the Highway Commission will have to establish which court and which procedure will govern.

It must be noted, however, that the new Texas statute is a movement in the right direction. Past laws of eminent domain proceedings have been criticized as not affording the displaced persons an equitable relief.<sup>42</sup> The new law recognizes the undeniable fact that condemnees are entitled to more than "just compensation" of the market value of their land and homestead. The government has the authority to take one's land, but the condemnee should not suffer disproportionate injuries such as moving costs, or the burden of relocation and loss of business or farm without governmental assistance. The effect of article

<sup>37</sup> N.M. STAT. ANN. 55-12-14 (Supp. 1969). The statute also provides such suits will have a preference on the docket.

<sup>38</sup> TEX. REV. CIV. STAT. ANN. art. 3264 (1962); *Pearson v. State*, 159 Tex. 66, 315 S.W.2d 935 (1958); *Southern Kansas Ry. Co. of Texas v. Vance*, 104 Tex. 90, 133 S.W. 1043 (1911).

<sup>39</sup> TEX. REV. CIV. STAT. ANN. art. 1970 (1962); *Kneeling v. St. Louis Southwestern R.R. Co.*, 240 S.W.2d 402 (Tex. Civ. App.—Waco 1951, no writ).

<sup>40</sup> *Board of Firemen's Relief & Retirement Fund Trustees v. Marks*, 150 Tex. 433, 242 S.W.2d 181 (1951).

<sup>41</sup> TEX. REV. CIV. STAT. ANN. art. 6674n-4, § 1 (Supp. 1969).

<sup>42</sup> See Comment, *The Interest in Rootedness: Family Relocation and an Approach to Full Indemnity*, 21 STANFORD L. REV. 801 (1969).

6674n-4 is the raising of many unanswerable questions at this time. But with future analogical legislation to supplement and broaden the scope of relocation assistance and through judicial interpretation and guidelines, article 6674n-4 is the commencement of a new area of governmental assistance for Texas residents.

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