NO. 02-10-00069-CV

IN THE COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH, TEXAS

TOWN OF FLOWER MOUND, TEXAS,
APPELLANT

VS.

MOCKINGBIRD PIPELINE, L.P.,
APPELLEE

INTERLOCUTORY APPEAL FROM CAUSE PR-2010-00050
IN THE PROBATE COURT OF DENTON COUNTY, TEXAS
THE HONORABLE DON R. WINDLE, PRESIDING

BRIEF OF AMICUS CURIAE
CENTERPOINT ENERGY RESOURCES CORPORATION

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IDENTITY OF AMICUS CURIAE[1]

Amicus Curiae is CenterPoint Energy Resources Corporation ("CenterPoint"). CenterPoint has been serving the public for more than 130 years by delivering natural gas service to 3.2 million homes and businesses in Arkansas, Louisiana, Minnesota, Mississippi, Oklahoma and Texas, including the high-growth areas of Houston and Minneapolis. CenterPoint's gas utility operations own approximately 70,700 linear miles of natural gas distribution mains in its service territories. Generally, in each of the cities, towns and rural areas it serves, CenterPoint owns the underground gas mains and service lines needed to deliver natural gas to customers' premises, as well as the metering and regulating equipment located on customers' premises and the district regulating equipment necessary for pressure maintenance. Flower Mound's position in this case drastically impacts CenterPoint's ability to install such lines and equipment and its obligation to the public to provide safe and reliable natural gas service at just and reasonable rates. It is CenterPoint's position that the trial court correctly denied the plea to the jurisdiction. CenterPoint is paying the fees associated with the preparation of this Amicus Brief.

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[1] Amicus Curiae adopts the designation of the identities of the parties and their counsel as set forth in the Appellants' and Appellee's Briefs.

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STATEMENT OF THE CASE

Nature of the Case:	This is a condemnation case filed by a gas pipeline company for an easement to install and maintain a pipeline under property owned by a governmental unit. The fundamental issue in this case is whether a governmental unit can stop the construction of a large gas utility pipeline that will benefit many citizens by asserting governmental immunity.
Trial Court:	The trial court was Probate Court of Denton, Texas, the Honorable Don R. Windle presiding. The Plaintiff was Mockingbird Pipeline, L.P. ("Mockingbird"). The Defendant was The Town of Flower Mound, Texas ("Flower Mound"). Flower Mound filed a plea to the jurisdiction asserting that the trial court did not have jurisdiction over Mockingbird's condemnation suit due to governmental immunity.
Trial Court's Disposition:	The trial court denied the plea finding that governmental immunity did not bar Mockingbird's condemnation suit, and Flower Mound filed this appeal. Flower Mound did not request any findings of fact and conclusions of law and none were entered.

ISSUE PRESENTED (RESTATED)

ISSUE I Texas encourages the development of reliable pipeline systems by having enacted broad statutes giving pipeline companies the right to condemn property and by having established precedent supporting a company's right to construct reliable systems. The trial court correctly denied Flower Mound's plea to the jurisdiction and governmental immunity defense because: 1) the Texas Utilities Code grants Mockingbird the right to condemn any person's property; 2) courts have historically allowed utilities to condemn public property; 3) the term "person" includes governmental units; and 4) the opposite decision would end in an absurd result that has significant consequences for the citizens of Texas and the gas industry.

ISSUE 2 Where a party fails to request findings and conclusions, all findings and conclusions are found in favor of an order or judgment. Moreover, an appellant has the duty to challenge implied findings for the insufficiency of the evidence. Because Flower Mound failed to challenge any implied finding in this case, this Court should affirm the trial court's denial of the plea to the jurisdiction.

STATEMENT OF FACTS

The Amicus Curiae adopts the statement of facts in the Appellee's Brief.

SUMMARY OF THE ARGUMENT

Flower Mound invites this Court to set dangerous precedent that would hinder the future development of gas transmission and distribution systems in Texas and harm the ability of not just pipeline companies, but also natural gas public utilities, to provide safe and reliable natural gas service to customers in Texas at just and reasonable rates. The trial court correctly held that Flower Mound was not entitled to stop progress on Mockingbird's construction of a pipeline in Denton County and/or hold Mockingbird hostage to ridiculous and arbitrary monetary demands that would end up being paid by the end users of natural gas – residential consumers and businesses. Rather, consistent with Texas statutory law and over 80 years of precedent, the trial court correctly determined that when a governmental entity stops being reasonable, another publicly-related entity – here, a gas utility – can condemn an easement and exercise the right to cross the governmental entity's property to construct a pipeline. If this Court were to rule for Flower Mound, the cost for providing safe and reliable natural gas service to the public will likely increase substantially, because every city or other political subdivision in Texas would be able to hold a pipeline company or public utility hostage to arbitrary fees for the construction and maintenance of pipeline facilities on public property, far in excess of the burden placed by those facilities on the public property, and notwithstanding the public interest necessity for those facilities. In effect, every city or other political subdivision in Texas would hold a "King's X" despite the gas utility

pipeline determining that there is a need for such a line and that a particular route serves the public interest.

This Court should also affirm the denial of the plea to the jurisdiction because Flower Mound has not correctly challenged the trial court's implied findings. In light of the important public policy issues concerned in this case, and Flower Mound's failure to challenge implied findings, this Court should affirm the trial court's order.

ARGUMENT

A. Flower Mound's Position Violates The Rules Of Statutory Construction: A Gas Pipeline Company Has The Right To Condemn Public Land.

Flower Mound's argument that governmental immunity defeats a pipeline company's condemnation right violates the rules of statutory construction. After taking into effect legislative history, the rules of statutory construction require a reasonable result and will not support an absurd one. The rules of statutory construction provide:

> In construing a statute, whether or not the statute is considered ambiguous on its face, a court may consider among other matters the:
>
> (1) object sought to be attained;
>
> (2) circumstances under which the statute was enacted;
>
> (3) legislative history;
>
> (4) common law or former statutory provisions, including laws on the same or similar subjects;
>
> (5) consequences of a particular construction;
>
> (6) administrative construction of the statute; and
>
> (7) title (Caption), preamble, and emergency provision.

TEX. GOV'T CODE ANN. § 311.023 (Vernon 2005). Courts presume that the Legislature intended a reasonable result when it enacted a statute. *See, e.g., Cardinal Health Staffing Network, Inc. v. Bowen*, 106 S.W.3d 230, 237-38 (Tex. App.—Houston [1st Dist.] 2003, no pet.). In fact, "where the application of the statute's plain language would lead to absurd consequences that the Legislature could not have possibly intended," courts will not apply the statutory language literally. *Korndorffer v. Baker*, 976 S.W.2d 696, 700 (Tex. App.—Houston [1st Dist.] 1997, pet. dism'd w.o.j.).

1. Plain Language Of The Texas Utilities Code Provides For The Right Of Pipeline Companies To Condemn Public Lands.

Flower Mound's extreme position, essentially that a governmental unit can impose any condition or monetary fee on a grant of an easement on public land for the installation of public utility facilities, would result in unreasonable costs and delays for all pipeline projects in Texas, including gas utility pipeline projects. Importantly, Flower Mound's position is not mandated by the language of relevant statutes.

a. "*In Rem*" Condemnation Suits Do Not Implicate Governmental Immunity Concerns.

Gas utility pipeline companies have "the right and power to enter on, condemn, and appropriate the land, right-of-way, easement or other property of any person or corporation." *See* TEX. UTIL. CODE ANN. § 181.004. Flower Mound argues that it cannot be considered a "person" or "corporation" under the terms of section 181.004 of the Texas Utilities Code because it has governmental immunity. In attempting to rely on these provisions, Flower Mound exhibits a fundamental misunderstanding of governmental immunity and the nature of a condemnation proceeding.

This condemnation suit is not the type of proceeding that triggers governmental immunity. The Legislature views sovereign immunity as necessary to "preserve the legislature's interest in managing state fiscal matters through the appropriations process." *See* TEX. GOV'T CODE ANN. § 311.034 (Vernon 2009). Courts view sovereign immunity as necessary to "shield the public from the costs and consequences of improvident actions of their governments." *See Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006). These policies behind sovereign immunity are irrelevant in this case because this

proceeding is not a suit for monetary damages, nor was it initiated below as a result of Flower Mound's improvident actions.

Mockingbird filed this lawsuit to acquire an easement in accordance with the Texas eminent domain statutes. *See* TEX. PROP. CODE ANN. § 21.012. This is not a lawsuit against a governmental body where Mockingbird is seeking money damages, nor did Mockingbird instigate it because of some improvident action taken by a governmental body. Rather, Mockingbird is seeking to pay a governmental body for the use of its property. This relief will not interfere with the management of the fiscal matters of Flower Mound or any appropriations process and will certainly not require it to pay unforeseen costs or monetary liabilities. For this reason the authorities cited by Flower Mound are inapposite because those cases all concern suits for monetary damages and do not discuss the issue of whether immunity applies to a condemnation proceeding.

Rather, a condemnation suit is not a suit for monetary damages or even one of *in personam* liability. "A condemnation proceeding is an *in rem* matter and is not a taking of rights of persons in an ordinary sense but is an appropriation of physical properties...."[2] The essential nature of an *in rem* proceeding has been described as follows:

> A proceeding in rem is essentially a proceeding to determine rights in a specific thing or in specific property, against all the world, equally binding

[2] *State v. Rogers*, 772 S.W.2d 559 (Tex. App.—Amarillo 1989, writ denied) (citing *Reeves v. City of Dallas*, 195 S.W.2d 575, 581 (Tex. Civ. App.—Dallas 1946, writ ref'd n.r.e.); *United States v. Eight Reels of Film*, 491 F. Supp. 129 (W.D. Tex. 1978) (condemnation is in rem and in not an in personam action). *See also United States v. Petty Motor Co.*, 327 U.S. 372, 376 (1946); *Clegg v. State*, 42 Tex. 605, 1874 Tex. LEXIS 380 (1874); *McKenzie County v. Hodel*, 467 N.W.2d 701, 705 (N.D. 1991); *Farley v. State*, 350 S.E.2d 263, 264 (Ga. Ct. App. 1986); *Utilities, Inc. v. Wash. Suburban Sanitary Comm'n*, 763 A.2d 129, 135 (Md. 2000); *State v. Clark*, 395 P.2d 146, 148 (Or. 1964); *In re Petition of Seattle*, 353 P.2d 955, 957 (Wash. 1960); *Julius L. Sackman*, NICHOLS ON EMINENT DOMAIN § 26A.05[1] (2001).

> on everyone. It is a proceeding that takes no cognizance of an owner or person with a beneficial interest, but is against the thing or property itself directly, and has for its object the disposition of the property, without reference to the title of individual claimants. The action of the court is binding, even in the absence of any personal notice to the party interested or any jurisdiction over his person.

1 AM. JUR. 2D ACTIONS § 34 (1994) (internal citations omitted). Further, the United States Supreme Court outlined the distinctions between *in rem* and *in personam* jurisdiction:

> [S]tate authority to adjudicate was based on the jurisdiction's power over either persons or property. This fundamental concept is embodied in the very vocabulary which we use to describe judgments. If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated "in personam" and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called "in rem" or "quasi in rem." The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.

Shaffer v. Heitner, 433 U.S. 186, 199 (1977). For these reasons, the United States Supreme Court has held that a city may condemn the real property of another state located within the city's boundaries without any sovereign immunity defense. *See Georgia v. City of Chattanooga*, 264 U.S. 472 (1924). Further, the Court has held that other *in rem* proceedings do not interfere with or implicate sovereign immunity.[3]

For example, in *Cass County Joint Water Resource Dist. v. 1.43 Acres of Land in Highland Township*, a landowner, opposed to construction of a dam, conveyed 1.43 acres

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[3] *See Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 451 n. 5 (2004) (a State's sovereign immunity is not offended where a bankruptcy court exercises *in rem* jurisdiction in determining whether to discharge a student loan debt based on undue hardship); *Cal. & State Lands Comm'n v. Deep Sea Research, Inc.*, 523 U.S. 491, 118 S.Ct. 1464, 140 L.Ed.2d 626 (1998) (the Court held that the *in rem* nature of suits in admiralty created an exception to Eleventh Amendment immunity).

of land that would have been flooded by the dam to the Turtle Mountain Band of Chippewa Indians. 2002 ND 83, 643 N.W.2d 685, 689 (N.D. 2002). The water resource district brought an action seeking to condemn the land, and the Tribe moved to dismiss, claiming sovereign immunity. *See id.* The North Dakota Supreme Court determined that condemnation is an *in rem* proceeding and that exercising jurisdiction over *in rem* proceedings does not implicate sovereignty immunity.[4]

Similarly here, Mockingbird sought an interest in land *in rem* via condemnation. Procedurally, Section 21.012 of the Texas Property Code requires a petition in condemnation to name the "owner of the property." *See* TEX. PROP. CODE ANN. § 21.012. This requirement is simply to give notice to the owners. In such petitions, municipalities, counties, and other governmental entities are routinely named by condemning authorities as the holders of liens for property taxes and countless other matters. In other words, these governmental entities are only named because of their interest in the land. The *in personam* interests of these entities are not invoked by a condemnation proceeding. Under Flower Mound's theory, an absurd interpretation results whereby governmental entities can never be joined as parties to any condemnation proceeding.

[4] *See id. See also Smale v. Noretep*, 150 Wn. App. 476, 208 P.3d 1180 (2009) (trial court correctly denied motion to dismiss filed by indian tribe sued under a quiet title claim for real estate because "exercising jurisdiction over *in rem* proceedings does not implicate sovereignty immunity."); *Coastland Corp. v. N.C. Wildlife Res.*, 517 S.E.2d 661, 134 N.C. App. 343 (N.C. App. 1999) (Because "[s]overeign immunity is a defense to a claim of personal jurisdiction," sovereign immunity does not apply to partition suit which is an *in rem* proceeding); *People Ex Rel. Hoagland v. Streeper,* 12 Ill.2d 204, 145 N.E.2d 625 (Ill. 1957) (court refused to respect the State of Missouri's asserted sovereign immunity claim in an *in rem* action concerning property located within Illinois).

This proceeding is not a suit to establish liability against Flower Mound. Mockingbird named Flower Mound as a party because the condemnation statute required the joinder of it as an "owner" of the subject property. *See* TEX. PROP. CODE ANN. § 21.012(b). Because this proceeding does not implicate immunity, immunity is not a bar to the trial court's jurisdiction over Mockingbird's claims.

b. Texas Utilities Code Chapter 181 Waives Governmental Immunity.

Section 181.004 of the Texas Utilities Code grants the power of eminent domain to gas utilities and pipeline companies to condemn the property of "any person." Furthermore, unless the statute or the context requires a different definition, the term "person" as used in any Texas statute must be defined to include a "governmental subdivision." TEX. GOV'T CODE ANN. § 311.005(2). Section 181.004 of the Texas Utilities Code does not specifically define "any person"; nor does the context of that statute require a definition of the term "person" different than the definition given that term in Section 311.005(2) of the Texas Government Code.[5] Therefore, the power to condemn the property of any person in this state, given by the Texas Legislature to gas utilities and pipeline companies, by definition includes the power to condemn the property of a governmental subdivision in this state, such as Flower Mound.

Although section 181 of the Texas Utilities Code and Chapter 21 of the Texas Property Code do not expressly state that "sovereign immunity to suit is waived" in a condemnation proceeding, the statutes nevertheless plainly demonstrate legislative intent

[5] Indeed, the very section following section 181.004 expressly grants gas companies the power to use public property for the installation of their lines, so the context of section 181.004 necessarily requires "person" to include the governmental entity that owns the public property. *See* TEX. UTIL. CODE ANN. § 181.005(a).

to waive immunity to suit. Flower Mound's position that such an intent may not be inferred but instead must be statutorily expressed is simply wrong.

Courts may discern legislative intent to waive sovereign immunity from the words and context of the statute in the absence of any "magic words" of immunity waiver. *See* TEX. GOV'T CODE ANN. § 311.034; *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697-98 (Tex. 2003). Factors to consider in determining whether sovereign immunity has been waived by the state's condemnation statutes are: (1) whether the relevant statute(s) waive immunity beyond doubt, such as when the provision in question would be "meaningless unless immunity were waived," but resolving any ambiguities against a finding of waiver; (2) whether the statute requires the joinder of a governmental entity in a suit for which immunity would otherwise attach, in which case the court will find that the Legislature has "intentionally waived" immunity, and (3) whether the Legislature simultaneously enacted legislation limiting the governmental entity's potential liability. *See Taylor*, 106 S.W.3d at 697-98. Here, these considerations strongly favor a waiver of immunity.

The first *Taylor* factor is met because the various statutes authorizing Mockingbird's eminent domain power plainly demonstrate its right and power to condemn the subject property. Mockingbird has the right and power to condemn the "property of any person or corporation." *See* TEX. UTIL. CODE ANN. § 181.004. "Person" includes a "corporation, organization, government or governmental subdivision [...]." *See* TEX. GOV'T CODE ANN. § 311.005(2); *Fort Worth & W. R.R. Co. v. Enbridge Gathering*, 298 S.W.3d 392, 395 (Tex. App.—Fort Worth, 2009, no pet.) (governmental

unit was considered "person"); *Crosstex N. Tex. Gathering, L.P. v. Fort Worth & W. R.R.*, No. 10-08-00204-CV, 2009 Tex. App. LEXIS 8733 (Tex. App.—Waco November 10, 2009, no pet.) (same). "Government" or "governmental subdivision" includes Flower Mound.

Furthermore, although section 311.034 of the Texas Government Code qualifies section 311.005's inclusion of governmental entities in the definition of the term "person" when that term is used in other Texas statutes, that qualification does not mean that Mockingbird has no right to condemn Flower Mound's property. *See* TEX. GOV'T CODE ANN. § 311.034. Indeed, section 311.034 expressly limits this qualification to preserving the state's interest "in managing state fiscal matters through the appropriations process," which as stated above is not an interest implicated in this case. *See id.* Moreover, this qualification to the meaning of "person" (i.e., excluding governmental entities from its meaning) was intended to maintain prior law on immunity and was not intended to effectuate new law. The prior law in Texas was that utilities were entitled to condemn public lands. *See Humble Pipe Line Co. v. State*, 2 S.W.2d 1018 (Tex. Civ. App.—Austin 1928, writ ref'd). Therefore, holding that Mockingbird can condemn Flower Mound's property is consistent with precedent and the fact that the codification process was not intended to change prior law.

Additionally, the Legislature has specifically granted gas companies, subject to certain conditions not applicable here, the right and power to install and maintain their facilities "over, along, under, and across a public road ... or a municipal street or alley." TEX. UTIL. CODE ANN. § 181.005(a). In other words, this provision expressly grants to

gas utility pipeline companies the right to lay a line under public property, and if a governmental unit fights that right, the pipeline company has the right to condemn the route under Section 181.004.

The express references to various types of public property in the eminent domain statutes further indicate the Legislature's intent to waive immunity from suit. For example, in *State v. Montgomery County*, Montgomery County brought a condemnation suit against the State of Texas and the Texas A&M University System ("TAMUS") for title to a strip of land for a highway expansion project. 262 S.W.3d 439, 442-43 (Tex. App.—Beaumont 2008, no pet.). The State and TAMUS filed a plea to the jurisdiction, asserting, among other things, immunity from suit based on sovereign immunity. *Id.* at 441. The trial court denied the plea to the jurisdiction, and the court of appeals affirmed. The eminent domain statute in that case granted authority to condemn "public or private land, but not land used for cemetery purposes." *Id.* at 442. The court of appeals held that the express reference to "public" land clearly and unambiguously indicated legislative intent to waive immunity from suit as to governmental entities. *Id.*

Similarly, the specific grants of authority to Mockingbird to use public lands, coupled with the broad grants of the power of condemnation and the important public functions of pipelines, support an implied legislative intent to waive a governmental entity's immunity from a condemnation suit. Mockingbird has the right to build a pipeline on public property. Because Flower Mound derives its right over public land, as well as its immunity from suit, from the State of Texas, Mockingbird's implied power to condemn public property extends to lands belonging to Flower Mound. *See Tooke*, 197

S.W.3d at 345 ("All governmental immunity derives from the State[.]"). The specific grants of authority to Mockingbird in section 181.001 *et seq.* of the Texas Utilities Code to use public lands necessarily imply Mockingbird's authority to use public lands belonging to Flower Mound in order for Mockingbird to carry out its statutory authority and public service purpose.

Further, Mockingbird's broad grants of authority, including its express right to use public property, would be meaningless if they excluded lands belonging to municipalities. Immunizing municipalities from suit in condemnation proceedings would accomplish the same result as narrowly interpreting the eminent domain statutes. If governmental units can refuse an easement to a pipeline company, and there is no right to condemn an easement, then pipeline companies will not be able to fully exercise their statutory rights and powers or carry out their important public service functions. *See Humble Pipe Line Co.*, 2 S.W.2d at 1020; *Taylor*, 106 S.W.3d at 697-98. In fact, the entire industry – and the citizens it serves – would suffer.

The second and third *Taylor* factors also favor waiver of immunity. Section 21.012 of the Texas Property Code requires Mockingbird to join Flower Mound as an "owner of the property" to a suit after it refused to accept an offer for the purchase of its property. *See* TEX. PROP. CODE ANN. § 21.012(b). *See also Elliott v. Joseph*, 351 S.W.2d 879, 884 (Tex. 1961) (all persons with an interest must be made a party for the condemning authority to have complete title); *Lo-Vaca Gathering Co. v. Earp*, 487 S.W.2d 789, 790 (Tex. Civ. App.—El Paso 1972, no writ) ("The failure of a condemnor to join an owner of an interest in the land renders ineffectual the proceedings as to

interest of the party not joined."). Because Flower Mound is required to be a party to this proceeding, the Legislature intentionally waived governmental immunity. *See Taylor*, 106 S.W.3d at 698. Finally, as noted earlier, the liability of Flower Mound is not only objectively, but also absolutely, limited in this proceeding. Like any other landowner in a condemnation proceeding, Flower Mound has absolutely no liability in the proceeding.

The *Taylor* factors demonstrate that the Legislature, via the Texas Utilities Code and the Texas Property Code, intentionally and unambiguously intended to waive a governmental unit's immunity in a condemnation proceeding. Based on these factors, this Court should affirm the trial court's denial of the plea to the jurisdiction.

Finally, the Dallas Court of Appeals's opinion in *DART v. Oncor Electric Delivery Company LLC*, is not persuasive and should not impact this Court's decision in this case. No. 05-09-1500-CV, 2010 WL 2952090 (Tex. App.—Dallas July 29, 2010, motion for rehearing pending). First, this Court should note that there is a motion for rehearing currently pending in the *DART* case. In fact, CenterPoint's affiliate recently filed a similar amicus brief in support of the motion for rehearing. So, that opinion should be considered somewhat tentative at this time. Moreover, as this Court well knows, the *DART* opinion is merely from a sister court and is not binding precedent on this court – it is merely persuasive authority at best.

Further, this Court should not be "persuaded" by the *DART* opinion because the court of appeals did not undertake a rigorous statutory construction analysis that is required to determine if a utility can condemn public property. For example, the Dallas

court did not even mention the *Taylor* factors and the fact that a statute does not have to contain "magic words" even though Oncor raised that in the appeal. Further, the Dallas court erred in misusing Section 311.034 of the Government Code to change, rather than to preserve, precodification law, and in holding that the doctrine of immunity applies to eminent domain actions against governmental units. In fact, the Dallas court did not even address the fact that condemnation proceedings are *in rem* proceedings, not *in personam*, that do not threaten any governmental unit's budgets. For these reasons, this Court should take an independent review of the authority and statutes and determine that Mockingbird does have the right to condemn Flower Mound's property.

2. The Object Of The Texas Utilities Code Was To Encourage The Development Of Critical Infrastructure Such As Pipelines.

The Texas Utilities Code sought the objective of allowing utilities to construct pipelines to serve the citizens of Texas. Since 1911, the Legislature has granted pipeline companies like CenterPoint and Mockingbird the statutory power of eminent domain. *See* TEX. UTIL. CODE ANN. §§ 181.001, *et seq.* The Legislature considers pipeline systems to be "critical infrastructure." *See* TEX. PROP. CODE ANN. § 21.024 (Vernon 2007) (citing TEX. GOV'T CODE ANN. § 421.001).[6]

Courts have routinely upheld statutes giving rights to such companies over lands necessary for the public purposes for which they are organized. *See Cotulla v. La Salle Water Storage Co.*, 153 S.W. 711, 713 (Tex. Civ. App.—San Antonio 1913, writ ref'd). "The history of the many laws enacted by the legislature of this state relating to the

[6] "'Critical infrastructure' includes all public or private assets, systems, and functions vital to the security, governance, public health and safety, economy, or morale of the state or the nation." TEX. GOV'T CODE ANN. § 421.001 (Vernon 2003).

exercise of the right of eminent domain clearly shows that it is the policy of the legislature to liberalize the exercise of the right, rather than restrict it." *See Brazos River Conservation & Reclamation Dist. v. Costello*, 143 S.W.2d 577, 578 (Tex. 1940); *Houston v. Adams*, 279 S.W.2d 308, 313 (Tex. 1955). The power of eminent domain "in effect constitutes a grant from the state to the property reasonably necessary for the particular purpose ..." for which the right was granted. *See Galveston H. & S.A. Ry. Co. v. City of Eagle Pass*, 260 S.W. 841, 844 (Tex. Comm'n App. 1924).

Courts have recognized that the Legislature has delegated to a utility corporation the right to fix the location – as well as the quantity – of the property it in good faith determines to be needed for the construction, maintenance, and servicing of its lines. *See, e.g., Arcola Sugar Mills Co. v. Houston Lighting & Power Co.*, 153 S.W.2d 628, 633 (Tex. Civ. App.—Galveston 1941, writ ref'd w.o.m.). In *Arcola Sugar Mills*, the court noted that "public policy in Texas ... places no express restrictions upon the power of a corporation ... to condemn land for the prosecution of the business it has been chartered to carry on." *Id.* at 633; *see also Loesch v. Oasis Pipe Line Co.*, 665 S.W.2d 595, 598 (Tex. App.—Austin 1984, writ ref'd n.r.e.); *Tenngasco Gas Gathering Co. v. Fischer*, 653 S.W.2d 469, 476 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.). In other words, the "legislature has ... delegated to such a corporation the right to fix the location – as well as the quantity – of the property it in good faith determines to be needed for the construction, maintenance, and servicing of its lines." *Arcola Sugar Mills*, 153 S.W.2d at 633.

The Dallas Court of Appeals previously recognized the importance of similar infrastructure systems. In *Lewis v. Texas Power & Light Co.*, the trial court issued a temporary injunction to allow the company's engineers and surveyors to go on the property to create field notes for an easement right-of-way later to be condemned. 276 S.W.2d 950 (Tex. Civ. App.—Dallas 1955, writ ref'd n.r.e.). In a case of first impression, the court held that the statute giving power companies the right to enter on, condemn, and appropriate lands also granted authority to enter to make preliminary surveys:

> [T]he trial court no doubt weighed the relative convenience and inconvenience and the comparative injuries to the parties and to the public which would arise from the granting or refusal of this temporary injunction, and found the equities to lie with Appellee (Power Company). There can be little if any doubt that Appellee under the facts shown in this record is entitled to acquire easement rights over the Appellant's land, either by voluntary conveyance or by condemnation. That being so, the injuries suffered by Appellant from the survey will be small compared with the injuries suffered by the Appellee and the public if Appellee were denied the right to proceed with its preliminary survey.... The continuing growth and development in recent years of the area it will serve through the contemplated transmission line are matters of common knowledge. It is the duty of the Appellee as a supplier of light and power to the public to make timely preparation to meet such increased demands on its facilities. It would be reprehensible of Appellee to wait until "brown-outs" occur due to inadequate facilities before bestirring itself to expand and increase its plant and equipment to serve the public needs. In our opinion the trial court, after weighing the equities did not abuse its discretion in granting the temporary injunction.

Id. The court held that due to the public need for reliable energy, a utility had the right via an interlocutory, temporary injunction to enter and survey another's land. Many other courts have similarly followed this precedent. The objective of the Texas Utilities Code is to allow pipeline companies and electric utilities to construct a reliable infrastructure system, and Flower Mound's position seriously undercuts that objective.

Moreover, there is longstanding Texas precedent holding that a city has but a public welfare interest in its property. The municipality's dominion over its property is assuredly not analogous to a private landowner's control over his private property, which control includes the broad right to exclude others for any reason or no reason at all. In *City of Mission v. Popplewell*, the Texas Supreme Court remarked as follows:

> The city controls the streets as trustee for the public. It has no proprietary title nor right to exclusive possession. Its right of control is restricted by its trusteeship. It has the duty to maintain the streets and keep them open and free of obstruction. It can close a street only in the public interest and even then not over the objection of an abutting property owner with a co-existing private easement therein.

294 S.W.2d 712, 715 (Tex. 1956) (internal citations omitted). Because a municipality has no right to control its property other than for the public benefit, the idea that it can refuse to allow another public-interest entity – a gas utility pipeline company or other utility – to use that same public property for a public purpose when the dual use will not otherwise impair the property is simply absurd and violates the rules of statutory construction.

3. The Circumstances Of The Enactment Of The Texas Utilities Code And Its Predecessor Statutes Confirm Broad Support For The Development Of Reliable Pipeline Systems.

The Utilities Code's predecessor statutes were enacted at a time when many areas of Texas did not have gas service and state government encouraged the development of gas pipeline systems to bring heat and other gas uses to the citizens of the State. In fact, no one can dispute the fact that one of the most significant factors in changing, for the better, the lives of urban and rural Texans is the use of gas and electricity in homes and

businesses. Flower Mound's position threatens to undermine, if not completely foreclose, the ability of gas pipeline companies to construct delivery systems in the public interest and for the public good where such systems would cross any public property. One court observed the "indispensable" nature of pipelines:

> The construction and operation of common carrier pipe lines are now recognized as necessary and indispensable to a proper and economical exploitation of the petroleum, natural resource. They are of great importance to the public. Private property owners, the producers of crude oil, and the public are interested in the expeditious and economical transportation of oil from the producing fields and the distribution of it to the consuming public and industry. Pipe line transportation is the best mode yet provided. The public has an interest in relieving other means of transportation and its highways of the burden they would have to carry but for pipe line transportation. Hence the Legislature has recognized the pipe line as a public convenience and modern necessity and a business of public concern. In the Act defining them to be common carriers and regulating them as such it has declared it to be a business in the conduct of which the public is interested. In the same Act. . . it confers the right "to lay, maintain and operate pipe lines, together with telegraph and telephone lines incidental to and designed for use only in connection with the operation of such pipe lines along, across or under any public stream or highway in this State." Vernon's Ann. Civ. St. Art. 6020. It has extended the public policy of the State to embrace them as other common carriers and public utilities.

Continental Pipe Line Co. v. Gandy, 162 S.W.2d 755, 757 (Tex. Civ. App.—El Paso 1941, writ ref'd w.o.m.). *See also County of Harris v. Tenn. Products Pipe Line Co.*, 332 S.W.2d 777, 780-81 (Tex. Civ. App.—Houston 1960, no writ) ("The importance of pipe lines to the entire state is well recognized.... The grant of right to certain companies under Articles 6020, 6022 and 1497, V.A.C.S., including the right of eminent domain, was evidently designed to facilitate inter-county transmission of petroleum products.").

Moreover, the Texas Legislature expressly states that it wants pipeline companies to use public land where possible to construct pipelines: "In determining the route of a

pipeline within a municipality, a gas corporation shall consider using existing easements and public rights-of-way...." *Id.* at 181.005(c). The Legislative History informs that the Senate believed it was preferable to use public lands rather than making pipeline companies resort to condemnation proceedings against private landowners. *See* HB 2572, Bill Analysis (attached as appendix A). It would be very odd, absurd even, for the Texas Legislature to direct pipeline companies to use public land but not give those same companies the right to condemn the land when a governmental unit acts unfairly or unwisely.

4. Former Statutes Confirm That Pipeline Companies May Condemn Public Land.

Historically, gas utilities have had the right to condemn public lands, and there is no reason to interpret the current statute any differently. In *Humble Pipe Line Co. v. State*, a pipeline company sought to lay pipes across and upon State-owned tidal lands and waters. 2 S.W.2d 1018, 1019 (Tex. Civ. App.—Austin 1928, writ ref'd). The State of Texas sued for trespass to try title and to temporarily enjoin the company, contending that the pipeline company's eminent domain statute only authorized the company to lay pipes "under any public road or highway, street, railroad, canal or stream[...]," and that the company could only appropriate use of public lands outside those specifically enumerated by obtaining special permission from the Legislature. *Id.* at 1018, 1020. The trial court found that the company was trespassing and granted a temporary injunction against the company.

The court of appeals dissolved the temporary injunction and reversed and rendered judgment for the company. The court of appeals held that even though the pertinent eminent domain statutes did not specifically include the affected state lands, the broad and general language of the statutes granting the company the right to operate its pipelines "between different points in this state" and to "any distributing, refining, or marketing center or reshipping point thereof, within this State," clearly indicated a legislative intent to grant to the pipeline company by necessary implication the use of any lands belonging to the state in order for the common carrier to carry out its statutory powers and purposes. *See id.* at 1021. The court noted that historically courts liberally construe express statutory grants of power to public service corporations to effectuate the purposes of the powers, including implying all powers necessary and proper for the execution of the express powers. *See id.* at 1019. The court reasoned that narrowly interpreting the statutes would not only frustrate the express, broad grants of authority to the pipe line company, but would frustrate the company from carrying out its important public functions and would unnecessarily limit and curtail the industry. *Id.* at 1020.

The *Humble Pipe Line* opinion applies with particular force in this proceeding. The statutes at issue in the *Humble Pipe Line* case are substantially similar to the pertinent eminent domain statutes in this proceeding. *Compare* TEX. REV. CIV. STAT. ANN. art. 1497, 6018, 6020, 6022 (Vernon 1925) with TEX. UTIL. CODE ANN. § 181.004. Moreover, this Court must presume that the Texas Legislature knew of the precedent, and intended to continue it when it codified a utility's right to condemn in Texas Utilities Code Chapter 181 with virtually the same language that was in effect when *Humble Pipe*

Line was decided. Indeed, if the Legislature had wanted to clarify that pipeline companies did not have the right to condemn public land, then it certainly would have so stated, or at the very least have omitted references to pipeline companies' right to build lines on various types of public property. *See, e.g.,* TEX. UTIL. CODE ANN. § 181.005.

Moreover, the law in Texas has consistently applied the prior use doctrine to allow the taking of public land by condemnation. An authority seeking to condemn property already devoted to public use may do so if it will not destroy its existing use, and even if there is a destruction of current use, condemnation is still appropriate where the condemning authority shows that its intended use is of paramount public importance and that its purpose cannot be otherwise accomplished. *See Sabine & E. Tex. Ry. Co. v. Gulf & I. Ry. Co.*, 92 Tex. 162. 46 S.W. 784, 786 (1894). *See also In re Burlington N. & Santa Fe Ry. Co.*, 12 S.W.3d 891, 894 n.1 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding); *Fort Worth & Denver Ry. Co. v. City of Houston*, 672 S.W.2d 299, 300-01 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.). If a governmental unit has an absolute immunity defense to condemnation, then the prior public use doctrine is meaningless in Texas. This would place Texas out of the mainstream of jurisdictions in the United States, which allow for some version of a prior public use doctrine. *See* 1A-2 NICHOLS ON EMINENT DOMAIN § 2.17 (2010).

The right of a condemning authority to take public land is implicit in the general grant of eminent domain power where such grant is meaningless without such ability:

> There are many cases in which land in public use may unquestionably be taken under a general delegation of the power of eminent domain. Express authorization to impair or destroy the prior use is the best authority, but is

> not required if the nature of the proposed use is such as to confer the power by necessary implication. A public way, whether it be a highway, a railroad, or a canal, cannot in the nature of things be constructed for any considerable distance through an inhabited country without crossing other public ways. Accordingly, general authority to lay out and construct public ways and to take the necessary land justifies the condemnation of crossings over other ways so far as it can be done without destroying the use of the original way, and subject to the condition that the power is to be exercised so as to interfere as little as possible with the original use.

Id. Examples where under the prior public use doctrine a condemning authority may condemn prior public lands include the ability of a highway, railway or pipeline to cross a canal, other highway, turnpike, or railroad. *See id.*

For example, the Texas Supreme Court held that a school district had the implied right to condemn portions of a city park by a general grant of eminent domain authority. *See Austin Indep. Sch. Dist. v. Sierra Club*, 495 S.W.2d 878, 882 (Tex. 1973). The Court held that the lower court had jurisdiction over the condemnation action and could address the prior public use doctrine in exercising its jurisdiction:

> By the express terms of Sec. 23.31, V.T.C.A., Education Code, the District is vested with "power by the exercise of the right of eminent domain to acquire the fee simple title to real property." This authorizes the District to condemn land and to invoke the eminent domain jurisdiction of the County Court at Law, but the statute does not expressly empower the District to condemn property already devoted to a public use. In these circumstances and when the condemnation will practically destroy the use to which the property has been devoted, the power will not ordinarily be implied from a general power conferred by statute. The power will be implied, however, where the necessity is so great as to make the new enterprise of paramount importance to the public and it cannot be practically accomplished in any other way. It is clear then that the question of the District's right to condemn the school site under the facts and circumstances of the case does not go to the jurisdiction of the County Court at Law but was a matter to be resolved by that court in the exercise of its jurisdiction.

Id. See also Canyon Reg'l Water Auth. v. Guadalupe-Blanco River Auth., 258 S.W.3d 613, 617 (Tex. 2008). The careful use of the term "jurisdiction" in the context of a governmental unit suing another governmental unit had to refer to either the non-application of governmental immunity or a waiver thereof. Therefore, Flower Mound's position effectively overrules this long standing doctrine, which has been endorsed and applied by the Texas Supreme Court.

Under Flower Mound's position, condemning authorities never get to argue prior public use because governmental units can simply assert governmental immunity. In that vain, the prior public use doctrine is a judicial doctrine that allows competing public entities (government vs. utility) to come to court, explain the dispute, provide evidence, and explain which side has the best use of the public's property. But if Flower Mound is correct, that will not happen anymore. Rather, a governmental unit (the executive branch) will be the sole, exclusive decision maker behind which use is paramount. If a governmental unit thinks that it does not want a pipeline over its property, even though it has no impact on the use or function of the property, then "King's X" there will be no pipeline built. The issue is done. The pipeline company and the Texas Railroad Commission have no ability to go to the third branch of government, the judicial branch, and seek a fair and reasonable outcome. Flower Mound would have this Court impair the judicial branch's jurisdiction and cede it to any number of governmental units, who do not have the specialization to deal with the complicated issues involved in planning an pipeline.

5. Flower Mound's Position Could Impact The Reliability of Gas Systems In Texas.

If Flower Mound's position is correct, then electric utilities have no real right to eminent domain in Texas. If Flower Mound's argument is accepted, pipeline companies will have to build their systems in a costly ad hoc pattern to avoid the public property of municipalities and other governmental units throughout Texas who may arbitrarily decide to oppose the construction of new pipelines on public property, notwithstanding that their construction was previously found to be in the public interest by the Texas Railroad Commission. Of course, it is impossible in heavily congested areas for pipeline companies and gas utilities to avoid the use of public property to lay their lines to serve the residents and businesses located within boundaries of a governmental entity.

Under the prior *Humble Pipe Line* precedent and a plain reading of the Texas Utilities Code, Texas has experienced monumental development and has a very reliable gas transmission and distribution system. The reliability of that system may be in jeopardy in the future if utilities are not able to certificate, construct, and operate pipeline facilities across publically owned land – land that encircles many of Texas's metropolitan areas. For example, transit authorities own many miles of roadway around Fort Worth, Dallas, Austin, and Houston. Gas deliveries will simply be shut down in these areas because utility companies will not be able to obtain access to consumers through these governmental units' property. Private land owners will not receive royalty checks. Public authorities will not receive royalty checks and will not receive any taxes on those funds. In today's climate of municipalities not having enough funds to balance their

budgets, it seems odd that they would want to cut off the ability of gas utility pipeline companies from being able to service these areas of gas production and the natural economic benefits that flow from such development.

Moreover, it seems odd that governmental units – who themselves have condemnation power – would want to limit their own ability to build projects. What if DART builds a rail line up through Flower Mound to serve Flower Mound's citizens. Then ten years later, Flower Mound wants to build a new water line under DART's property. But DART refuses to give such an easement. Under Flower Mound's position, DART will have the right to arbitrarily assert governmental immunity and stop Flower Mound in its track from building this important public project. Flower Mound's governmental immunity argument is short-sighted and dangerous for its own residents and all of Texas's citizens. This Court should affirm the trial court's denial of Flower Mound's plea to the jurisdiction.

B. The *Lain* Precedent Does Not Undercut The Fact That Pipeline Companies May Condemn Public Property.

The Texas Supreme Court's decision in *State v. Lain*, holding that a private individual does not have a right to sue the government for title to real property, does not impact this condemnation case. 162 Tex. 549, 349 S.W.2d 579, 581-82 (1961). The *Lain* case involved a private citizen raising *in personam* claims regarding interests in real estate against the State, whereas the issue in this case is whether a condemning authority – an entity acting with governmental eminent domain power – can condemn public property in an *in rem* proceeding, which was not addressed in any fashion in *Lain*.

Interestingly, Flower Mound fails to point out to the Court that the Texas Supreme Court noted in *Lain* that:

> When suit for recovery of title to and possession of land, filed without legislative consent, is not against the state itself, but is against individuals only, the mere assertion by pleading that the defendants claim title or right of possession as officials of the state and on behalf of the state, will not bar prosecution of the suit.

Lain, 349 S.W.2d at 582. Such a suit is not barred because:

> One who takes possession of another's land without legal right is no less a trespasser because he is a state official or employee, and the owner should not be required to obtain legislative consent to institute a suit to oust him simply because he asserts a good faith but overzealous claim that title or right of possession is in the state and that he is acting on behalf of the state.

Id. at 581. *See also State v. BP Am. Prod. Co.*, 290 S.W.3d 345, 352, 361, 363 (Tex. App.—Austin 2009, pet. filed) (noting that "[t]he central holding of *Lain* ... is that sovereign immunity does not bar a plaintiff from suing a state official in possession of property that plaintiff claims to determine, as between those parties, which party has the superior title or right of possession" and to recover possession if plaintiff prevails); *State v. Beeson*, 232 S.W.3d 265, 271 n.5 (Tex. App.—Eastland 2007, pet. abated) (stating that, in a trespass to try title action, "state officials named as defendants are not entitled to defeat the court's subject[-]matter jurisdiction by asserting sovereign immunity").

Flower Mound's position is that *Lain* stands for the proposition that a governmental unit is protected from any suit for the possession of an interest in real property. But that is simply not true. Even a private land owner without any governmentally granted right to eminent domain can sue a governmental official for a property interest without an immunity bar. Additionally, where a governmental unit

takes property, a private landowner may have various claims that are not subject to an immunity defense, such as an inverse condemnation suit. *See* TEX. CONST. ART. I, § 17(a); *State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007). The *Lain* precedent is simply irrelevant and does not support Flower Mound's public policy aspects of this case.

C. Municipality Has No "Veto" Right Regarding Road Crossing.

Flower Mound makes an unfortunate misstatement in its Reply Brief and suggests that cities have a "veto" right regarding a request to cross a road. See Reply at 12. Although Texas Utilities Code section 181.005 does recognize that a municipality has the ability pursuant to its police power to have some reasonable regulation of street crossings, the municipality cannot withhold such permission or consent arbitrarily, or for reasons unrelated to the legitimate exercise of its regulatory police power.[7] *See City of Houston v. Todd*, 41 S.W.3d 289 (Tex. App.—Houston [1st Dist] 2001, pet. denied). Moreover, if a governmental official wrongfully denies consent to allow a road crossing, the pipeline company should be entitled to declaratory relief and/or a writ of mandamus to compel a public official to give consent. *See* TEX. CIV. PRAC. & REM. CODE § 37.004(a); *Anderson v. City of Seven Points*, 806 S.W.2d 791, 793 (Tex. 1991). *See also Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 938 (Tex. 1998) (indicating that a municipal action that is a "mere arbitrary or irrational exercise of power having no substantial relation to the public

[7] It is also worth noting that if there is any doubt whether a city possesses a particular power, that doubt must be resolved against a finding that the city possesses the power in question. *See City of Arlington v. Lillard*, 294 S.W. 829, 831 (Tex. 1927) (". . . the rule. . . is that 'where a particular power is claimed for a municipal corporation any fair, reasonable doubt as to the existence and possession of the power will be resolved against the corporation, and the power denied to it.'") (citation omitted). In *Lillard*, the Texas Supreme Court cited this rule in holding that a city did not possess the power to prohibit commercial vehicles from using certain of its streets, for such a prohibition went beyond "merely control[ling] and regulat[ing] the use of said streets." *See id.* at 829-31.

health, the public morals, the public safety or the public welfare in its proper sense" would violate substantive due process).

Just as a city cannot arbitrarily withhold permission or consent for gas companies to make use of the public streets as authorized by the State in the Texas Utilities Code, a city cannot demand unreasonable concessions in return for such permission or consent. A city's regulatory police power over its streets cannot be used as a bargaining chip to extort favorable consideration from an entity that seeks to use the streets. *See Tex. Power & Light Co. v. Garland*, 431 S.W.2d 511, 518 (1968) ("The City has no right to barter with the police power."). In fact, the Texas Legislature has recently enacted a statute that protects gas utility pipeline companies from municipalities' unreasonable fees by allowing the companies to appeal an assessment of a fee to the Railroad Commission. *See* TEX. UTIL. CODE ANN. § 121.2025. But Flower Mound's position would undercut these provisions and allow any governmental unit to demand unreasonable concessions in exchange for consent. In other words, if a governmental unit can simply use a "King's X" to stop a project, it can extort unreasonable compensation for the easement, charge unreasonable fees, deny reasonable access requests, and require other "kickback" items like "requesting" that the pipeline company build a new park or contribute to some pet project.

Moreover, there is a real chance that other improper conduct could occur. For example, a governmental unit could hire a consultant to handle all requests by utilities, and that same consultant could represent private land owners. The consultant could wrongfully use his position with a governmental unit to extort concessions, route

changes, and additional compensation for his private landowner clients in exchange for processing the gas pipeline's request to use public property owned by the governmental unit. Flower Mound's statutory construction arguments lead to absurd results.

D. Flower Mound Has Not Properly Challenged The Trial Court's Implied Findings, And The Court Should Affirm The Denial Of The Plea.

This Court should affirm the denial of the plea to the jurisdiction because Flower Mound has not correctly challenged the trial court's implied findings. The trial court entered an order denying Flower Mound's plea to the jurisdiction, and Flower Mound immediately filed a notice of appeal. But Flower Mound did not request or receive any findings of fact or conclusions of law regarding the trial court's order. On appeal, Flower Mound attempts to correct this by quoting the trial court at the hearing. Texas precedent has long held that a trial court's oral statements incident to a written ruling have no procedural effect and do not substitute for express findings. *See In re Jane Doe 10,* 78 S.W.3d 338, 340 n. 2 (Tex. 2002) (oral comments from the bench cannot substitute for written findings of fact and conclusions of law); *In re W.E.R.*, 669 S.W.2d 716, 716 (Tex. 1984) (same); *In re E.A.S.*, 123 S.W.3d 565, 568 (Tex. App.—El Paso 2003, pet. denied) (same).

So, what impact does the fact that there are no express findings have in this case? Because there are no express findings, this Court must presume that the trial court implied all findings to support its order denying the plea to the jurisdiction. *See Fleming v. Patterson*, 310 S.W.3d 65 (Tex. App.—Corpus Christi 2010, pet. dism'd.). In *Fleming*, the court of appeals held that a party challenging the grant of a plea to the jurisdiction

waived its appeal by not challenging on appeal the evidentiary basis for the trial court's implied findings:

> 'In a nonjury trial, where no findings of fact or conclusions of law are filed or requested, it will be implied that the trial court made all the necessary findings to support its judgment.'" In concluding that it did not have subject-matter jurisdiction, the trial court must have concluded that the State had superior title and right of possession and impliedly made all findings necessary to support that conclusion. "When the appellate record includes the reporter's and clerk's records, these implied findings are not conclusive and may be challenged for legal and factual sufficiency in the appropriate appellate court." However, "[w]hile implied findings may be challenged for legal and factual sufficiency, we do not determine the sufficiency of the evidence supporting the finding without such a challenge." . . . [After discussing the fact that the appellant discussed legal arguments,] He does not discuss or even allude to the sufficiency of that evidence. Thus, we find that Fleming has waived any complaint about the implied findings of the trial court.

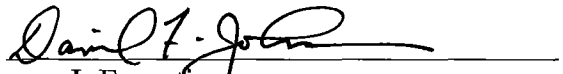
Id. at 71-72. *See also Berg v. AMF Inc.*, 29 S.W.3d 212, 216 n.1 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (holding that appellants' failure to cite any authority or to the record to support their attempted challenge of the implied findings resulted in a waiver of their challenge). Similarly here, Flower Mound spends its entire brief discussing its interpretation of the law, but never challenges any of the implied factual findings made by the trial court, and importantly, has no appellate issue directed at any legal or factual insufficiency of the evidence. For this procedural reason, this Court should affirm the trial court's denial of the plea to the jurisdiction.

CONCLUSION AND PRAYER

Gas utility pipeline companies have the right of condemnation: to build and maintain pipelines for our society's well being and our nation's defense. Flower Mound's position allows small governmental units, only looking out for their own myopic self-

interests, to delay and effectively stop a large, important pipeline project like the pipeline in this case. The result of giving governmental units a "King's X" power is inconsistent with the public policy of this state and is not legally correct. For the reasons stated in this brief, Amicus Curiae request this Court to affirm the trial court's order, and grant Appellee all other relief to which it is entitled in either law or equity.

Respectfully submitted,

By: 
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 4th day of October, 2010, the above document was served via Certified United States Mail, Return Receipt Requested, on all parties or their attorneys of record listed below pursuant to the Texas Rules of Appellate Procedure:

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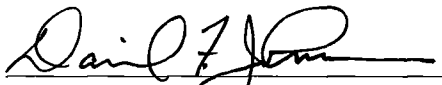

David F. Johnson

APPENDIX

TAB A. HB 2572, Bill Analysis

HOUSE RESEARCH ORGANIZATION bill analysis 4/27/2009

HB 2572
Gonzalez Toureilles
(CSHB 2572 by Farabee)

SUBJECT: Authority of gas corporations to lay lines under public rights-of-way

COMMITTEE: Energy Resources — committee substitute recommended

VOTE: 8 ayes — Keffer, Crabb, Craddick, Farabee, Gonzalez Toureilles, Hardcastle, Rios Ybarra, Strama

0 nays

1 absent — Crownover

WITNESSES: For — Charles Yarbrough, Atmos Energy; *(Registered, but did not testify:* Marty Allday, Enbridge Energy; Kathy Deyoung, Copano Energy; Delbert Fore, Enterprise Products; Mark Gipson, Devon Energy; Kinnan Golemon, Shell Oil; Kelly Mcbeth, Martin Midstream, Prism Gas, Crosstex Energy; Patrick Nugent, Texas Pipeline Association; Lindsay Sander, Kinder Morgan*)*

Against — None

BACKGROUND: Under Utilities Code, sec. 181.005, a gas corporation has the right to lay and maintain lines over and across a public road, a railroad, a canal or stream, or a municipal street or alley.

Utilities Code, sec. 121.2025 authorizes cities to levy a reasonable charge on gas utilities to cover administrative costs incurred by the city in dealing with the utility. A city also may recover reasonable costs of repairing damages to city infrastructure by a utility that the utility did not repair itself. Tax Code, sec. 182.025 allows a city to levy on a gas utility a reasonable charge of up to 2 percent of the gross receipts from the sale of gas within the city.

DIGEST: CSHB 2572 would give a gas corporation the right to lay and maintain lines under a public road, a railroad, a canal or stream, or a municipal street or alley.

A gas corporation's right to lay and maintain lines over, under, and across a municipal street or alley would be subject to payment of compensation under Utilities Code, sec. 121.2025 or Tax Code, sec. 182.025.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2009.

SUPPORTERS SAY:

CSHB 2572 would make a technical correction that would help avoid disputes and litigation over of the rights of gas corporations to lay lines under public rights-of-way, which they have been doing for years. Natural gas pipelines generally are placed underground.

Common carrier pipelines of various commodities currently may lay their facilities under various public rights-of-way. This bill would make the rights of gas corporations consistent with past practice and with statutes that provide other entities the right to lay lines over, across, and under public rights of way.

OPPONENTS SAY:

Natural gas pipelines generally are placed underground, but not under municipal streets. Although it would be preferable to avoid condemnation proceedings by placing gas pipelines under municipal streets, rather than under private property, this could pose a danger for the Texas Department of Transportation (TxDOT) when they do road work. This also could create additional administrative duties and procedures for TxDOT in having to deal with the pipelines.

NOTES:

The committee substitute differs from the bill as filed by providing compensation for municipalities.

The companion bill, SB 1749 by Jackson, is pending in the Senate Natural Resources Committee.