Policy Perspective
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Restoring Justice: Protecting Private Property Rights from Eminent Domain Abuse

by Clark Neily, senior attorney for the Institute for Justice

Introduction

The Institute for Justice (IJ) represents people whose rights are being violated by their government. One of the main areas in which we litigate is property rights, particularly in cases where homes or small businesses are taken by government through the power of eminent domain and transferred to another private party. IJ has represented property owners across the country, fighting the use of eminent domain for private gain. Our clients include the homeowners in the *Kelo v. City of New London* case, in which the U.S. Supreme Court decided that eminent domain could be used to transfer property to a private developer simply to generate higher taxes, as long as the project is done pursuant to a plan. We have also published a report about the use of eminent domain for private development throughout the United States (available at www.castlecoalition.org/report).

In the *Kelo* decision, a narrow majority of the Court decided that, under the U.S. Constitution, property could indeed be taken from its rightful owner and transferred to another private party for a different use that might generate more taxes and more jobs, as long as the project was pursuant to a development plan. The *Kelo* case was the final signal that, according to the Court, the U.S. Constitution provides no meaningful protection for the private property rights of Americans. Indeed, the Court ruled that it's okay to use the power of eminent domain when there's the mere *possibility* that something else could make more money than the homes or small businesses that currently occupy the land. It's no wonder, then, that the decision caused Justice O'Connor to remark in her dissent: "The specter of condemnation hangs over all property. Nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping center, or any farm with a factory."

There has been an outpouring of public outrage in response to this closely divided decision. Overwhelming majorities in every major poll taken after the *Kelo* decision have condemned the result. Forty-seven states have filed, or are drafting, eminent domain legislation.

Texas was one of the first states to adopt meaningful reforms. The Texas Legislature is to be commended for its trail-blazing effort to curb eminent domain abuse as a result of the U.S. Supreme Court's dreadful decision in *Kelo v. City of New London*. Senate Bill 7 was a valiant start; now the Legislature must determine what reforms are needed to finish the task.

The future for eminent domain

The use of eminent domain for private development has become a nationwide problem, and the Supreme Court's *Kelo* decision is already encouraging further abuse.

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Eminent domain, called the "despotic power" by the Supreme Court in the early days of this country, is the power to kick citizens out of their homes and seize their small businesses against their will. Because the Founders were conscious of the possibility of abuse, the Fifth Amendment provides a very simple restriction: "[N]or shall private property be taken for public use, without just compensation."

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Historically, with a few very limited exceptions, the power of eminent domain was used for things the public actually owned and used—schools, courthouses, post offices and the like. Over the past 50 years, however, the meaning of public use has expanded to include ordinary private uses like condominiums and big-box stores. The expansion of the public use doctrine began with the urban renewal movement of the 1950s. In order to remove so-called "slum" neighborhoods, cities were authorized to use the power of eminent domain. This "solution," which has been a dismal failure, was given ultimate approval by the Supreme Court in *Berman v. Parker* in 1954. The Court ruled that the removal of blight was a public "purpose," despite the fact that the word "purpose" appears nowhere in the text of the Fifth Amendment and government already possessed the power to remove blighted properties through public nuisance law. By effectively changing the wording of the Fifth Amendment, the Court opened a Pandora's box, and now properties are routinely taken pursuant to redevelopment statutes when there's absolutely nothing wrong with them except that some well-heeled developer covets them and the government hopes to increase its tax revenue.

The *Kelo* case completed the court's evisceration of the public use clause. As a result of this decision, every home, every church and every small business is now up for grabs to the highest bidder. According to a narrow majority of the Court, the mere *possibility* that private property might make more money when put to another use is reason enough for the government to take it away. The well-paid lobbyists of developers

Harry Whittington v. the City of Austin

—by Bill Peacock, Texas Public Policy Foundation

Harry Whittington and his family own a city block near the Austin Convention Center. On August 9, 2001, the Austin City Council passed a resolution that the Whittingtons' property, "should be acquired for a public use." The city's resolution was silent regarding what public use the city council intended to effectuate by condemning the Whittingtons' property.

However, the city later said that it wanted to use the land for the purpose of building a parking garage for the Austin Convention Center and chilling plant. It appears that the parking garage use came to light only after discussion on a proposed convention center parking facility in conjunction with the adjacent Hilton hotel project fell through. The chilling plant use came even later. Additionally, testimony in the trial showed that "the city could have met all of its projected convention center parking needs for a fraction of the cost merely by non-renewing contract parking leases in the city's existing parking garage at Second and Brazos." The condemnation, it seems, was actually for the purpose of allowing the city to acquire parking for the convention center without having to forego revenue from private citizens using their other parking facility.

The city was initially successful in its condemnation of the land, and built a parking garage on the property. However, the Whittingtons' have successfully appealed the case, and the ultimate ownership of the property and parking garage is still up in the air.

and municipalities will claim that the decision doesn't affect Texas, and that there's really no problem that needs fixing. They're wrong. The *Kelo* decision signifies a fundamental shift in the sanctity of all our property rights—it erases the public use requirement for eminent domain. Under *Kelo*, purely hypothetical economic development is the only justification necessary to condemn property.

Eminent domain will continue to adversely affect those who have relatively little influence in politics, most typically the poor, minorities and the elderly. It remains a benefit for those with more money and better connections. Eminent domain is routinely abused to transfer property from one person to another in order to build luxury condominiums and big-box stores. Americans are fed up with this abuse.

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The use of eminent domain for private development has become widespread. The Institute for Justice documented more than 10,000 properties either taken or threatened with condemnation for private development in the five-year period between 1998 through 2002. Because this number was reached by counting properties listed in news articles and court cases, it grossly underestimates the actual number of condemnations and threatened condemnations. In Connecticut, the only state that keeps separate track of redevelopment condemnations, we found only 31 in our study of newspaper articles and court filings, while the true number recorded by the state was 543. Now that the Supreme Court has actually sanctioned this sort of abuse in *Kelo*, the floodgates to even more abuse have been thrown open. Home and business owners have every reason to be very, very worried.

The abuse of eminent domain is a problem in Texas. For example, the City of Hurst agreed to let its largest taxpayer, a real estate company, expand its North East Mall and thus increase the city's sales and property tax revenues. There happened to be 127 homes in the way, but that wasn't a problem. The city agreed to condemn the homes if the owners did not sell. Under the threat of eminent domain, almost all of the homeowners sold their property. Ten condemnees refused to sell and took the city to court. The Lopez, Duval, Prohs and Laue families had each owned their homes for approximately 30 years. Some of the other families had been there for more than a decade. A Texas trial judge refused to stay the condemnations while the suit was ongoing, so the residents lost their homes. Of the 10 couples that challenged the city, three spouses died and four others suffered heart attacks during the dispute. During litigation, the owners discovered evidence that the land surveyor who designed the roads for the mall expansion had been told to change the course of one access road so that it would run through the houses of the eight owners challenging the condemnations. However, as litigation often does, the case moved slowly, and the exhausted owners finally settled in June 2000. Until the time of settlement, however, they had received no compensation at all for the loss of their homes or disruption to their lives.

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Another abuse that has received some attention is happening in Freeport. Hours after the *Kelo* decision, officials in Freeport began legal proceedings to seize the waterfront property of two seafood companies to make way for an $8 million private boat marina. In November 2005, the Fifth U.S. Circuit Court of Appeals lifted a court order that had prevented the city from moving forward with its condemnation efforts. One of the properties that city officials are taking by eminent domain is Western Seafood, a shrimp-packing operation that has been in Wright Gore III's family for years.

What the Supreme Court first sanctioned as a way to remove dangerously dilapidated and abandoned properties (what were historically considered public nuisances, the abatement of which has always been permitted pursuant to the government's police powers) has been transformed into the ability to seize entire neighborhoods of perfectly normal homes to give to private developers promising increased tax revenues and jobs.

Although the Supreme Court reached the wrong result in *Kelo*, there is one thing it did get right—states are free to enforce more robust property rights protections. States can also make sure the law that currently exists actually provides home and small business owners with the security that they can hold on to their homes and businesses and that state law doesn't improperly equate private use with public use. I have submitted to the Texas Senate's State Affairs Committee the Institute for Justice's white paper on *Kelo* and proposed legislative reforms along with my testimony, all of which present suggestions for further eminent domain reform in Texas.

Texas needs a constitutional amendment that will enshrine a traditional definition of public use and limit eminent domain authority in the state to projects that are truly for public ownership and enjoyment.

Frank Newsom v. Malcomson Road Utility District

—by Bill Peacock, Texas Public Policy Foundation

Frank Newsom owned a northern and a southern tract of undeveloped land outside the Malcomson Road Utility District's boundaries. A drainage ditch lay along the eastern boundary of Newsom's northern tract. A corporate landowner that wished to develop its nearby tract into a residential subdivision tried to purchase 2.6178 acres along the eastern edge of Newsom's northern tract to expand the drainage ditch, which the Harris County Flood Control District (HCFCD) required for development of the subdivision. Similarly, a different owner of nearby property tried to purchase 2.58 acres of Newsom's property to build a retention pond that HCFCD required for development of the second subdivision. The second owner wanted to use Newsom's property in order to be able to build more houses on the property that he already owned. The district supported the purchase because it would increase the district's tax base.

Newsom rejected both of the offers. The developers asked the district to condemn the portions of Newsom's land that they had tried to purchase. The district proceeded to file separate condemnation proceedings in county court for each piece of property.

The appeals court ruled that the takings were for a public use, despite the fact that the drainage projects were required for the permitting of specific developments, and were designed to be of a size to accommodate the runoff only from those projects. In making its determination, the court relied on the fact that the ditch and the pond could both receive runoff from other uphill properties. And even though the retention pond in the second case could have been built on property already owned by the developer, the appeals court left open the possibility that the takings constituted a public necessity. The court said that the "condemnor's discretion to determine what and how much land to condemn for its purposes—that is, to determine public necessity—is nearly absolute. Courts do not review the exercise of that discretion without a showing that the condemnor acted fraudulently, in bad faith, or arbitrarily and capriciously, i.e., that the condemnor clearly abused its discretion." Because of this standard, courts very rarely review the facts underlying a determination of public necessity. Newsom has appealed to the Supreme Court.

Suggested Reforms

Constitutional:

Article I, Section 17 of the Texas Bill of Rights protects private property from government taking, except for a public use with adequate compensation. Unfortunately, what constitutes "public use" in Texas is rather broad. It has expanded beyond the roads, parks, schools and other public buildings to include condominiums and industrial parks.

Texas needs a constitutional amendment that will enshrine a traditional definition of public use and limit eminent domain authority in the state to projects that are truly for public ownership and enjoyment. An example of such language is as follows:

> With just compensation paid, private property may be taken only when necessary for the possession, occupation, and enjoyment of land by the public at large, or by public agencies. Except for privately owned public utilities or common carriers, private property shall not be taken for private commercial enterprise, for economic development, or for any other private use, except with consent of the owner. Property shall not be taken from one owner and transferred to another, on the grounds that the public will benefit from a more profitable private use. Whenever an attempt is made to take property for a use alleged to be public, the question whether the contemplated use is truly public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

Statutory:

Last year, Texas was a pioneer in eminent domain reform as the second state to change its eminent domain laws in response to *Kelo*. While it was a step in the right direction, there is still significant work to be done to close loopholes and exceptions in the law that leave Texans vulnerable to continued eminent domain abuse. The new law makes it clear that economic development cannot be the primary purpose of a condemnation and sets a higher standard for local governments defending their use of eminent domain in court. However, this is an easy standard to work around if a condemning authority claims any other public use as the *primary* purpose and simply avoids designating a *particular* private party to receive a private benefit. Additionally, it is difficult to prove to courts' satisfaction that a claimed public use is in fact a pretext for a taking that is actually for private use. These new standards are great in theory, but very prone to manipulation and abuse, placing an onerous burden on property owners and not offering truly significant protection for property rights. However, with a substantive public use definition, suggested above, home and businesses will be much safer.

Texas' new eminent domain reform law also contains a number of troubling exceptions; a number of current projects were exempted from the law, and there is still an exception for condemnations in areas deemed "blighted." This is troubling because Texas still has an extremely broad and easily abused definition of blight.

Under the Texas Urban Renewal Law, an *area* (not property) can be designated "blighted" because of "deteriorating buildings," which in some states has been found to mean such a minor failing as a broken downspout. Other criteria include "defective or inadequate streets" (something completely out of a property owner's control) or an area that "results in an economic… liability to the municipality," which simply means too low of a tax base.

Eminent domain should only be used in those situations where the general public, public agencies or public utilities will ultimately use or own the property. Removing the power to condemn for private development would not affect a city's ability to condemn, using the police power, properties that present a genuine public nuisance and/or where property is truly unfit for habitation. However, if Texas must preserve an exception for blight, it should be narrowly tailored to only include truly unsafe, unsanitary or abandoned properties, determined on a property-by-property basis. Model language is as follows:

Removing the power to condemn for private development would not affect a city's ability to condemn, using police power, properties where there is a public nuisance and where property is truly unfit for habitation.

Prohibiting Eminent Domain for Private Use and Defining an Exception for Certain Properties that Threaten Public Health or Safety

Notwithstanding any other provision of law, neither this State nor any political subdivision thereof or any other condemning entity shall use eminent domain to take private property without the consent of the owner to be used for private commercial enterprise, economic development, or any other private use except that property may be transferred or leased:

(1) to private entities that are public utilities or common carriers;

(2) to private entities that occupy an incidental area within a publicly owned and occupied project;

(3) to private entities if the current condition of the property poses an existing threat to public health and safety and meets the definition of "condemnation-eligible" property. The condemnor shall bear the burden of establishing by clear and convincing evidence that property is condemnation-eligible.

Condemnation-eligible property shall include:

(1) Any premises which because of physical condition, use or occupancy constitutes a public nuisance or attractive nuisance.

(2) Any structure which, because it is dilapidated, unsanitary, unsafe, or vermin-infested, has been designated by the agency responsible for enforcement of the housing, building or fire codes as unfit for human habitation or use.

(3) Any structure which, in its current condition, is a fire hazard, or is otherwise dangerous to the safety of persons or property.

(4) Any structure from which the utilities, plumbing, heating, sewerage or other facilities have been disconnected, destroyed, removed, or rendered ineffective so that the property is unfit for its intended use.

(5) Any vacant or unimproved lot or parcel of ground in a predominantly built-up-neighborhood, which by reason of neglect or lack of maintenance has become a place for accumulation of trash and debris, or a haven for rodents or other vermin.

(6) Any property that has tax delinquencies exceeding the value of the property.

(7) Any property with code violations affecting health or safety that has not been substantially rehabilitated within one year of the receipt of notice to rehabilitate from the appropriate code enforcement agency.

(8) Any property which, by reason of environmentally hazardous conditions, solid waste pollution or contamination, poses a direct threat to public health or safety in its present condition.

(9) Any abandoned property, defined as property not occupied by a person with a legal or equitable right to occupy it and for which the condemning authority is unable to identify and contact the owner despite making reasonable efforts or which has been declared abandoned by the owner, including an estate in possession of the property.

Conclusion

Last year's Senate Bill 7 was a landmark piece of legislation and has moved Texas' property rights in a positive direction. The legislature should finish the job in the coming session by passing a constitutional amendment that enshrines the historic protections that most property owners have always understood the

constitution to provide, and statutory definitions that close loopholes to abuse. This would ensure that the reforms provide real and enforceable limits on the use of eminent domain. Some will no doubt promote "compromise" measures for reforms that only deal with compensation or procedural issues regarding how—not *whether*—properties may be taken. While not unhelpful, those reforms are, by themselves, simply not enough to protect Texas home and business owners.

> Using eminent domain so that another, richer person may live or work on the land taken by force from its rightful owner tells Americans that their hopes, dreams and hard work do not matter as much as money and political influence.

Eminent domain may sound like an abstract issue, but it affects real people. Real people lose the homes or businesses they love and are forced to watch as their properties are replaced with the condos and shopping malls that many localities find preferable to modest homes and small businesses. Using eminent domain so that another, richer, person may live or work on land taken by force from its rightful owner tells Americans that their hopes, dreams and hard work do not matter as much as money and political influence. The use of eminent domain for private development has no place in a country built on traditions of independence, hard work, and the protection of property rights. By passing stronger reform legislation, Texas has a historic opportunity to lead the way in eliminating the rampant abuse of eminent domain by private developers and their political help-mates.

Clark Neily is a senior attorney for the Institute for Justice. Please address any comments or questions to Bill Peacock, director of the Center for Economic Freedom at the Texas Public Policy Foundation. He may be contacted at bpeacock@texaspolicy.com.

Balous Miller v. the City of San Antonio

—by Jeremy Mazur, Office of Rep. Bill Callegari

During the late 1980s the City of San Antonio condemned a portion of Balous Miller's family farm for the construction of the Applewhite Reservoir to serve the area's growing thirst. The city paid Mr. Miller for the land taken for the reservoir. He was not, however, compensated for damages that would accrue to that portion of property he retained. In fact, city officials advised Mr. Miller that he would soon enjoy a lakeside view from his remaining land.

San Antonio's development of the Applewhite Reservoir ended as quickly as it began. Local opposition questioning the project's necessity brought construction to a halt in 1991. For years the land that the city condemned remained fallow. Rather than offer to sell the land back to the original landowners the city eventually sold the property to another buyer, the Toyota Corporation.

San Antonio reportedly profited from the land transaction.

San Antonio ultimately abandoned its development of a reservoir in favor of an economic development project benefiting a private corporation. In the end, Mr. Miller never enjoyed the lakeside view he was promised. What was once to overlook a scenic reservoir now abuts a truck factory. He remains uncompensated for damages to his property.

Other Eminent Domain Publications

In conjunction with this paper, the Texas Public Policy Foundation is also releasing three policy briefs by Bill Peacock, director of the Center for Economic Freedom, on eminent domain:

1) Eminent Domain Legislation Passed by Other States;
2) Recent Examples of Eminent Domain Abuse in Other States; and
3) Protecting Private Property Ownership from Eminent Domain Abuse.

These reports are all available at www.TexasPolicy.com

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