



Testimony on Eminent Domain Public Use & Necessity

by Bill Peacock, Director of the Center for Economic Freedom

SB 7 was the Starting Point

At the time *Kelo* was delivered, the Texas Legislature was in the midst of a special session called by Texas Governor Rick Perry to respond to a court ruling that the Texas system of public school finance was unconstitutional. Though the primary business of the day was school finance, Gov. Perry and many members of the Legislature understood how *Kelo* had radically restricted private property rights. So the governor broadened the call of the session, allowing the Legislature to address this issue.

Senate Bill 7, passed in the 2nd Called Session of the 79th Texas Legislature, was the starting point in the legislative effort to reform eminent domain abuse. Because there was little time to devote to eminent domain reform during the special sessions, even the strongest supporters of property rights acknowledged that the best plan was to pass some immediate, but limited, protections for private property rights in order to allow time for a thorough study of this issue and address it more fully in 2007.

Why More Reform is Needed

Public Use

Western Seafood - The city of Freeport is seeking to seize a portion of Western Seafood's property and turn the property over to the adjacent property owner, Freeport Waterfront Properties, a private entity, for the purpose of building a private marina. In an October 11 ruling, the Fifth Circuit Court of Appeals said:

Recommendations

- Define public use—in both the Texas Constitution and in statute.
- Ban the taking of private property that conveys ownership or control of the property from one private person to another, except in very limited circumstances.
- Require a condemnor to prove by clear and convincing evidence that the contemplated use of taken property is truly public and necessary.
- Property that is not used for the purpose for which it was condemned should be offered back to the original owner at the price at which it was taken.

Kelo, 125 S. Ct. 2655, which was issued after the district court's summary judgment order, is directly on point and supports this conclusion. The facts in *Kelo* bear a strong resemblance to the circumstances of the instant case. ...

As in *Kelo*, the city of Freeport seeks to develop its waterfront to revitalize a flagging local economy. ... The record does not suggest that the City is seeking an end other

CONTINUED ON NEXT PAGE

than economic development. Therefore, we hold that the City's exercise of eminent domain does not violate the Takings Clause of the United States Constitution.

Blight Exception in SB 7

El Paso – Of course, SB 7 banned economic development takings in some instances. Unfortunately, because “economic development” has no precise legal meaning, everyone pushed to receive an exemption from the ban. This problem with these exceptions is most apparent with regard to the blight exception. While Western Seafood could possibly be saved by this ban, inner-city residents and business owners will not be so fortunate, as seen by the fact that the city of El Paso is moving forward with a redevelopment plan that will almost certainly include the use of eminent domain for taking non-blighted properties—specifically to hand them over to private developers.

Conferring a Private Benefit

Western Seafood – The language in SB 7 that bans eminent domain if the taking “confers a private benefit on a particular private party through the use of the property” would be useful if it were not for the *Kelo* court. This is seen in the 5th Circuit's decision in *Western Seafood*:

Western Seafood cites *Kelo's* warning that “the City [would not] be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.” ... Relying on Justice Kennedy's concurrence in *Kelo*, *Western Seafood* argues that these facts [in their case] warrant a stricter standard of scrutiny than rational basis. ... We decline to address whether a heightened standard is necessary in certain cases because the facts in the instant case do not warrant it. ... The evidence provided by *Western Seafood* does not support the inference that the City exhibited favoritism or has a purpose other than to promote economic development in Freeport.

Public Necessity

Frank Newsom – Frank Newsom owned a northern and a southern tract of undeveloped land outside the Malcomson Road Utility District's boundaries.

When Newsom wouldn't sell a portion of his property to his neighbor for a retention pond for a new neighborhood—so that neighbor could build more houses on his own property—the neighbor convinced the MUD to condemn Newsom's land—outside the district's boundaries—in order to increase its tax base. The case has been sent back to the district court for a full trial.

Harry Whittington – Harry Whittington and his family owned a city block near the Austin Convention Center. While the City condemned the property in 2001, its resolution was silent regarding what exactly that public use should be. Since then, the City has built a convention center parking garage on the site, even though the City admitted in deposition testimony that it could have met all of its projected convention center parking needs at much less cost by non-renewing contract parking leases in the City's existing parking garage at Second and Brazos.

Both the *Newsom* and *Whittington* cases highlight the extremely high bar that property owners must overcome when challenging a governmental entity's determination of public use or necessity. Particularly in the case of public necessity where a government entity's discretion is “nearly absolute.” Absent fraud or a similarly egregious offense, a property owner has little chance of getting a court to review the facts underlying a government entity's determination of public necessity.

Legislative Presumption on Public Use and Necessity

Current Texas jurisprudence requires the courts to offer great deference to governmental determinations of public use and necessity. Therefore, as long as a government entity follows proper procedures, it is very difficult for a property owner to challenge these determinations in court.

In one case where a property owner attempted to make such a challenge, a Texas appeals 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.”

While the provision in SB 7 addressing presumption is a good start, it is so narrowly tailored to specific situations that it is likely to have little impact in most cases where a property owner seeks to question the determinations by the condemnor. Courts will still have to defer to the condemnor in most situations.

Public Use or Speculation?

Another problem with eminent domain law in Texas is that once a property has been condemned, it can be used for just about any purpose—the condemnor is not required to use it for the purpose it was taken. There is a provision in Texas law that allows for the repurchase of property if the public use for which it is taken is cancelled. However, that provision applies for only 10 years after the taking, and the property must be purchased back at the current market value at the time the use was cancelled, not the price paid to the former landowner.

The case of Larry Raney highlights this problem. Though his family’s homestead of three generations was taken by the city of Rowlett over two years ago for “possible expansion of city park land,” it is being used today only as a vacant lot. Though a portion of the property is designated on city planning maps as a park, a nearby resident was unaware that she lived across the street from a park. Additionally, part of the land is now zoned for new residential development.

Recommendations

The Foundation recommends the following to address these issues:

- Define public use—in both the Texas Constitution and in statute.
- Ban the taking of private property that conveys ownership or control of the property from one private person to another, except in very limited circumstances.
- Require a condemnor to prove by clear and convincing evidence that the contemplated use of taken property is truly public and necessary.
- Property that is not used for the purpose for which it was condemned should be offered back to the original owner at the price at which it was taken.

Legislative Prerogative and Local Control

Finally, some have expressed concern that these remedies will provide too much deference to the courts and will take away local control from communities. Let me briefly address these concerns.

In the Western Seafood case, the 5th Circuit said:

Because the Texas Courts have interpreted the “public use” language of the Texas Constitution with an eye to legislative declarations, and because the Act can be construed as a recent statement of the legislature’s view of what constitutes “public use,” we believe that the Act should be considered when assessing Western Seafood’s claims under the Texas Constitution.

Unfortunately, three things have occurred to turn this deference into a weapon against Texas property owners. First, the courts have over the years taken “a liberal view” of what constitutes a public use. Second, through its liberal granting of eminent domain authority, particularly in the name of urban renewal and economic development, the Legislature has encouraged the courts to continue this view of public use. Finally, the legislative deference has been extended to local governments and their agents, often making it difficult to even challenge the facts of a particular taking once a local government has declared the taking a necessary public use.

While SB 7 made some improvements to eminent domain law, even the 5th Circuit noted that “the Act does not hold itself out explicitly as narrowing or redefining public use . . .” If the Texas Legislature wants to ensure that it has set standards for the protection of private property rights that all have to follow, it needs to take additional action to make that happen. Although the courts may have the discretion to review all the facts in a case, they will be able to do so only under the tightly drawn standards that you have adopted.

In addition, legislators shouldn’t be concerned about the issue of local control. In many instances, the Legislature has taken steps to ensure uniformity and fair application of laws across the state.

For instance, the Legislature has twice removed the granting of local franchises from cities, once for telephone service and more recently for video and cable service. The property tax appraisal process has become much more regulated by the state. Voting is another example where the state has deemed the issues of uniformity and fairness to be more important than local control.

If these issues are worthy of the state taking an active interest, certainly private property rights rise to this level of importance. And in fact, it is clear that the founders of both the United States and the state of Texas thought this to be the case, since they enshrined this fundamental right in our respective constitutions. ★

This testimony was presented before the Joint Interim Committee on Eminent Domain on Oct. 25, 2006 by Bill Peacock.

Bill Peacock is the director of the Center for Economic Freedom at the Texas Public Policy Foundation. Contact Bill Peacock at: bpeacock@texaspolicy.com.

