



Policy *Perspective*

Securing Texans' Private Property Rights

HB 2006, HB 3057, HJR 30 & HB 1495

by **Bill Peacock**
Director, Center for
Economic Freedom

The U.S. Supreme Court's infamous 2005 *Kelo* decision was the culmination of a series of federal and state court decisions that have essentially rewritten the Takings Clauses of the U.S. and Texas Constitutions. In essence, *Kelo* says that private property is not a fundamental civil right, but a privilege granted by the state at its sole discretion.

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. Because there was little time to devote to eminent domain reform during the special session, the Legislature passed SB 7 to provide some immediate, but limited, protections for private property rights in order to allow time for thorough study of this issue and address it more fully in 2007.

After a detailed interim study, the Legislature is addressing this issue in several pieces of legislation which are expected to soon be considered by the Texas Senate. The following is an analysis of key provisions of these bills.

HB 2006

The following provisions in HB 2006 are vitally important to protecting Texans' property rights, and should remain key components of eminent domain reform:

Public Use

Defines public use as meaning a "use of property, including a use described by Section 2206.051(c), that allows the state, a political subdivision of the state, or the general public of the state to possess, occupy, and enjoy the

property." This definition is vitally important to correcting the abuse of eminent domain seen in *Kelo* and similar takings, and should not be altered. *Section 2206.001, Government Code.*

Ban on Takings Not for Public Use

Given that takings for other than a public use are already prohibited in the U.S. and Texas constitutions, this may seem redundant. Unfortunately, federal and state court decisions make it necessary for the Legislature to speak clearly on this. The ban was not in the House version of the bill, but was included in the committee amendment adopted in Senate State Affairs. *Section 2206.051 (b)(4), Government Code.*

Presumption on Takings

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 if not impossible for a property owner to challenge these determinations in court.

The committee amendment vastly improves current law on this matter by eliminating the presumption of public use in all takings. *Section 2205.051(e), Government Code.*

Procedures and Standards

There are numerous instances in HB 2006 and the committee amendment which add accountability to the eminent domain process. These include requiring bonafide offers and record votes by governmental entities, improving evidentiary standards in the determination of compensation, and improving the procedures of private condemnors. *Various sections.*

900 Congress Avenue
Suite 400
Austin, TX 78701
(512) 472-2700 Phone
(512) 472-2728 Fax
www.TexasPolicy.com

QuickFact:

HB 3057 sets up specific criteria in the Texas Urban Renewal Law to determine what property is blighted in lieu of the current easily manipulated language that allows for most any property to fall under the definition of slum or blight.

Repurchase of Taken Property

The committee amendment to HB 2006 requires government entities to offer to sell back a property to the previous owner if the entity has not used the property for the public use for which it was taken. Ten years is more than enough lead time for a local government to plan, construct or implement the public use for which a property was acquired. Additionally, the owners would be able to buy it back at the price for which they were paid for it, not at the increased value most properties would have after 10 years. *Section 21.102, Property Code.*

There are two areas in which HB 2006 could still be improved:

Blight Exception

Current law generally bans the use of eminent domain for economic development purposes; however, it gives cities a huge loophole by allowing an exception to this ban which allows takings when “economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted areas.” This exception opens the door to *Kelo*-style takings right here in Texas. And in fact the city of El Paso is poised to do just this through its downtown redevelopment plan. Eminent domain reform should include the removal of the blight exception. *Section 2206.051(b)(3), Government Code—as changed in HB 2006.*

Presumption on Public Necessity

While HB 2006 removes the presumption given to condemnors regarding determinations of public use, it does not change the preference when it comes to necessity. Currently, findings of necessity are practically impossible to challenge because, as a Texas appellate court has stated, “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.” Removing the presumption for both public use and necessity should be a key component of eminent domain reform. *Section 2205.051 (e), Government Code.*

HB 3057

New London in Connecticut and Poletown in Michigan are just two examples of where governments have taken private land from one person and given it to a more politically connected person (or corporation) in the name of urban renewal and economic development. Until the *Kelo* decision, most of these takings were done by declaring areas to be blighted or slums, which allowed large tracts of land to be taken whether or not individual properties were blighted. HB 3057 addresses this abuse of private property rights in two main ways:

1. Findings of Blight on Specific Properties

The Texas Community Development Act, Texas Urban Renewal Law, and the Tax Increment Financing Act all allow for condemnations as described above. HB 3057 amends the community development act and urban renewal law to require that designations of blight be property specific. This helps to keep non-blighted properties from being condemned just because neighboring property may be truly blighted.

2. Specific Criteria for Findings of Blight

HB 3057 also sets up specific criteria in the Texas Urban Renewal Law to determine what property is blighted in lieu of the current easily manipulated language that allows for most any property to fall under the definition of slum or blight.

There are two areas in which HB 2006 could still be improved:

1. Specific Criteria for Findings of Blight

While HB 3057 does set up specific criteria for determinations of blight, two of

the criteria are so easy that most properties could be construed as qualifying. Since a property has only to meet four of the criteria to be designated blighted, most properties would be halfway there at the start. These two criteria, where 1) the maintenance of the property is below county or municipal standards; and 2) the property presents an economic liability to the immediate area because of deteriorating structures or hazardous conditions, should not become law.

2. Tax Increment Financing Act

While HB 2006 makes some good changes to the Texas Community Development Act and Texas Urban Renewal Law, it fails entirely to address the problems in the Tax Increment Financing Act, whereby cities like El Paso can set up a Tax Increment Reinvestment Zone to raise funds and take land using eminent domain. In conjunction with the blight and slum exemption in the Government Code (see above in HB 2006 analysis), this failure would allow this practice to continue unabated. Stopping this should be a central component of any eminent domain reform.

HJR 30

Because the Texas Constitution prohibits the state from giving away or disposing of property at less than market value, HJR 30 is necessary so that the Legislature can allow the resale of condemned property to the previous owner at the original selling price if the public use is cancelled or not carried out within 10 years, as proposed in HB 2006.

HB 1495

HB 1495 requires the attorney general to prepare a landowner's bill of rights that must be provided to a property owner before any government or private entity with the power of eminent domain begins negotiating with a property owner to acquire real property.

CONCLUSION

The pace of erosion of private property rights has increased significantly in the last 50 years in our country. Legislatures, courts and local governments have all contributed to this, but the courts and local governments have surely taken the lead most recently. The Texas Supreme Court conceded "this Court has adopted a rather liberal view as to what is or is not a public use." The Texas Municipal League hailed the *Kelo* decision, saying that *Kelo* "simply confirms what cities have known all along: under the Fifth Amendment to the U.S. Constitution, economic development can be as much a 'public use' as a road, bridge, or water tower."

The creativity employed in these assaults on private property rights is astounding. Only specific, focused reforms by the Texas Legislature can reverse this trend. ★

Bill Peacock is the Director for the Center for Economic Freedom and Vice President of Administration at the Texas Public Policy Foundation. He may be contacted at: bpeacock@texaspolicy.com.

