TEXAS PUBLIC POLICY FOUNDATION
Testimony

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Eminent Domain: Restoring Constitutional Protections HB 2006 & HB 3057

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THE PROBLEMS EXPOSED BY KELO

The practical problem with the *Kelo* decision was not so much what it said, but the problems with Texas eminent domain law that it exposed. Before *Kelo*, the property rights of Texans were somewhat shielded from the inherent weaknesses in Texas law. Whatever the law might have said, there was no general understanding that the U.S. Constitution's Public Use Clause allowed the government to take any property from any person for any public purpose and give it to someone else. There were limits in place. However, post-*Kelo*, everyone's property was up for grabs.

SB 7 improved the situation, but while it was a good starting point, there is more left to be done. Here are four key areas that need to be addressed by the committee in the two bills before you today:

Define Public Use

While the federal courts were busy changing the U.S. Constitution to allow property to be taken for public purposes or benefits, the Texas courts continued to require a public use. Unfortunately, as the Texas Supreme Court noted, Texas courts have "adopted a rather liberal view as to what is or is not a public use." Essentially, public use in Texas has been construed as including the concepts of public purpose and benefit. The meaning of public use should be restored to its traditional meaning through a definition in statute.

Eliminate the Blight/Slum Loophole

SB 7 included a ban on takings for the purpose of economic development. But since no one knew how the courts would interpret economic development, a laundry list of exemptions to this ban were added into the law. While most of these exemptions are fine, the one 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" opens the door for *Kelo*-style takings right here in Texas. In fact, unless the law is changed, the city of El Paso is poised to do exactly that in the Fall of 2008 under its downtown redevelopment plan.

Restore the Balance on Determinations of Public Use and Necessity

While challenges to takings on the grounds of compensation occur relatively often, challenges based on determinations of public use and necessity are much less common. This is because 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." In other words, the courts cannot look at the facts of the case absent extraordinary circumstances. The standard for examining public use determinations is better, but still weighted too heavily in favor of condemning entities.

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While SB 7 addressed this, its language regarding presumption is so narrowly tailored that it is likely to have little impact in most cases where a property owner seeks to question determinations by the condemnor. Courts will still have to defer to the condemnor in most situations. Texas property owners should be allowed to challenge the facts regarding public use and necessity in the court room.

End The Use of Eminent Domain for Land 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.

HB 2006

HB 2006 is a good next step in the building on SB 7. I'd like to address these fours areas I just discussed in the context of HB 2006, and what needs to be changed, or not changed, in it to adequately restore Texan's private property rights.

Defining Public Use

The definition of public use in Subchapter A of HB 2006 is exceptionally good. It should not be modified. However, there are a couple of related examples of poor drafting that should be addressed. First, the introductory language in the paragraph should be eliminated because there is no other place in the chapter where an alternative meaning of public use is provided. Second, the definition stands by itself in Subchapter A but is not properly incorporated into Subchapter B. This can be addressed in several ways, most importantly by including, in Subchapter B, a ban on takings for other than a public use.

Eliminate the Blight/Slum Loophole

The existing blight/slum loophole I previously discussed is not adequately addressed in HB 2006. While there are provisions in HB 3057 that will partially address this, the economic development language combined with the blight/slum language would still allow private property to be taken from one citizen and given to another. For instance, in the case of El Paso, Pablo Bay apartments, where the first novel of the Mexican Revolution was published in 1915, could be torn down to make way for upscale condominiums. Or the building housing Juarez Boots could be replaced with retail establishments with better political connections.

To remedy this problem, the confusing ban on taking for eminent domain, along with the companion blight/slum exception, should be eliminated. It is no longer needed with the public use definition included in the bill.

Restore the Balance on Determinations of Public Use and Necessity

As I mentioned, the presumption language in existing law is written in such a way that a court might apply it very narrowly, and therefore allow most property owners to go without this very important protection.

This can be fixed very easily by inserting language into the section allowing courts to examine whether all contemplated uses are truly public and necessary.

End The Use of Eminent Domain for Land Speculation

Rather than the current law that allows property owners to buy back a taken property where the public use was cancelled within ten years, this right should be extended to property owners whose property was not put to the public use for which is was taken. Except perhaps in the case of public right of way, 10 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.

HB 3057

The Texas Public Policy Foundation opposes any takings where the land is taken by a government entity from one private property owner then subsequently transferred to another. This is the inevitable consequence of the blight exception in current law. This can be seen in the case of El Paso. Where its downtown redevelopment plan was once focused on economic development, since the passage of SB 7 the emphasis has been placed on the redevelopment of blighted areas.

These types of takings are quite new to the jurisprudence of eminent domain. Only in the past 50 years or so have we seen these types of takings become common, and only in *Kelo* was this concept taken to its logical, but unfortunate—and I would say unconstitutional, conclusion.

Florida dealt with the problem in two ways. First, it prohibited the condemnation of private property to prevent or eliminate slum or blight conditions or to abate or eliminate public nuisances; requiring instead municipalities to use their police powers to address properties that pose a danger to public health or safety. Second, it banned the transfer of taken private property to private parties for a period of 10 years following the condemnation.

However, to the extent that the Texas Legislature takes a different approach to this problem, HB 3057 takes some significant steps in the direction of significantly restricting these kinds of takings.

Most importantly, HB 3057 requires that individual properties be identified as blighted, so that local governments cannot with a broad stroke take whole neighborhoods with healthy businesses and residences for redevelopment purposes. Another key component of HB 3057 is that is puts specific criteria into law that must be used to identify blighted properties. However, two of these criteria are very subjective and are subject to the kind of abuses that have led to many of the takings that this bill is trying to avoid. They should be removed. They are 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.