

RESTORING PROPERTY RIGHTS IN A POST-KELO TEXAS

THE ISSUE

The *Kelo* decision exposed significant problems with Texas eminent domain law. 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 is up for grabs.

The Texas Municipal League understood this when it embraced the *Kelo* decision. It said 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." Not everyone, however, understood this to be the meaning of the Fifth Amendment.

Former Texas Agriculture Commissioner Jim Hightower said about *Kelo*, "In plain words, government officials have just been cleared to turn over your property to companies that'll pay more in taxes. As one of the homeowners put it: 'It's basically corporate theft.'" U.S. Representative John Conyers said, "The concept of ... using private takings for private use should not be allowed. ... [T]hat is wrong. That is a misuse. That is an abuse."

Texas has taken some steps since *Kelo* in moving toward protecting its citizens from eminent domain abuse. SB 7 improved the situation somewhat, but served only as a starting point during a busy session on school finance. HB 1495 provided important information to landowners. HJR 30 was important, but needs enabling legislation. However, the veto of HB 2006 and the failure to pass HB 3057 last session have left much to be done in restoring Texans' property rights.

THE FACTS

- ★ The Institute for Justice examined claims that eminent domain reforms would harm the ability of cities to enhance economic development, finding:
 - ★ There appears to be no negative economic consequences from eminent domain reform. State trends in all three key economic indicators—construction jobs, building permits and property tax revenues—were essentially the same after reform as before.
 - ★ More importantly, even states with the strongest reforms saw no ill economic effect compared to states that failed to enact reform. Trends in all three key economic indicators remained similar across all states, regardless of the strength of reform.

TEXAS PUBLIC POLICY FOUNDATION

- ★ Large-scale economic development can and does occur without eminent domain.
- ★ The City of El Paso is actively taking steps to protect its ability to employ eminent domain in the implementation of its Downtown Revitalization Plan.
 - ★ In December 2007, the El Paso City Council expanded the boundaries of the Tax Increment Reinvestment Zone through which it can exercise eminent domain.
 - ★ In January 2008, the El Paso City Council rejected 3-4 the same property rights protections contained in HB 2006.
 - ★ As of November 2008, El Paso will be able to use eminent domain to implement its downtown plan.

RECOMMENDATIONS

- ★ **Define Public Use.** 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.** An exception to SB 7's ban on takings for the purpose of economic development 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 allows *Kelo*-style takings under scenarios like El Paso's Downtown Revitalization Plan. This loophole should be eliminated along the lines contained in HB 3057.
- ★ **Restore the Balance on Determinations of Public Use and Necessity.** Challenges by property owners to determinations of public use and necessity are uncommon because current Texas jurisprudence puts on property owners the burden of proof regarding these determinations. As long as a government entity follows proper procedures, it is very difficult for a property owner to challenge these determinations in court. The burden should be put on the condemning authority.
- ★ **End The Use of Eminent Domain for Land Speculation.** 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. If a government entity doesn't use a condemned property for the public use for which it was taken within five years, it should be offered by to the original owner at the price for which it was taken.

RESOURCES

- *Securing Texans' Private Property Rights: HB 2006, HB 3057, HJR 30 & HB 1495* by Bill Peacock, Texas Public Policy Foundation (May 2007) <http://www.texaspolicy.com/pdf/2007-05-PP13-ED-bp.pdf>.
- *Private Property and Public Use: Restoring Constitutional Distinctions* by Bill Peacock, Texas Public Policy Foundation (Sept. 2006) <http://www.texaspolicy.com/pdf/2006-09-RR-eminentdomain-bp.pdf>.
- *Restoring Justice: Protecting Private Property Rights from Eminent Domain Abuse* by Clark Neily (May 2006) <http://www.texaspolicy.com/pdf/2006-05-PP-ED-cneily.pdf>.
- *Doomsday? No Way: Economic Trends and Post-Kelo Eminent Domain Reform*, Institute for Justice (Jan. 2008) <http://www.ij.org/publications/other/doomsday.html>.

