TEXAS PUBLIC POLICY FOUNDATION
BillAnalysis

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Eminent Domain Legislation SJR 42, SB 533, & SB 18

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Why Texas Needs a Positive Definition of Public Use

The U.S. Supreme Court's infamous 2005 *Kelo* decision exposed years of jurisprudence in Texas that has undermined the standard in the Texas Constitution that property be taken only for a "public use." Legislative changes in 2005, in response to *Kelo,* attempted to solve this problem, but they came up short.

Current Texas law tries to define public use by saying what it is not. The problem with this approach is that this requires a laundry list of items that can never be long enough to prohibit every possible illegitimate use of eminent domain. There is always going to be a loophole using this approach.

The biggest problem with current law is that it bans takings for the purpose of economic development. While this sounds good, no one is quite sure what it means since the courts have barely addressed this issue. In order to accommodate the fears of entities with eminent domain authority, many exceptions, i.e., loopholes, have been put into law. Many of these are legitimate, but not all.

The worst loophole bans takings "for economic development purposes, unless the 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." (Sec. 2206.051 (b) (3), Government Code)

This allows cities to take essentially any property they want by declaring an area—not specific properties, but entire blocks—blighted and placing it within a Tax Increment Reinvestment Zone (TIRZ). At that point, cities can then take any property in the area using eminent domain for "secondary" economic development purposes such as increasing tax revenues, replacing low-income housing with high-end condos, and swapping out the old retail establishments that catered to the previous residents with a fashion mall catering to the new residents of the area.

El Paso already has all this in place and will be able to do this anytime if the Legislature leaves Austin in May without changing the law. And other cities can avail themselves of this loophole too.

A positive definition, however, eliminates the loopholes, and tells the courts exactly what the state means when it says "public use." The courts need this plain talk because for years they have been undermining the commonly understood meaning of "public use" in place when the Texas Constitution was established in the 1870s.

Current Senate Legislation

SJR 42 by Duncan

SJR 42 takes the negative approach to defining public use. It says, "'public use' does not include the acquisition of a private property interest for the primary purpose of economic development when the acquired property interest is transferred to the benefit of a private person or entity." Today, without this provision in the Texas Constitution, an attorney could at least argue that the statute allowing takings secondarily for economic development purposes is unconstitutional. However, this language would essentially enshrine in the Texas Constitution the loophole allowing takings for "secondary" economic development purposes in the Texas Constitution. This language would have significant negative repercussions for property rights in Texas despite its original intent.

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There are several ways to improve SJR 42. The best of which would be to change it by adding a positive definition of what eminent domain is. Here are two examples:

- Public use means the possession, occupation, and enjoyment of property by the state, a political subdivision of the state, or the general public of the state, including the use of the property for the purpose of providing utility or common carrier services to the general public of the state; or

- Public use means that the state or a political subdivision of the state must own, or the general public of the state must have the legal right to use, any taken, damaged, or destroyed property. This includes the use of the property for the purpose of providing utility or common carrier services to the general public of the state.

While this is the best language for protecting property rights, there is opposition to this by those who want governments to continue taking property for "secondary" economic development problems. So perhaps the simplest way to deal with this problem is to address the symptom, i.e., the taking of lands by a government entity from one property owner and transferring them to another property owner to use in a way that the government believes benefits the public.

Florida did this by adopting a constitutional amendment, HJR 1569, in 2006. The Florida constitutional language could be adapted to Texas as follows:

- Private property taken by eminent domain pursuant to a petition to initiate condemnation proceedings filed on or after November 3, 2009, may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature.

This would both solve the problem of owner to owner takings and allow the Legislature to deal with any needed exceptions without having to go through the constitutional amendment process again. The three-fifths vote ensures that exceptions will be thoroughly vetted before being passed into law.

SB 533 by Duncan

SB 533 makes largely procedural changes to eminent domain law. However, it doesn't contain a positive definition of public use. Since this bill will likely be the vehicle for eminent domain reform this session, it should contain a positive definition. This is even more important because a positive definition may not get into the Texas Constitution. It should be noted that the committee substitute for HB 4, the companion to SB 533, now contains the following positive definition of public use and a ban on takings that are not for a public use that should be added into SB 533:

- Sec. 2206.001. DEFINITION OF PUBLIC USE. Except as otherwise provided by this chapter, "public use," with respect to the use of eminent domain authority, means 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.

- Sec. 2206.051. (b) A governmental or private entity may not take private property through the use of eminent domain if the taking … (4) is not for a public use.

Making these changes to SJR 42 and SB 533 would do what is necessary to protect Texans against the illegitimate taking of their lands.

SB 18 by Estes

SB 18 as filed is an exact replica of HB 2006 by Woolley that was passed by the Texas Legislature and vetoed by Gov. Perry in 2007. While there was a debate over the impact of compensation language in HB 2006, it contained the positive definition of public use shown above. Likewise, SB 18 contains the same positive definition and a ban on takings that are not for public use. Without commenting on the compensation provisions, SB 18 provides excellent protections for private property owners in Texas. ☆

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